Union Of India And Others vs Ex. Flt. Lt. G.S. Bajwa on 2 May, 2003

Equivalent citations: AIR 2004 SUPREME COURT 808, 2003 (9) SCC 630, 2003 AIR SCW 7009, 2003 (2) UPLBEC 1479, (2003) 3 SCR 1092 (SC), 2003 (2) UJ (SC) 849, 2003 (2) SERVLJ 288 SC, 2003 (4) SCALE 494, 2003 (2) LRI 736, 2003 (5) ACE 304, 2003 (3) SLT 465, (2003) 2 SERVLJ 288, (2003) 4 JT 505 (SC), 2003 (3) SCR 1092, (2003) 104 DLT 618, (2003) 2 LAB LN 948, (2003) 2 UPLBEC 1479, (2003) 4 SUPREME 96, (2003) 4 SCALE 494, (2003) 3 ESC 337, (2003) 6 INDLD 525

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Bench: N. Santosh Hegde, B.P. Singh

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           CASE NO.:
Appeal (civil)  10383 of 1996

PETITIONER:
Union of India and others

RESPONDENT:
Ex. Flt. Lt. G.S. Bajwa

DATE OF JUDGMENT: 02/05/2003

BENCH:
N. SANTOSH HEGDE & B.P. SINGH.

JUDGMENT:
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J U D G M E N T B.P. SINGH, J.

The Union of India has preferred this appeal by special leave against the judgment and order of the High Court of Delhi dated August 3, 1995 in Civil Writ Petition No. 245 of 1986 whereby the High Court allowed the writ petition filed by the respondent herein and while setting aside the order of dismissal passed by the Court Martial after trial, directed his reinstatement in the same post which he held when he was dismissed, but made his continuation in the same post subject to medical fitness. It also directed payment of 50% of the back wages to the respondent from the date of dismissal till the date of the judgment.

The case of the respondent in the writ petition was that he was commissioned in the Indian Air Force on 27th June, 1970 and was appointed to the substantive post of Flight Lieutenant on 27th June, 1976. In the year 1976 he was posted at Udhampur. In the course of his duties he found certain

irregularities in the matter of transportation of explosives, which were being transported piecemeal at higher rates. He, therefore, brought this to the notice of the authorities and pointed out that Air Marshal Dilbagh Singh had passed orders, which were beyond his jurisdiction and financial powers resulting in loss to the Union of India. He claimed that on account of his alertness and fearlessness in pointing out these irregularities, the Union of India saved a considerable amount. However, by this act of his he incurred the wrath of Air Marshal Dilbagh Singh who instructed his subordinate officers to "fix" him. He was illegally and improperly admitted in the Psychiatric Ward between June 15, 1979 and July 10, 1979 and thereafter between August 22, 1979 and October 19, 1979.

The case of the respondent was that on June 18, 1982 Wing Commander S.L. Gupta directed him to undergo an examination by the Medical Board on June 21, 1982 with a view to his recategorisation of last medical category. This order was patently illegal and, therefore, the respondent did not obey the order. On account of his disobedience of the order passed by the Wing Commander, a General Court Martial was ordered to try him on the charge of disobeying the lawful command given by his superior officer and also for improper conduct prejudicial to the good order and Air Force discipline. Accordingly the respondent was charged of offences punishable under sections 41(2) and 65 of the Air Force Act, 1950 (hereinafter referred to as 'the Act'). According to the respondent the proceedings before the General Court Martial were conducted illegally and improperly and in breach of law inasmuch as the respondent was denied legal assistance in the Court Martial proceedings even though he was charged of a serious offence which, on proof, entailed a sentence of imprisonment for a term which could extend to 14 years under section 41(2) and 7 years under Section 65 of the Act. Moreover he was denied copies of the day to day proceedings which were essential for his defence. He was also denied a fair opportunity to examine witnesses in defence. The General Court Martial proceeded to try the respondent and ultimately found him guilty by its verdict pronounced on June 21, 1983. The General Court Martial imposed the sentence of dismissal from service. The appeal preferred by the respondent to the Central Government was dismissed on January 14, 1985 which compelled him to file the writ petition challenging the Court Martial proceedings and praying for a declaration that the order passed by the General Court Martial was null and void. He also prayed for all consequential benefits including compensation for illegal detention in Psychiatric Ward and for his illegal arrest on June 21, 1983.

The Union of India controverted the allegations made in the writ petition and at the threshold took the objection that the question regarding his illegal confinement in Psychiatric Ward and his illegal arrest were barred by the principle of constructive res judicata as he had moved several writ petitions and special leave petitions earlier raising those contentions but had failed in each one of them. It was submitted that the General Court Martial conducted the proceedings in accordance with law and there was no breach of a statutory provision or breach of principle of natural justice. The order of Wing Commander S.L. Gupta was a lawful order and its disobedience by the respondent attracted the provisions of section 41 of the Act which made it an offence punishable with a term of imprisonment which may extend to 14 years.

