Supreme Court of India
Major G.S. Sodhi vs Union Of India (Uoi) on 30 November, 1990
Equivalent citations: AIR 1991 SC 1617, 1991 CriLJ 1947, 1992 (65) FLR 484, JT 1991 (5) SC 55, (1991) 2 SCC 382
Author: K J Reddy
Bench: S Pandian, K J Reddy
JUDGMENT K. Jayachandra Reddy, J.

1. Counsel appearing in these two petitions both for the petitioners and the respondents submitted that many of the questions common in these two petitions and they can be heard together and disposed of. We shall, however, first take up Writ Petition (Crl.) No. 478/89 in which several questions including those that arise in the other petition are urged.

WRIT PETITION (CRL.) NO. 478 OF 1989

2. This writ petition is filed under Article 32 of the Constitution of India. The petitioner at the relevant time was a Major in the Indian Army. He was charge-sheeted ans tried by the court-martial for certain offences and was found guilty and punishment of removal from service was ordered. The court-martial proceedings and the order of punishment are questioned on various grounds.

3. It is mainly contended that the inquiring officer was prejudiced and biased against the petitioner and malafides are also alleged against him. The next submission is that the initiation of summary of evidence was irregular and illegal as the same was not in conformity with the Army Rules 22 to 25. The further submission is that the general court-martial proceedings were not conducted as per law and that no grounds were made out for court-martial. Another submission is that the punishment was awarded in an arbitrary manner and that there is no confirmation of sentence as per law.

4. To appreciate these submissions it becomes necessary to state few more facts and then refer to the relevant provisions of the Army Act and Rules.

5. The petitioner became a Commissioned Officer of the Army on 30th April, 1972. On 30th April, 1985 he joined 18 FD Regiment Dharandhera. It is stated that in May 1985 he was responsible for controlling the riots in Ahmedabad city while on internal security duty and was recommended for Sena Medal. On 10th September, 1988 there was a scuffle between the petitioner and another two officers. As per the charge-sheet the allegation is that the petitioner assaulted Captain S.R. Shukla and Captain S.S. Chadha and caused them minor injuries and they were treated in the Hospital at Meerut. A convening order of a Court of inquiry was passed and a presiding officer and two members were nominated for investigating into the circumstances under which those two officers received injuries. It may be mentioned here that the petitioner also gave his own report about the incident stating that on 10th September, 1988 at about 2245 hrs Captain Chaddha and one Captain R. Gandhi trespassed into a single- officer quarter and they came in front of his room and started arguing with the petitioner in a humiliating manner and when he requested them to leave the place they did not do so and that resulted in a scuffle in the course of which the petitioner's kurta got torn off and Captain Gandhi bit him on his left arm. However, the Court so constituted proceeded to

enquire into the matter. The petitioner was also asked to furnish the list of defence witnesses, if any. The evidence of some of the witnesses was recorded the details of which could be adverted to at a later stage. After the conclusion of the enquiry, the Court of Inquiry made its recommendations resulting in court-martial which found him guilty and the promulgation was made and as mentioned above the sentence was awarded and the same was confirmed.

6. At this juncture it becomes necessary to refer to the relevant provisions of the Army Act and the Rules. The Army Act came into force in the year 1950. Chapters VI and VII deal with the offences and punishment's respectively and the corresponding sections are from 34 to 89. Chapter X provides for convening of court-martial and its powers. The sections are from 108 to 127. Chapter XI deals with procedure of Court-martial. The concerned sections are from 128 to 158. Chapter XII deals with confirmation and revision of such sentences and the sections are from 153 to 165. Under Section 191 rules are made by the Central Government. Similarly under Section 192 power is there for the Central Government to make regulations and as provided under Section 193 the rules as well as regulations have to be published in the Official Gazette. Such rules called Army Rules are made in the year 1954 and duly published. Chapter V of these Rules provides for investigation of charges and remand for trial and power of Commanding Officers. Rule 22 provides for the hearing of charges. Rule 23 lays down the procedure for taking down the summary of evidence. Rule 24 deals with remand of accused and lays down that the summary of evidence recorded under Rule 23 shall be considered by the Commanding Officer who thereupon-shall either remand the accused for trial by a court-martial or refer the case to the proper superior military authority and if the accused is remanded for trial by a court-martial the commanding officer shall without unnecessary delay either assemble a summary court- martial or apply to the proper military authority to convene a court-martial. Rule 25 provides for the procedure to be followed on a charge against an officer. Rule 28 deals with framing of charges and lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial. Rule 33 deals with the defence by the accused person. Rule 37 deals with the convening of general court-martial and District court- martial. Rule 40 provides for composition of court-martial. Rule 41 deals with the procedure at the trial. A provision is also made for the participation of the Judge-Advocate and Rule 61 lays down that the Court shall deliberate upon its findings in a closed court in the presence of the Judge-Advocate. Rule 64 deals with the procedure on conviction and Rule 65 deals with the sentence thereupon. Rule 67 provides for announcement of sentence and transmission of proceedings for confirmation. Rule 68 deals with the revision of the case. Rule 70 deals with confirmation and Rule 71 with promulgation. As per Rule 95 the accused is permitted to be defended by an officer called defending officer. In Rules 96-97 there is a provision for appearance of a counsel on behalf of the accused in certain General and District Court-martials and the permission is within the discretion of the convening officer. Rules 134 to 143 contain general provisions regarding the witnesses and evidence. Chapter VI containing Rules 177 to 183 deals with courts of inquiry and their Constitution etc. These are the relevant provisions for our purpose.