The High Court rejected the contention of the respondent that the order passed by Wing Commander was an illegal order and that its disobedience did not amount to a disobedience of a lawful order for purposes of section 41 of the Act. Relying upon the judgment of this Court in Ranjit

Thakur vs. Union of India :

> (1987) 4 SCC 611 it was held that the said order of Wing Commander Gupta was not an illegal order and that order had been issued bona fide and in public interest.

The High Court also rejected the contention of the respondent that the orders directing him to appear before the Medical Board, as well as the trial before the General Court Martial, were mala fide acts committed at the instance of Air Marshal Dilbagh Singh. It noticed that it was sometime in the year 1976 that the respondent claimed to have exposed some mal practice which cast a reflection on Air Marshal Dilbagh Singh. The General Court Martial proceedings were initiated in the year 1983. The submission, that the action was malafide, was therefore, far fetched. Moreover Air Marshal Dilbagh Singh against whom mala fide was alleged was not even a party in the writ petition. The submission was, therefore, rejected.

The High Court then proceeded to consider the submission urged before it that an illegality had been committed in as much as the petitioner was deprived of his fundamental right by not being permitted to be represented by a counsel of his choice at State expense in the Court Martial proceedings. The High Court observed in this regard that it is a fundamental right of an Indian citizen to have assistance of a legal expert when he is to face a trial for an offence punishable with imprisonment, as his personal liberty is at stake. If such an accused was not in a position to engage an advocate at his own cost, then it becomes the fundamental duty of the State to provide him legal assistance at the cost of the State. Reliance was placed on the judgment of this Court in Suk Das vs. Union Territory of Arunachal Pradesh : AIR 1986 SC 991 to support the view that the accused has a fundamental right under Article 21 of the Constitution of India to obtain free legal service at the cost of the State, if he is unable to engage the services of a lawyer on account of poverty or indigence. The High Court noticed that in the instant case as soon as the respondent was intimated about the constitution of General Court Martial to try him he made an application to the President of India on May 2, 1983 bringing to his notice his inability to engage an advocate at his own cost and requested that he may be provided funds for engaging an advocate to defend him in the said General Court Martial. A copy of this application was also given to the General Court Martial. Moreover, since the respondent apprehended that the other subordinate officers may not be in a position to give him proper and necessary assistance in defending him on account of their fear of Air Marshal Dilbagh Singh, his request to have an advocate for defending him, in view of his apprehension, could not be said to be unreasonable or improper.

The Union of India on the other hand contended that neither in the Air Force Rules nor in the Air Force Act is there has any provision to appoint a legal practitioner at State expense to defend the accused before a Court Martial and, therefore, such a request could not be granted. The Rules only provide that an accused may be represented by any officer subject to Air Force laws who shall be called the 'defending officer' or assisted by any person whose services he may be able to procure who shall be called the 'friend of the accused'. The submission urged on behalf of the Union of India was rejected by the High Court on the reasoning that even if there was no such provision in the Act or the Rules, the principles laid down by the Supreme Court in the case of Suk Das (supra) were applicable and, therefore, the respondent had a fundamental right under Article 21 of the

Constitution of India to be represented by a legal practitioner. Article 21 commanded that no person shall be deprived of his personal liberty except in accordance with the procedure established by law and, therefore, it followed that when a person was to be prosecuted, he must be afforded sufficient opportunity to defend himself and, consequently, he must be given legal aid. Failure to provide such legal aid vitiated the trial and in these circumstances the trial was not proper and legal.

The learned Judge further observed that Rule 102 which provided for an accused being represented by a defending officer or a friend of the accused hardly satisfied the test of giving proper opportunity to the accused to defend himself. The prosecution was conducted by a prosecutor before the General Court Martial and the Judge Advocate is appointed to assist the Court. The Judge Advocate is an officer belonging to the department of the Chief Legal Adviser or an officer approved by the Chief Legal Adviser. The role of the Judge Advocate is to explain to the Court the legal provisions in order to assist the Court to come to the right conclusion. Thereafter the High Court observed :-

> " In the instant case there was a prosecutor for the prosecution and the Judge Advocate was also appointed. The Judge Advocate always represents the Chief Legal Advisor in a Court Martial as per the provisions of Section 111. Thus, the prosecution had the aid of a prosecutor as well as a Judge Advocate whereas in the instant case though the petitioner was insisting to have appointment of a Civil Advocate, the same was not appointed. No doubt initially a Defending Officer was helping the petitioner but he had also withdrawn in the midst of the trial. But merely because the petitioner was given the assistance of the Defending Officer, it could not be said that the petitioner and the prosecution were in equal position. In view of the present (sic) of the prosecutor and the assistance of Judge Advocate, the non-appointment of a Civil Advocate for the petitioner has put the petitioner in an unequal position."

The High Court, therefore, held that the denial of petitioner's request for being represented by an advocate resulted in miscarriage of justice, particularly in a case where the prosecution itself alleged that the accused was suffering psychologically to some extent. Refusal of any legal aid from a legal expert or a person having expertise in law to such an accused amounted to miscarriage of justice. The High Court was of the view that the respondent was handicapped in conducting his defence which was obvious from the fact that when he was required to cross-examine the witnesses he requested the Court Martial to grant him time so that he could consult his advocate in this regard. For the same reason the respondent could not explain to the Court Martial the relevancy of the witnesses whom he wished to summon. He apprehended that he may disclose his defence if he attempted to explain the relevancy of the concerned witnesses and that would cause serious prejudice to him in the trial.

It was pointed out by the Union of India before the High Court that in his application to the President of India, the respondent has asked for appointment of the two advocates named therein. An accused cannot insist on having an advocate of his choice to defend him at State expense. The High Court observed that even if an Advocate of his choice could not be given, the State was bound to provide him legal assistance and this could be done if a panel of advocates was prepared by the State and the respondent was called upon to make his selection. The High Court, therefore,

concluded that the non-appointment of an advocate to defend the accused resulted in miscarriage of justice and, therefore, the trial of the petitioner stood vitiated.

Another grievance of the respondent was that he had given two lists of witnesses, the first consisting of 24 names and the second of 7 names. But when he requested the General Court Martial to summon those witnesses the Judge Advocate advised the General Court Martial that the respondent should be asked to explain the relevancy of those witnesses and accordingly the respondent was called upon to disclose the relevancy of each witness and on what point he wished to examine him. The High Court held that technically as well as legally the direction of the Court Martial was proper and correct, but the Court Martial ought not to have acted too technically since the respondent was not in a position to state the relevancy of the witnesses without disclosing his defence and, therefore, apprehended that he while attempting to disclose the relevancy of witnesses may disclose his defence to his prejudice.

The High Court noticed that the respondent, when called upon to explain the relevancy of the witnesses, stated that he would write letters to the witnesses who were out of Delhi. They were officers of the Indian Air Force, some of them retired and some of them in service. Only after getting their replies, he could state their relevancy to the Court and also whether he wanted to examine any of them. He sought an adjournment on June 3, 1983 and prayed that the matter be adjourned till June 17, 1983. However, he was granted an adjournment only for 4 days. The High Court observed that it failed to understand how the General Court Martial expected that the respondent would be in a position to contact witnesses residing at Bombay, Bangalore etc. and get their replies in 4 days. Thus by adjourning the hearing on June 3, 1983 to June 7, 1983 the General Court Martial denied reasonable opportunity to the respondent to examine his defence witnesses.

The High Court then considered the complaint of the respondent that he was not supplied copies of the proceedings taking place every day despite his repeated requests. The non supply of copies of evidence and proceedings amounted to denial of reasonable opportunity to the accused to defend himself and was also against the principles of natural justice. The High Court accepting the submission held that the denial of copies of the evidence and proceedings recorded every day, to the petitioner also resulted in denying reasonable opportunity to him to defend.

Lastly the High Court considered the grievance of the respondent that the prosecutor, the Judge Advocate and the members of the General Court Martial met behind close doors and changed the recorded proceedings and evidence after careful editing. Portions favourable to the respondent were removed and the depositions were changed to suit the prosecution and the original statements destroyed. The High Court examined portions of the typed record of proceedings produced by the petitioner and found that on the same date some portion of the statement of the Judge Advocate as well as the witnesses were typed on different typewriters. The High Court also noticed that the evidence of witnesses was recorded by the Court in long hand and it was not dictated directly to the typists and the statements were subsequently typed by the typists. Even the signatures of the witnesses were not taken nor did the signatures of the Court appear on those documents. The High Court, thereafter concluded :-

> " Therefore, in these circumstances, the procedure followed by the Court in conducting the trial in question is also not proper as the original statements of the witnesses recorded by the Court in its own hand in the open court are not preserved and when the petitioner is alleging that there was tempering with the evidence recorded, it has become very difficult for us to come to a conclusion that the allegations made by the petitioner are baseless or false in the absence of the original record."

In view of these findings the High Court held that the trial of the petitioner was vitiated and consequently the punishment awarded to him was set aside.

Shri Raju Ramachandran, learned Additional Solicitor General appearing on behalf of the appellant-Union of India assailed the judgment of the High Court and submitted that the finding recorded by the High Court that the failure of the appellant to provide a counsel to the respondent at State expense resulted in breach of the fundamental right of the respondent guaranteed under Article 21 of the Constitution of India, was recorded by the High Court in ignorance of the provisions of Article 33 of the Constitution of India which expressly empowers the Parliament to modify the rights conferred by Part III of the Constitution in their application to the members of the armed forces. The High Court was, therefore, in error in not considering the provisions of the Act, as a law made by Parliament under Article 33 of the Constitution of India modifying and restricting the right conferred by Article 21 of the Constitution of India. In a Court Martial trial the appellant was not required to provide a counsel at State expense to the respondent, whose rights were governed by the provisions of the Act and the Rules. They provided that the appellant may be represented by an officer called "the defending officer" or assisted by any person whose services he may be able to procure who shall be called "the friend of the accused" . The respondent was in fact permitted to engage a counsel at his own expense but he failed to do so. Even the friend of the accused, had to withdraw at the request of the respondent. The respondent cannot be, therefore, heard to say that prejudice was caused to him on account of non-compliance of any of the provisions of the Act or the Rules. He further submitted that in recording a finding that the respondent and the prosecution were not equally placed in the proceedings before the Court Martial, the High Court completely misunderstood the duties of the Judge Advocate and the role played by him in proceeding before the Court Martial. He also assailed the other findings recorded by the High Court.