7. The learned counsel, at the outset, submitted that as ordained under Article 33 the fundamental rights are curtailed in their application to the members of the armed forces. The provisions of the Army Act which is made by Parliament under the power conferred under Article 33 abrogate and restrict these rights in their application to the members of the armed forces and the army personnel

cannot have their grievances redressed in ordinary law courts and therefore according to the learned Counsel this Court under Article 32 has to consider all the pleas raised from a different angle. But we do not propose to deal with these submissions elaborately, like a trial court or an appellate court. Suffice it to say that where there are disputed questions of fact, they cannot be gone into or at any rate cannot be resolved by this Court.

8. A perusal of the above mentioned provisions goes to show that they deal with offences against the military law which are triable by tribunal called court-martial. But the trial before them is in the nature of regular trial before a criminal court inasmuch as courts-martial are bound to follow the provisions of the general law of evidence contained in the Evidence Act subject to certain modifications. However, the provisions of Criminal Procedure Code as such are not applicable. The learned Counsel submitted that apart from malafide and bias on the part of the inquiring officer there was a gross violation of the rules prescribing specific procedure and therefore prejudice per se must be inferred.

9. We shall first examine the contention of malafide and bias. It is submitted that Lt. Col. S.K. Maini who ordered summary of evidence against the petitioner was inimical towards him because of certain prior incidents. It is alleged that the petitioner made a report against Lt. Col. S.K. Maini on 7th April, 1986 alleging that there was loss of unit ammunition and there was an accident of a unit vehicle resulting in the death of a civilian and also about bringing a lady in the single-officer quarter. On this report was a court of enquiry against Lt. T.C. Rawal. The further allegation is that Lt. Col. S.K. Maini who joined 18 FD Regiment as its Second-in-command was thoroughly briefed by Lt. T.C. Rawal as against the petitioner and thus bore grudge. It is alleged that Lt. Col. S.K. Maini took the petitioner's belt away and put him under arrest on 12th January, 1987 and on a complaint made by the petitioner there was an inquiry and summary of evidence was ordered. According to the petitioner though he wanted a copy of that summary of evidence, it was not supplied. It is also alleged that on 7th March, 1987 the petitioner filed a non-statutory complaint against Lt. T.C. Rawal and Lt. Col. S.K. Maini but the same was returned back from the army headquarters on the ground that the same should have been sent to a particular branch. The further submission is that though the petitioner fell sick he was not given due attention. Some other minor enquiry was also ordered against the petitioner. Therefore, according to the learned counsel, theory of scuffle between him and the other two officers is a fabricated one at the instance of Lt. Col. S.K. Maini who has ordered regarding summary of evidence against the petitioner. It is also stated in the petition that Lt. Col. S.K. Maini did not accede to certain requests made by the petitioner during the enquiry and that all this would go to show that Lt. Col. S.K. Maini who ordered summary of evidence was prejudice and acted malafide. In the counter-affidavit filed by Lt. Col. S.K. Maini all these allegations are denied. Regarding the complaint against Lt. T.C. Rawal it is stated that the petitioner levelled those allegations against him because of a warning for initiation of adverse report against the petitioner given by Lt. T.C. Rawal. However there was an inquiry and the cases were closed and attachment orders were terminated. Regarding the scuffle Lt. Col. S.K. Maini stated in his counter-affidavit that there was an assault and affray on 10th September, 1988 at about 22.45 hours wherein the petitioner physically hit Captain Shukla and after lapse of about one hour the petitioner physically hit Captain Chadha and on receipt of information it was investigated by staff court of inquiry ordered by Headquarters and after the inquiry was finalised disciplinary action against the

defaulters including the petitioner were directed and finally initiated complying with the provisions of Rule 25 read with Rule 22 of Army Rules. The other allegations made are denied. Regarding the non-compliance of some of the requests made by the petitioner sufficient explanations are given. A perusal of the averments in the counter-affidavit would go to show that the plea of bias and prejudice cannot be accepted. In any event we cannot make a roving enquiry into these allegations and counter-allegations in this writ petition particularly when Lt. Col. S.K. Maini has specifically stated that he had no bias against the petitioner.

10. In any event Lt. Col: S.K. Maini was concerned with the preliminary enquiry and it was for the court-martial to try the case and give verdict. Therefore the more allegations of bias and malafides against Lt. Col. S.K. Maini do not affect the court- martial proceedings. The learned Counsel in this context relied on a judgment of this Court in Ranjit Thakur v. Union of India and Ors. It is observed therein that:

The test of real likelihood of bias is whether a reasonable person, in possession of relevant information would have thought that bias was likely and is whether respondent 4 was likely to be disposed to decide the matter only in a particular way.

It is further observed that:

As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?" but to look at the mind of the party before him.

So far as aspects of bias and malafides are concerned we have already discussed and held that the plea cannot be accepted. We reiterate once again that the allegations made against Lt. Co. S.K. Maini are not really substantial. Even looked at from the point of view of the petitioner we cannot but hold that it is not reasonable on his part to apprehend that the said officer would act in a biased and partisan manner. As mentioned hereinbefore the enquiry conducted by him is only a preliminary one and he was not the concerned authority for determining the guilt of the petitioner.

11. Now we shall proceed to consider the irregularities and the alleged violation of the rules of procedure. Firstly, the main grievance of the petitioner is that there is a gross violation of Rules 22 and 25. Rule 22 contemplates that every charge against a person other than an officer, shall be heard in the presence of the accused, and 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. Rule 25 lays down the procedure on a charge against officer and is to the effect that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence be taken in his presence in writing, in the same manner as required by Rules 22 and 23. According to the petitioner though he wanted to be present when the summary of evidence was being recorded under Rule 23 but Lt. Col. S.K. Maini obtained a fictitious consent certificate from the petitioner. The consent certificate which is marked as Annexure 16 is dated 19th November, 1988 and admittedly it is signed by the petitioner but what the petitioner contended is that he gave his consent to dispense

with his attendance only during annual leave at the time of hearing of the charge but some interested person has blocked out the words "during AL" and made the letter appear as though the petitioner had given absolute consent to dispense with his presence at the time of hearing of the charge. All these allegations are denied in the counter-affidavit and it is stated that the charges against the petitioner were heard in accordance with the provisions of Rule 25 read with Rule 22 and it is further stated that at the hearing of the charge the petitioner declined to be present and gave his consent in writing to dispense with his presence and since the word "attendance "had been typed twice the latter word "attendance" was blocked. It is further stated that the charges against the petitioner were read out and explained to him and a copy also was provided. In view of this denial we are unable to give any weight to the submission. Further we have also examined Annexure 16 and there is nothing to indicate that the words blocked out were "during AL" and not the word "attendance". This is a highly disputed question of fact and this Court can in no manner accept any argument based on such a disputed question, and we have to proceed on the basis that the petitioner did not require as provided under Rule 25 that the recording of summary of evidence under Rules 22 and 23 should be in-his presence. At any rate the copy of the chargr.-sheet in fact was given to the petitioner and there is no prejudice caused because later we find that he had as well crocs-examined the witnesses examined. Yet another submission in this regard is that Lt. Col. S.K. Maini did not make the requisite deletions in the form that has been filled at the time of hearing of the charge. It appears in para 2 of that form Annexure 17A, in the words "requires or does not require" the necessary deletion has not been made inspite of the instructions appended to the form. Therefore there is a non-compliance of the requisite rule. In para 31 of the counter-affidavit it is stated that it came to the notice of Lt. Col. S.K. Maini that the unnecessary words were not deleted. But in view of the consent certificate Ex.R-4 it was left to the petitioner to carry out the necessary deletion and it was not done so. Taking averments on both sides into consideration we are unable to see as to how failure to score off the unnecessary words proves to be fatal to the proceedings. Taking the entire contents of the form as such coupled with the consent certificate Ex.R-4 given by the petitioner, into consideration we are of the view that the non-deletion of the unnecessary words in the form leads nowhere.

12. The next grievance of the petitioner is that recording of summary of evidence is not in accordance with law. Rule 23 lays down the procedure for taking down the summary of evidence (SOE). Under this Rule if the case is adjourned for the purpose cf 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, shall be taken down in writing in the presence and hearing of the accused and the accused may put in cross- examination such questions as he thinks fit. Under Rule 23(3) after all the evidence is recorded the accused will be asked to make any statement if he so wishes. The accused may then call his witnesses. The evidence of the witnesses and the statement of the accused shall be recorded in the English language. Under Rule 24 the Commanding Officer after considering the evidence so recorded and the statement of the accused may remand the accused for a trial by court-martial or to the proper superior military authority or rehear the case and either dismiss the case or dispose it of summarily.

13. It is contended that all the defence witnesses wanted by the petitioner were not properly exmined. It is stated in the petition that some of the witnesses examined as defence witnesses were

openly purchased by Lt. Col. S.K. Maini. The learned Counsel also invited our attention to various annexures. In Annexure 20B the list of defence witnesses is mentioned and is signed by the petitioner. Annexure 20C is relied upon to show that Major S.S. Bhaduria is an interested person. Annexures 26A, 26B and 27B pertain to leave application and the leave. They show that Annual Leave was sanctioned from 31.1.89 to 1.3.89 and according to the petitioner there is no recalling. Therefore according to the petitioner it has to be presumed that charges were dropped and when such presumption is permissible the enquiry itself is vitiated. We see no substance in this submission. We are not shown any provision of law in support of such a submission. We have gone through annexures and the material on records. We are not able to find any serious infraction of these rules.