Learned counsel appearing on behalf of the respondent submitted that the findings recorded by the High Court are unassailable and he urged further grounds, which were not urged before the High Court, to support the conclusion reached by the High Court.

It is indeed surprising that while considering the submissions urged on behalf of the respondent alleging the breach of his fundamental right under Article 21 of the Constitution of India, the High Court neither noticed the provisions of Article 33 of the Constitution of India nor does it appear to have been brought to its notice. Article 33 of the Constitution of India expressly empowers the Parliament to determine by law the extent to which any of the rights conferred by Part III of the Constitution, in their application, inter alia, to the members of the armed forces, shall be restricted or abrogated to ensure the proper discharge of their duties and the maintenance of discipline among

them. The Parliament can, therefore, in exercise of powers conferred by Article 33 of the Constitution of India restrict or abrogate the fundamental rights guaranteed under Part III of the Constitution in their application to the members of the armed forces. It, therefore, follows that if any provision of the Act or the Rules restricts or abrogates any right guaranteed under Part III of the Constitution of India, it cannot be challenged on the ground that it is violative of the fundamental right as guaranteed under Part III. It is no doubt true that the restriction or abrogation is dependent on Parliamentary legislation and only a law passed by virtue of Article 33 can override Articles 21 and 22 of the Constitution of India. The law on the subject is fairly well settled and we may only refer to some of the authorities on the subject. In Ram Sarup vs. Union of India and another : AIR 1965 SC 247 a Constitution Bench of this Court upholding the submission urged by the Learned Attorney General observed :-

> "The learned Attorney General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has thereby, in the exercise of its power under Art. 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however of opinion that the provisions of S. 125 of the Act are not discriminatory and do not infringe the provisions of Art. 14 of the Constitution. It is not disputed that the persons to whom the provisions of S. 125 apply do form a distinct class. They apply to all those persons who are subject to Act and such persons are specified in S. 2 of the Act."

In Lt. Col. Prithi Pal Singh Bedi vs. Union of India and others : (1982) 3 SCC 140 this Court observed :-

> "Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin. In fact, after the Constitution came into force, the power to legislate in respect of any item must be referable to an entry in the relevant list. Entry 2 in List I : Naval, Military and Air Forces; any other Armed Forces of the Union, would enable Parliament to enact the Army Act and armed with this power the Act was enacted in July 1950. It has to be enacted by the Parliament subject to the requirements of Part III of the Constitution read with Article 33 which

> itself forms part of Part III. Therefore, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act".

This Court referred to the observations in Ram Sarup (supra) and held that the question was no longer res integra in view of the decision of the Constitution Bench. The Court, therefore, rejected the submission that the law which prescribed procedure for trial of offences by Court Martial must satisfy the requirement of Article 21 because to the extent the procedure is prescribed by law and if it stands in derogation of Article 21, to that extent Article 21 in its application to the armed forced is modified by enactment of the procedure in the Army Act itself. The Court noticed that there operate two conflicting public interests; the maintaining of discipline in the Armed Forces to safeguard national security, to ensure enjoyment by the people of India of their fundamental rights, and the right of members of Armed Forces themselves to fundamental rights.

In Delhi Police Non-Gazetted Karmachari Sangh and others vs. Union of India and others : (1987) 1 SCC 115 the challenge to the Act and the Rules impugned therein was on the ground of infringement of fundamental right guaranteed under Article 19(1)(c) read with Article 19(4) of the Constitution of India. It was argued in that case that recognition of the Association carries with it the right to continue the Association as such. It is a right flowing from the fact of recognition. To derecognise the association in effect offends against the freedom of association. This Court held :-

> " That the Sangh and its members come within the ambit of Article 33 cannot be disputed. The provisions of the Act and Rules taking away or abridging the freedom of association have been made strictly in conformity with Article 33. The right under Article 19(1)(c) is not absolute. Article 19(4) specifically empowers the State to make any law to fetter, abridge or abrogate any of the rights under Article 19(1)(c) in the interest of public order and other considerations. Thus the attack against the Act and Rules can be successfully met with reference to these two articles as members of the police force, like the appellants herein, are at a less advantageous position, curtailment of whose rights under Article 19(1)(c) comes squarely within Article 33 in the interest of discipline and public order."

Having regard to the authorities it must be held that the provisions of the Act cannot be challenged on the ground that they infringe the fundamental right guaranteed to the respondent under Article 21 of the Constitution of India. Since the Air Force Act is a law duly enacted by Parliament in exercise of its plenary legislative jurisdiction read with 33 of the Constitution of India, the same cannot be held to be invalid merely because it has the effect of restricting or abrogating the right guaranteed under Article 21 of the Constitution of India or for that reason under any of the provisions of Chapter III of the Constitution.