14. The next submission is that the additional summary of evidence is not contemplated under law and therefore the proceedings in relation to such additional summary of evidence is vitiated. It must be remembered that it is only an additional recording of summary of evidence for which no special provision is necessary because it is only in addition to the summary of evidence (SOE) already commenced and once the SOE is permitted under rule the additional SOE is its necessary con-comitent. We may, however, point out that the entire proceedings contemplated under Rules 22 to 25 are only preliminary and it is meant for the purpose of Commanding Officer satisfying himself whether court- martial should be ordered or not. We must also observe that the main thrust of the argument in this case is only about the violation of Rules 22 to 25. But we are unable to find any flagrant violation of any of these rules. Even otherwise if there are some minor irregularities they do not, in any way, affect the proceedings in the general court-martial during which a regular trial was conducted.

15. In Lt. Col. Prithi Pal Singh Bedi etc. v. Union of India and Ors. , the nature of Rules 22 to 25 came up for consideration. In this case, petitions under Article 32 of the Constitution were filed and it was contended that to satisfy the requirement of Article 33 the law must be a specific law enacted by Parliament and that Rule 40 should be construed as to subserve the mandate of Article 21 and that the principles of natural justice should be observed even in respect of persons tried by the Army tribunals. Dismissing the petitions, the Court held that the dominant purpose in construing a statute is to ascertain the intention of the Parliament and that if any provision of the Army Act is in conflict with the fundamental rights, it shall have to be read subject to Article 33 as being enacted with a. view to either restricting or abrogating the fundamental rights to the extent of inconsistency or repugnancy with the Army Act. It is further observed that:

Therefore, it is not possible to accept the contention that the law prescribing 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 Forces is modified by enactment of the procedure in the Army Act itself.

It is further held thus:

Therefore, the requirement of Rules 22 to 24 are not mandatory in case of an officer and this becomes manifestly clear from Sub-rule (1) of Rule 25 which provides that 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. The opening words of Rule 22 clearly demonstrate the mandatory applicability of the provisions in rules"22 and 23 in case of persons subject to the Act other than officers. Any lurking doubt in that behalf is removed by the language of Rule 25 which provides that if an officer is charged with an offence under the Act, the investigation, if he requires, shall be held and the evidence, if he requires it, shall be taken in his presence.

xx xx xx xx xx xx Therefore, it is crystal clear that in the absence of a request from the petitioner as required by Rule 25, failure to comply with Rules 22,23 and 24 would not vitiate the trial by the general court-martial.

(emphasis supplied) As already mentioned the petitioner who is an Officer on the other hand did not choose to be present as is evidenced by Annexure 16 though he now tries to explain it away. We have already found that the explanation cannot be accepted. Therefore there was no request as required under Rule 25 and consequently even if there is any failure to comply with Rules 22, 23 and 24 that would not vitiate the trial.

16. In this context the learned Counsel also submitted that the convening order constituting the court of inquiry is defective and that Col. B. Bahadur is junior to the petitioner. According to the petitioner he was only an Acting Colonel. Therefore he cannot be treated as superior officer to him. Reliance is placed on Army Regulation No. 518 wherein it is stated that when the character or military reputation of an officer is likely to be a material issue, the presiding officer of the court of enquiry, wherever possible, will be senior in rank and other members at least equivalent in rank to that officer. It is also submitted that Col. Bahadur can at the most be termed as a re-employed officer and as per the re-employment policy laid down in Army Headquarters' Letter dated 7th September, 1988 such re-employed officers are being posted against the vacancy of Captain and generally being employed for carrying out the routine administrative duties of the Station. Therefore, according to the petitioner the court of enquiry is presided over by a junior officer. We are unable to accept this submission. The fact remains that Col. Bahadur at the relevant time was a Colonel and therefore superior to the petitioner and consequently it cannot be stated that junior officer presided. Even otherwise we are mainly concerned with the court-martial, its Constitution and proceedings held by the said court. A feeble attempt was also made that Lt. Col. S.K. Maini who was inimical towards the petitioner was influenced by others and he initiated the court of inquiry. Having considered all the aspects and the averments in the counter-affidavit sworn in by Lt. Col. S.K. Maini, we find no substance in this submission. The petitioner also placed reliance on his submissions made during the court of inquiry wherein he stated that he had to examine the injury reports in respect of Captain Shukla and Captain Chadha in order to know the nature of injuries sustained by them and therefore his statement is inconclusive for want of their cross-examination. At this distance of time particularly having regard to the fact that the petitioner fully participated in the general court-martial also, we cannot conclude that the entire proceedings were vitiated on this slender ground namely that his statement before the court of inquiry was inconclusive just for the reason that he has not seen the medical certificates in respect of the injuries found on those two

officers. For the above reasons we are unable to see any serious legal infirmity in convening the court of inquiry and recording of summary of evidence or in respect of other steps contemplated under Rules 22 to 25.