It was not disputed before the High Court, nor was it disputed before us, that the Act and the Rules framed thereunder do not oblige the State/Union of India to engage at the cost of the State a counsel

for the officer who faces his trial before the Court Martial. The High Court relying on the judgment of this Court in Suk Das vs. Union Territory of Arunachal Pradesh (supra) held that the respondent had a fundamental right under Article 21 of the Constitution of India to obtain free legal service at the cost of the State if he was unable to engage the services of a lawyer on account of poverty or indigence. It clearly erred in applying the principles laid down in that case. That was not a case dealing with a member of the armed forces governed by a law enacted by Parliament, which restricted or abrogated the right with a view to ensure the proper discharge of duties and the maintenance of discipline among members of the armed forces, and which the Parliament was authorized to enact by virtue of Article 33 of the Constitution.

We also fail to understand how the respondent can claim that he was unable to engage the services of a counsel on account of poverty or indigence. The respondent was an officer of the Indian Air Force and was holding the rank of Flight Lieutenant. He had served the Indian Air Force for many years. The mere fact that he wrote to the President of India stating that he was not in a position to engage an Advocate at his own cost, was not sufficient to hold that he was unable to do so on account of poverty or indigence. In any event, there being no provision under the Act or the Rules to provide a defence counsel at a State expense, the respondent could not claim such a right de hors the Act and the Rules on the ground of Article 21 of the Constitution of India which stood restricted by the Act.

We may notice at this stage that it is not as if the respondent was not permitted to engage a counsel at his own expense. The Court Martial permitted him to engage a counsel at his own expense. After seeking several adjournments on this ground, the respondent ultimately informed the Court Martial that he was not in a position to engage counsel at his own expense. In view of these facts the respondent cannot place any reliance on the judgment of this Court in Major General Inder Jit Kumar vs. Union of India and others : (1997) 9 SCC 1. In that case, as was submitted by the respondent, time was given to the appellant to engage a defence counsel. In the instant case, as we have observed earlier, the respondent was also given such an opportunity but he did not engage a defence counsel of his choice at his own expense. Moreover in Major General Inder Jit Kumar (supra) the Court was not called upon to consider the claim of the appellant therein to be represented by a counsel of his choice at State expense. In fact the respondent has no such right under the Act. The respondent does not even have a right to claim an advance from the State for engaging a counsel at his own expense. In Union of India and others vs. Major A. Hussain : (1998) 1 SCC 537 a grievance was made before this Court by the respondent therein that since further advance of Rs.15,000/- was not given to him to engage another defence counsel he could not effectively defend his case. Repelling the argument this Court observed :-

> " The High Court, however, failed to take notice of the fact that the respondent was not entitled to any advance for the purpose of engaging the defence counsel and earlier as a special case an advance of Rs.10,000 had been sanctioned. No Rule or Army Instruction has been shown under which the respondent was entitled to an advance".

It is futile for the respondent to rely upon the decision in Board of Trustees of the Port of Bombay vs. Dilipkumar Raghavendranath Nadkarni and others : (1983) 1 SCC 124 and J.K. Aggarwal vs. Haryana Seeds Development Corporation Ltd. and others : (1991) 2 SCC 283 as the principles laid down therein are not applicable to the case of the respondent. The employees concerned in those cases were not governed by any law made by the Parliament and referable to exercise of legislative authority under Article 33 of the Constitution of India. This apart, in those cases this Court upheld the right of the employees to be represented by a legal expert or a lawyer only in those cases where the employer was represented by a legally trained person. In the instant case, therefore, the principle laid down therein has no application.

So far as the facts of this case are concerned it is clear from the record that the respondent was informed that he was not entitled to a civil defence counsel of his choice at State expense but he was given the option of engaging a civil counsel of his choice under own arrangement and at his own expense. He was also informed that he could give the name of any service officer whom he wished to have as his defending officer and whose services will be made available to him free of cost. Upon a written request of the respondent the services of Sqn. Leader V.K. Sawhney, an officer with legal qualifications having substantial experience as a defending officer in trial by Court Martial was made available to him as "the friend of the accused" by the convening authority. The respondent was also advised that he could accept the services of the said officer as his defending officer, if he so desired. Inspite of the options given to the respondent and inspite of several adjournments, the respondent did not engage a counsel at his own expense. When the defence case commenced, the respondent dispensed with the services of the "friend of the accused", whose services he had asked for in writing.

We are, therefore, satisfied in the facts and circumstances of the case that the provisions of the Act and the Rules were scrupulously followed in the conduct of the Court Martial proceedings and the respondent chose to defend himself without seeking the help of the defending officer or the friend of the accused. It, therefore, does not lie in his mouth to complain that he was prejudiced in his defence on account of the State not providing him defence counsel at State expense. The finding recorded by the High Court is, therefore, wholly unsustainable.