17. One other submission is that the charges are either fabricated or fictitious. The learned Counsel in support of this submission relied on some of the alleged defects in the charge- sheet namely the format of charges and the variations between this and the charge-sheet before the general court-martial. There is a prescribed format of the charge-sheet in respect of an offence of using criminal force punishable under Section 47 of the Act. It is submitted that the tentative charge-sheet is not in this prescribed form. It is also stated that this charge-sheet contains three charges whereas the general court-martial contains only two charges and that from the comparison of these two charge-sheets it emerges that the first charge in the tentative charge-sheet is superfluous and the same was done because Lt. Col. S.K. Maini gave a twist to the discussion in the officers' mess. But this charge, however, was dropped and the matter came up before the general court-martial. It is also submitted that the second charge of the tentative charge-sheet mentioned altercation while the third charge referred to a scuffle. Therefore the accusation is not accurate. It is further submitted that these two narrations do not find place in the general court-martial charge-sheet. It is also pointed out that the tentative charge-sheet indicate specific time where the GCM charge-sheet does not indicate any time. Yet another irregularity, according to the petitioner is that he should not have been charged under Section 47 being off-duty and that the charge should be read with Section 48(1) and Section 64(d). According to the learned Counsel these irregularities in respect of the various charge-sheets which are important steps in the procedure would go to show that there is no proper investigation at all. It is needless to say that the description of the occurrence by using the word "scuffle" at one place and "altercation" at another place cannot in any way affect the case. The investigation is only a preliminary step and meant for gathering of evidence and if there is sufficient material, the charge-sheet has to be filed. It is the report before the court- martial which is more important. We do not think that we should dilate much on these minor things.

18. Now we shall advert to some of the submissions about the alleged defects in the general court-martial. Under Section 109 of the Act a general court-martial can be convened by the Central Government or Chief of the Army Staff or any officer empowered in this behalf by warrant of the Chief of the Army Staff. It is submitted that GOC Infantry Division could not have ordered the general court-martial because GOC had examined and studied the GOI and given investigative directions for initiation of a disciplinary action and have recorded a SOE. It is also submitted that warrant for convening the general court-martial does not authorise a Staff officer to sign the convening order. Even otherwise the convening order has been signed in a mechanical way and it is not in the name of concerned person in joffice. It is also submitted that on 4th May, 1989 Col. S.K. Maini informed the petitioner about his court-martial to be held on 15th May, 1989 whereas the petitioner was issued a charge-sheet on 8th May, 1989 and that general court martial was convened on 15th May, 1989 whereas Col. S.K. Maini had already detailed court composition on 10th May, 1989. The learned Counsel relied on Note 3b to Section 109 at page 361 of the book wherein it is stated that if the officer on whom the command devolves is the commanding officer of the person to be tried or an officer who had investigated the case, he cannot afterwards act as convening officer in the same case but must refer it to a superior authority. The submission is that the General Officer

Commanding 9 Infantry Division because of the above steps taken by him must be deemed to have investigated the case, therefore he could not have convened the general court-martial. From the record we find the order convening the general court-martial is signed by D.M. Jadhav, Lt. Col. for General Officer Commanding 9 Infantry Division. It is stated that he is the Principal Staff Officer. From this endorsement it can be seen that he has signed for the General Officer. In the form for convening the general court-martial annexed to the Rules, we find an endorsement to the effect that the convening order must be signed by the officer personally or for him by a Staff Officer. Therefore there is no noticeable defect because the convening order is ultimately deemed to have been signed by a superior officer namely General Officer and not the Officer who investigated the case.

19. The next submission in this regard is that the warrant issued under Section 109 is not in conformity with Section 111 according to which provision such warrant may contain such restrictions, reservations or conditions as the officer issuing it may think fit. According to the learned Counsel the general warrant issued by the Chief of the Army Staff on 13th January, 1970 authorising the Field Officer commanding 9th Infantry Division to convene the general court-martial is a general authorisation and that on the other hand such authorisation should be from person to person who in accordance with Section 111 should impose restrictions, reservations or conditions. Section 109 as already noticed lays down that Chief of the Army Staff or any officer empowered by him can convene the general court-martial. In the counter-affidavit it is stated that as per the general authorisation issued by the General of the Army Staff the convening order was issued by the General Officer Commending but the same was signed by the Staff Offices. Therefore it is in compliance with the conditions and the note that is found in the above form annexed to the rules. In this context it is also submitted by the learned Counsel that the order convening the court-martial though dated 15th May, 1989 but even by 10th May, 1989 Lt. Col. S.K. Maini had issued letters indicating such a convening and that even on 8th May, 1989 the charge-sheet was issued. Therefore, according to the learned counsel, the order convening the general court-martial dated 15th May, 1989 is vitiated. We see no force in this submission. Convening the court-martial as per the Order dated 15th May, 1989 is in no way contrary to the Rules. Mere issuance of the charge-sheet or an indication of the names of the members who are to constitute the court-martial cannot render the convening order invalid.

20. The next submission is that the proper defence as requested by the petitioner has not been provided for. In this regard it is submitted that on 8th December, 1988 the petitioner made a request for a defence counsel and on 18th Dec. 1988 he gave consent to dispense with the defending officer. However on 8th May, 1989 L.t. Col. S.K. Maini asked the petitioner for three names of defending officers in order of preference. On 9lh May, 1989 he gave the list of three names but according to the petitioner on 17th May, 1989 Lt. Col. S.K. Maini detailed Lt. Col. R:S. Bhatt who is of his own choice. It is also pointed out that on 18th May, 1989 the petitioner during the court-martial requested for adjournment of the court for 10 days in order to engage a defence counsel. This request was turned down on the wrong advice of the Judge Advocate. The further submission is that the petitioner on 19th May, 1989 wrote a communication to the convening officer and apprised them with the prejudice caused to his defence. Considerable reliance is placed on this letter. We have perused the same. In that there is a reference to Rule 95 which deals only with the 'defending officer' and 'friend of the accused to be provided lor on request. The complaint made in

the letter is about not providing the defending officer of his choice at the trial. There are some of the circumstances which according to the learned Counsel should be taken into account in appreciating the prejudice caused to the petitioner's defence. Rule 95 to 101 deal with the appointment of defending officers and providing defence to the accused. Rule 95 lays down that at any general or district court-martial the accused person should be represented by any person who shall be called the defending officer. It is the duty of the convening officer to ascertain whether an accused person desires to have a defending officer assigned to represent him at his trial and if he does so desire, the convening officer shall use his best endeavours to ensure that the accused shall be so represented by a suitable officer. This rule also provides that accused person should be assisted by any person whose services he may be able to procure and who shall be called "friend of the accused" to give advice to the accused on all points and suggest the questions to be put to the witnesses. Under Rule 96 in certain general and district court- martials the counsel is allowed if the convening officer declares that it is expedient to allow the appearance of the counsel. Rule 97 prescribes the requirements for appearance of counsel. From a combined reading of these Rules it appears that generally it is the defending officer selected by the convening officer who defends the accused and the accused is allowed in special cases if the convening officer declares that it is expedient to allow the appearance of the counsel which is exceptional. However, in this case we need not make a roving investigation on this aspect because we do not find any illegality or irregularity that vitiate the trial nor we find any prejudice having been caused to the accused. As noted above under the rules the defending officer so selected is authorised to represent the accused and examine and cross-examine the witnesses. All that has been done duly in this case. Therefore we are unable to agree that prejudice has been caused to the petitioner's defence.

21. However in a general way referring to these so-called defects in the procedure in the court of inquiry, the learned Counsel submitted that the application for the GCM made by Lt. Col. S.K. Maini dated 5.12.88 was defective and the entire process is biased, prejudicial and malafide and the same shows that the GCM was a pre-conceived one. Therefore the proceedings of the court-martial have to be quashed as arbitrary, vindictive and against the law. It must be noted that the procedure is meant to further the ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such. In the instant case we have referred to almost all the so-called defects pointed out in the procedure preceding the court-martial and we are not convinced even remotely that anyone of them is of vital nature so as to affect the trial substantially.

22. The next submission is in respect of the alleged unfair manner in which the general court-martial was conducted. It is submitted that the witnesses cited as D.Ws were examined as PWs. However, according to the petitioner Maj. B.N. Lawerence, Capt. R. Choudhury and Capt. Pranvir Singh gave false evidence and the Judge advocate failed in his duties. According to the petitioner when his Kurta was torn Maj. B.N. Lawerence, Lt. Col. Sukhdev Singh and Capt. R. Choudhury were present. It is also his submission that S.S. Bisht, Maj. B.N. Lawerence and Capt. Gandhi denied having seen the petitioner's head hitting Capt. Shukla's face and that this aspect has not been taken into consideration by the general court-martial. It must be noted that under Rule 77(1) "it is the duty of the prosecutor to assist the court in the administration of justice, to behave impartially, to bring the whole of the transaction before the court, and not to take any unfair

advantage of, or suppress any evidence in favour of the accused." On perusal of record it would be seen that the witnesses were examined only from the point of view of bringing the whole transaction before the court. Therefore, there cannot be any grievance against examination as prosecution witnesses of the persons requisitioned as defence witnesses. Coming to the version of the witnesses examined we cannot re-appreciate the evidence and that is not the scope of this Writ Petition, in any event all the necessary evidence have been brought on record and the defence has cross-examined the witnesses effectively and it cannot be said that there is no evidence against the accused. Therefore, it was for the GCM to arrive at a conclusion on the basis of the evidence. The next submission is that there is discrimination in award of punishment. It is submitted that Maj. S.C. Mehra tried in a similar offence was awarded "severe reprimand" and in the case of Maj. Sen Verma only loss of six month seniority was awarded. We see no merit in the submission. It is for the general court-martial to decide as to what sentence should be awarded in the given circumstances of the case. We are unable to hold that the sentence awarded is wholly disproportionate. The further submission is that the findings of the general court-martial have not been confirmed as required under the rules. Section 154 of the Act deals with this aspect and lays down that the findings and sentence cf general court-martial may be confirmed by the Central Government or by an Officer empowered in this behalf by warrant of the Central Government. As per Section 156 such a warrant issued under Section 154 by the Central Government may contain restrictions, reservations or conditions as the Central Government may deem fit. It is submitted that the alleged confirmation was on 18th August, 1989. On 19th August, 1989, 5 Power of Attorney copies were asked from the petitioner and on 26th" August, 1989 the petitioner is purportedly dismissed from service without any promulgation. The submission is that the powers so conferred should be by way of notification and until so notified the powers cannot be exercised. Therefore the alleged confirmation is defective.