The High Court then considered the provisions of Rule 102 of the Rules and held that merely providing for the accused being represented by the defending officer or friend of the accused hardly satisfied the test of giving proper opportunity to the accused to defend himself. According to the High Court the prosecution was assisted by a prosecutor and the Judge Advocate whereas the respondent was insisting for engagement of an advocate at State expense, which was not granted. No doubt a defending officer had been given to the petitioner but he had also withdrawn in the midst of the trial. It cannot, therefore, be said that the petitioner and the prosecutor were in equal position.

The High Court erroneously referred to the respondent being assisted by a defending officer when in fact he was being assisted by a "friend of the accused", who was nominated at his own request. As noticed earlier, it was the respondent who dispensed with the assistance of the friend of the accused and, therefore, he cannot make a grievance of it. But the approach of the High Court belies a

complete misconception of the functions and duties of the Judge Advocate and the role played by him in a Court Martial proceeding. The High Court proceeded on the assumption that the Judge Advocate, who represents the Chief Legal Adviser in Court Martial proceedings, is there to assist the prosecution and he alongwith the prosecutor constitute a team against which is pitted the hapless accused in the trial. In doing so the High Court completely misdirected itself and laboured under a complete mis-apprehension of the duties and the role of the Judge Advocate.

Under Rule 110 of the Air Force Rules, 1969 an officer, who is disqualified for sitting as a Court Martial, shall be disqualified for acting as Judge Advocate at that Court Martial. This rule ensures that the Judge Advocate also enjoys the same impartiality as the President and Members of the Court Martial. The powers and duties of the Judge Advocate have been laid down in Rule 111 which provides that the prosecutor or the accused, is at all times, entitled to his opinion on any question of law relative to the charge or trial, whether he is or out of court, subject, when he is in court to the permission of the court. He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he shall inform the convening officer and the court of any informality in the proceedings or defect in the charge, or in the constitution of the court, and shall give his advice on any matter before the court. At the conclusion of the case he shall, unless both he and the court consider it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceeds to deliberate upon its finding. The Judge Advocate has, equally with the Presiding Officer, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or incapacity to examine or cross- examine witnesses or otherwise, and may, for that purpose, with the permission of the court, call witnesses and put questions to witnesses, which appear to him necessary or desirable to elicit the truth. In fulfilling his duties, the Judge Advocate must be careful to maintain an entirely impartial position. Rule 111, therefore, which lays down the powers and duties of the Judge Advocate leaves no room for doubt that though a participant in the proceeding, he is not partisan. He holds a brief neither for the prosecutor nor for the defence. He must guide the Court Martial when questions of law arise and render his honest opinion regardless of the consideration whether it helps the prosecution or the defence. He is neither a friend of the prosecutor nor an adversary of the defence. He has to maintain an entirely impartial position charged with the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such. The Judge Advocate performs a solemn obligation to advise honestly and to guide dispassionately the Court Martial with the objective to ensure a fair trial and justice according to law. The duties with which he is charged and the impartiality expected by him must assure the person being tried that he shall not suffer any disadvantage on account of his position as such and that whenever necessary intervention by Judge Advocate shall ensure even handed justice. We, therefore, do not agree with the conclusion reached by the High Court that the procedural safeguards under the Act do not provide a level playing field and that the dice is heavily loaded against the accused in a trial before the Court Martial. We cannot lose sight of the fact that even the Judge Advocate is administered an oath/affirmation before he enters upon his office. He is bound by his oath to carry out the duties of his office in accordance with the Act and the Rules without partiality, favour or affection and not on any account, at any time, whatsoever, disclose or discover the vote or opinion on any matter of any particular member of the Court Martial, unless required to give evidence thereof by a court of justice or a Court Martial in due course of law. The impartiality of the Judge

Advocate, is thus, ensured and it can never be contended that in the scheme of the Act and the Rules the role of the Judge Advocate is only to assist the prosecutor to secure the conviction of the accused.