23. The learned Counsel for the respondent has submitted that warrant for confirmation is called warrant A-3 and was signed by the Secretary, Ministry of Defence. Further under Para 472 of the Regulations for the Army Act, 1987 the Central Government has restricted the powers to confirm the findings and sentence in respect of persons below the rank of Brigadier in the General Officer Commanding-in-Chief Command (GOC-in-C Command). It can be seen that in the instant case the confirmation of findings and sentence were forwarded to the GOC-in-C Command who on 18th August, 1989 confirmed the same. It is also stated to the same effect in the Counter-affidavit.

24. We have noticed that Warrant A-3 is issued under Section 154 read with Section 156 of this Act subject to certain restrictions and that the Chief of Army Staff and other officers mentioned therein are empowered to confirm the findings and sentence of general court-martial. Apart from this Para 472 of the Regulations regulates the exercise of powers of confirmation under which the Central Government has vested the powers to confirm the findings and sentence passed by general court-martial in respect of persons below the rank of Brigadier in the General Officer Commanding-in-chief Command. The record shows that the confirmation of findings and sentence awarded by the general court-martial in respect of the petitioner were forwarded to Commanding-in-chief Command who on 18th August, 1989 confirmed the same. Therefore there is no infirmity in confirmation of the findings of the general court-martial. Learned counsel for the petitioner, however, relying on Sections 191 to 193 submitted that there is no proof that these regulations are duly published and unless they are so published they cannot become law. Section 191

provides for making rules and Section 192 provides for making regulations by the Central Government. Section 193 deals with the publication of. such rules and regulations in Gazette and lays down that they shall be published in the official gazette and on such publication shall have an effect as if enacted in this Act. A printed copy of this regulation is placed before us and there is a legal presumption that such official acts like publishing have been regularly performed. At any rale we see no need to investigate into this aspect since we are satisfied that due publication must have been made.

25. The petitioner has also contended that he submitted a petition under Section 154(1) of the Act and the same was not disposed of before confirmation. As per this section any person aggrieved by findings of any general court-martial can present a petition to the Central Government or the Chief of Army Staff or any prescribed officer. In the instant case, the petition dated 5th July, 1989 is admittedly received on 14th July, 1989. It is stated on behalf of the respondents that the same was forwarded to the Headquarters 9 Infantry Division which in turn forwarded the same to the Headquarters 11th Corps who further forwarded the same to the Command Headquarters and while processing the petition it was observed that the said petition was not accompanied by power of attorney and the petitioner was apprised of the same and that in the meantime the Army Commander confirmed the findings. It is also submitted by the respondents that the petitioner was apprised of the same and was advised to submit a petition under Section 164(2) of the Act. The said provision lays down that any person subject to the Act, aggrieved by a finding or sentence of any court-martial which has been confirmed may present a petition to the Central Government or the Chief of Army Staff or to any prescribed officer superior in command to the one who confirmed such findings, as the case may be. We have perused the petition dated 5th July, 1989. It is a very lengthy one. The main prayer in the petition is that the petitioner's posting at Dharandhera may be carried through and that the court-martial proceedings may be annulled and that guilty be court-martialled. It can therefore be seen that this petition in substance is a post confirmation one though dated 5th July, 1989 and the same cannot vitiate the verdict passed by the court-martial and the confirmation thereupon even if this petition is not disposed of.

26. Relying on these above-mentioned so-called irregularities from the point of view of the petitioner, the learned Counsel in a general way relied on the two judgments of this Court. In Ranjit Thakur's case it is observed that:

The procedural safe-guards contemplated in the Act must be considered in the context of and corresponding the plenitude of the Summary jurisdiction of the Court Martial and the severity or the consequences that visit the person subject to that jurisdiction. The procedural safe-guards shall be commensurate with the sweep of the powers.