The next finding of the High Court is with regard to the approach adopted by the Court Martial in regard to the relevancy of witnesses, which the respondent was called upon to disclose. The High Court itself found that there was nothing wrong in the Court calling upon the respondent to disclose the relevancy of each witness and the point on which the respondent wished to examine him. The High Court, however, went on to observe that the Court ought not to have acted too technically since the respondent was not in a position to state the relevancy of the witnesses without jeopardizing his defence. The reason given by the High Court does not impress us. If the direction of the Court Martial was in accordance with law, there could be no justification to hold that obedience of law itself resulted in prejudice to the respondent. In our view, in the facts and circumstances of the case, the Court Martial was fully justified in calling upon the respondent to satisfy the Court that it was necessary to examine those witnesses in the trial. We say so because a large number of witnesses were sought to be examined. Many of them were Air Force officers, which included some former Chief of the Air Staff as also the Chief of the Air Staff. One fails to understand what possibly could be the relevancy of these witnesses when the charge against the respondent was that he had disobeyed the order of his superior officer by not complying with the direction to submit himself to a medical examination by the Board. To us it appears that the request was not even bona fide and was a mere delaying tactics. This apprehension appears to be justified in view of the fact that the respondent asked for adjournment of the case by 14 days. The purpose for which adjournment was sought was that he would be writing to the witnesses concerned and only after getting their response he would decide whether to examine them before the Court Martial as his witnesses. This depicts the peculiar approach of the respondent. He prayed for an adjournment not on the ground that there was some difficulty in producing these witnesses on a particular day, but on the ground that he had not communicated with them and only after communicating with them and getting their response, he would be in a position to tell the Court whether he would examine them and if so, which of them, as his witnesses. On such a ground, the Court Martial would have been justified in rejecting the prayer but the Court Martial granted him 4 days time and accordingly adjourned the proceedings at his request. The High Court has found fault with the Court Martial in not giving to the respondent sufficient time to get replies from the witnesses. It has gone to the extent of holding that the Court Martial denied reasonable opportunity to the respondent to examine his defence witnesses. We are of the view that this finding is wholly unsustainable.

In the first instance Rule 89 of the Rules provides that when a court is once assembled and the accused had been arraigned, the court shall, subject to the provisions of Rule 88, continue the trial from day to day unless it appears to the court that an adjournment is necessary for the ends of justice, or that such continuance is impracticable. The normal rule, therefore, is that the trial must continue from day to day and this is with a view to expeditious disposal of the matter before the Court Martial. Unfortunately the practice of seeking unnecessary adjournments has become rampant with the resultant delay in disposal of matters before adjudicatory authorities and the courts. This practice has been deprecated by this Court. In Union of India vs. Major A. Hussain (supra), this Court observed :-

> "Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law."

We, therefore, hold that no illegality was committed either in calling upon the respondent to explain the relevancy of the witnesses or in refusing a long adjournment, on the request of the respondent.

In the facts and circumstances of the case the grievance of the respondent that he was denied reasonable opportunity to examine his defence witnesses is baseless.

The next grievance of the respondent which found favour with the High Court is that he was not supplied copies of the proceedings every day, though he had repeatedly asked for the same. The appellant pointed out that neither under the Air Force Act, 1950 nor the Air Force Rules, 1969 is there any provision for supply of copies of the evidence and the proceedings every day. But there is a provision which permits the charged officer to inspect the record of proceedings. Therefore, the request for supply of copies every day was not tenable. The High Court held that merely because there are no provisions in the Act and the Rules to supply copies, the Court cannot deny the copies of evidence and the record of proceedings to the accused and such denial amounts to denial of reasonable opportunity to defend himself, as it was in violation of the principles of natural justice.

Rule 125 of the of the Air Force Rules, 1969 provides as follows :-

> "125. Right of person tried to copies of proceedings. - Every person tried by a court martial shall be entitled on demand, at any time after the confirmation of the finding and sentence and before the proceedings are destroyed, to obtain free of cost from the officer or person having the custody of the proceedings, a copy thereof, including the proceedings upon revision, if any."

Rule 100 is as follows :-

> "100. Custody and inspection of proceedings. The proceedings shall be deemed to be in the custody of the judge advocate (if any), or, if there is none, of the presiding officer, but may, with proper precaution for their safety, be inspected by the members of the court, the prosecutor and accused, respectively, at all reasonable times before the court is closed, to consider the finding."

It will thus be seen that there is a specific provision in the Rules which provides for copies of the proceedings to the person tried by the Court Martial free of cost at any time after the confirmation of the finding and sentence and before the proceedings are destroyed. Clearly, therefore, the respondent was not entitled to a copy of the proceedings day to day as claimed by him. However, Rule 100 in terms provides that the proceedings may be inspected by the accused at all reasonable times before the court is closed to consider the finding. Nothing, therefore, prevented the respondent from inspecting the proceedings and preparing his defence. Rule 100 itself incorporates the principle of natural justice by giving to the respondent an opportunity to go through the

proceedings and for this purpose to inspect the same at all reasonable times. This meets the requirement of principles of natural justice and the respondent cannot complain on the ground that he was not given a copy of the proceedings day to day. The High Court was, therefore, clearly wrong in coming to the conclusion that the principles of natural justice were violated by non supply of copies of proceedings day to day.

The next allegation of the respondent which was considered by the High Court was to the effect that the Judge Advocate, the Prosecutor and the Court Martial were meeting in closed chamber and then the original depositions were being changed to favour the prosecution and after removing portions favourable to the respondent, the statements of witnesses were being re-typed and original statements were destroyed. The High Court observed that the Court was recording the proceedings in long hand and thereafter it was being typed. Some pages of such typed record showed that some portions of the submissions of the Judge Advocate as well as the witnesses were typed on different typewriters. From this the High Court jumped to the conclusion that the procedure followed by the Court in conducting the trial was not proper as the original statements of the witnesses recorded by the Court in its own hand in the open Court were not preserved and the respondent's allegation that records were tampered with could not be said to be baseless or false. The respondent relied upon an affidavit filed before the High Court by one Shri H.S. Siddhu who attended the Court Martial proceeding and stated that once he visited the room next to the Court Martial Room and he found typists typing Court Martial records. He found that the proceedings made by the Judge Advocate in manuscript were being typed by one of the typists. The said manuscript had several amendments made in red ink and even a whole para had been redrafted. Thereafter the respondent had requested the Court Martial to obtain his signatures on each and every page of the manuscript proceedings on each day and to give him a copy of the proceedings at the end of the day but that request was refused. The respondent has not filed any affidavit of his own but has chosen to file an affidavit of a former officer, which also does not clearly establish that the records were being tampered with. Obviously when the Judge Advocate records proceedings in long hand, the same has to be given a final shape before it becomes a part of the record. That cannot be said to be tampering with the record. Moreover the mere fact that copies of the proceedings were typed on two different typewriters does not necessarily lead to the conclusion that the evidence was changed or the record was tampered. Very often, with a view to quick disposal of work, the material to be typed may be distributed to more than one typist. We, therefore, find no force in the submission that the members of the Court Martial, the Judge Advocate and the Prosecutor tampered the record of proceedings with a view to prejudice the case of the respondent. No specific instance was pointed out to us to substantiate this charge.

We shall now take up for consideration the submissions urged before us, which were not urged before the High Court.

It was submitted that the power to convene a Court Martial cannot be delegated. In the instant case it was contended by the learned counsel for the respondent that the order convening the Court Martial was signed by Air Cdr. D.S. Sabhikhi on behalf of the Air Marshal. The heading of the document which is Annexure-R is as follows :-

> "Orders by Air Marshal D.A. Lafotaine, AVSM, VM, Air Officer In-charge Personnel, Air Headquarters, IAF."

A ground was taken before the High Court (ground f) that the convening of the General Court Martial was signed by an officer, in whose name no delegation or such authority had ever been made. In reply thereto the appellant had submitted that the convening order was signed by the said officer on behalf of the Air Officer Incharge Personnel, who had after due application of mind, issued the order for convening the above Court Martial. It was not disputed before us that the Air Officer Incharge Personnel (AOP) was empowered to convene a Court Martial. The only question which, therefore, requires consideration is whether the order convening the General Court Martial was passed by the AOP and it was only formally communicated under signatures of Air Cdr. concerned or whether the Air Cdr. named therein, who was not empowered, himself passed the convening order. With a view to avoid any controversy on this factual position, we directed the appellant to produce before us the original file. We have perused the file and we find that the order for convening the General Court Martial was approved by Air Marshal D.A. Lafotaine, AOP. There is, therefore, no force in the submission that the convening order was unauthorized and, therefore, illegal.

The next submission urged before us, which does not appear to have been urged before the High Court, was that the order given by Wing Commander S.L. Gupta on June 18, 1982 was itself illegal and, therefore, the respondent was not bound to obey that order. It was argued before us that there was an undertaking by the appellant before this Court with regard to the stay of medical board proceedings, which was due on 1st May, 1980. No such recorded undertaking has been brought to our notice and it is sought to be argued on the basis of the counter-affidavit filed in the instant proceedings before the High Court that even the appellant understood that an oral undertaking had been given to the Court not to hold a medical board till 1.5.1980. It is not possible for us to accept the ipse dixit of the respondent that there was an oral undertaking given to this Court. All undertakings given to this Court are recorded and even when an oral understanding is reached, one would find some reference to it in the proceedings of the Court. In the absence of any such material on record the contention of the respondent that the appellant was bound by the oral undertaking not to proceed with the medical board must be rejected. In any event even if it is accepted, that an oral undertaking was given, it was only to the effect that no medical board will be held till 1st May, 1980. There is no undertaking given thereafter. The order of Wing Commander Gupta was issued on 18th June, 1982, more than two years later.

It was urged before us for the first time that the prayer made by the respondent on 7th June, 1983 for examining himself as a defence witness was refused. The respondent contends that the said prayer was recorded in the proceedings. However, no proceeding was brought to our notice wherein it was recorded that the respondent shall not be allowed to examine as a defence witness. On the contrary, it appears from the extract of proceedings of the Court Martial, referred to by the appellant in its counter-affidavit, that at page 180 of the proceedings the following was recorded :-

> "The court also decides to inform the accused that since he has not brought out any fresh points in his submission and rejoinder, the court decides to proceed further in

the interest of justice.

The court is opened and the above decision is announced to the accused in open court. On being asked the accused confirms that he has no witnesses to examine in his defence. The court informs the accused that since he has no witnesses to examine, the defence case may be treated as closed. The accused confirms that he does not wish to examine any witness in his defence and that the defence case is closed".

` In these circumstances the submission that the respondent was not permitted to examine himself as a defence witness must be rejected.

In the result this appeal is allowed, the impugned judgment and order of the High Court of Delhi dated August 3, 1995 is set aside and the Writ Petition being C.W.P. No.245 of 1986 dismissed. There shall be no order as to costs.