In Capt. Virendra Kumar v. Union of India the termination order passed in non-compliance of the procedural requirements of either Rules 15 or 15-A was held to be invalid. We have examined Rules 15 and 15-A and they deal with a different situation. In the instant case the general and main complaint is about the non-observance of certain rules particularly Rules 22 to 25 of the Army Rules. We have already considered this aspect and we are firmly of the view that there is no flagrant violation of any of the provisions of the Act and the Rules dealing with the procedure which has

caused prejudice to the petitioner. For all these reasons, this Writ petition is dismissed. However, in the circumstances of the case, there will be no order as to costs. W.P. (CRIMINAL) NO. 525/88:

27. The petitioner was commissioned as an Officer on 11th December, 1962 and on 27.11.80 he was selected for Lt. Col.'s rank. On 29.7.81 he was placed as an Acting Lt. Col. against a permanent vacancy. One Major V.K. Bali filed a complaint on 16.3.83 making certain allegations pertaining to the purchased material to the stores. Before making the complaint Major Bali wrote a letter to the petitioner under whom the former was working, requesting him to arrange an interview with Brigadier- in-Charge, Administration. Since the irregularities were of serious nature involving senior officers, it was decided to hold a preliminary investigation. A senior officer Brigadier Prasher was detailed to carry out the preliminary investigation and as prima facie substance was found in the irregularities alleged a proper court of inquiry was decided to be held and the said court-of-inquiry was convened on 2nd May, 1983 and the same led to court-martial.

28. The court-martial who tried the petitioner, was convened by an order dated 8th October, 1985 and the general court-martial was held w.e.f. l0th October, 1985 till 4th February, 1986. The petitioner was tried on 19 charges under Sections 52(0 and 63 of the Army Act. At the trial the petitioner was represented by a civil counsel. The accused pleaded not guilty to all the charges. After trial the petitioner was acquitted of 11 charges but was convicted of 8 charges under Section 52(0 and one charge under Section 63 of the Army Act. Consequently he was sentenced to be dismissed from service. The findings and the sentence of the general court-martial were confirmed by the Chief of Army Staff on 31st December, 1986 rejecting the prcconfirmation petition filed by the petitioner. The findings and sentence were promulgated on 20th February, 1987. After the said confirmation the petitioner submitted a post-confirmation petition on 14th April, 1988 which was rejected by the Central Government on 13th March, 1989. Questioning the above mentioned proceedings, the conviction and the sentence, the petitioner has filed this writ petition. Learned counsel for the petitioner submitted that the charge-sheet is not framed as per the provision of the Army Act and Rules and the proceedings dated 29.10.83 were not given to the petitioner. One of the grievances is that the tentative charge-sheet was not signed but only final charge-sheet was signed. Alternatively it was contended that the Rules do not provide for a tentative charge-sheet. The next submission is that the convening of general court-martial is defective. Rule 37 has not been complied with. Learned counsel also submitted that recording of summary of evidence is not in accordance with Rules 22 to 25. In support of this submission touching upon the procedural aspects, the learned Counsel placed reliance on Article 33 of the Constitution of India and contended that there is no other forum where the petitioner could urge the effect of the violation except in this Court. Rules 28 to 32 deal with framing of charges. Rule 28 lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial at one time. The charge-sheet may contain one charge or several charges. As per Rule 29 every charge-sheet shall begin with the name and description of the person charged, his rank etc. Rule 30 enumerates contents of charge and lays down that every charge shall state one offence only and shall be divided into two parts namely statement of the offence and statement of the particulars of the act. neglect or omission constituting the offence. This Rule also lays down further the particulars of the charge that have to be mentioned. Under Rule 31, the charge-sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature. Rule 32, however, lays down that the charge-sheet shall not be

invalid merely by reason of the fact that it contains any mistake in the name or description of the person charged, provided that he docs not object to the charge-sheet during the trial and that no substantial injustice has been done to the person charged. Rule 32(2) states that in the. construction of a charge-sheet or charge, there shall be presumed in favour of supporting the same every proposition which may reasonably be presumed to be impliedly included though not expressed therein. Referring to these Rules, the learned Counsel contended that these Rules have not been followed in framing and issuing the charge-sheet. It must be noted that the purpose of a charge, as we find in Rule 30, is to enable the accused to know as to the charges or accusation he has to face. In this case, no doubt, three charge sheets (sic)ed 25th September, 3rd October and 5th October, 1985 were issued. In the counter- affidavit, it is stated that the chrgesheet dated 25th September, 1985 was a tentative charge-sheet on which the hearing of the charges in terms of Rule 25 read with Rule 22 were heard and on 3rd October, 1985, a formal charge-sheet on which the accused was to be tried by general court-martial was issued but this was subsequently cancelled and a revised charged-sheet dated 5th October, 1985 was given on which the petitioner was finally tried by the general court-martial. We have already adverted to the relevant Rules. A combined perusal of all these Rules would go to show that what all that is required is that the delinquent should be apprised of the charges that he has to answer so that he is not caught unaware and handicapped in preparation of his defence. The main question is one of prejudice but in this case the charge-sheet shows that all the details are mentioned and the trial went on and that the petitioner participated in the trial duly. The next grievance is that these charge-sheets were not duly signed. We are mainly concerned with the final charge-sheet dated 5th October, 1985. In that we find that all the details are mentioned elaborately and it is signed by Commanding Officer as well as Col. (Admn.) for the General Commanding Officer. Therefore even if the tentative charge-sheet is not signed it docs not make any difference. The same reasoning applies to the alleged non- compliance of Rule 25 read with Rule 22. The scope and object of these Rules have been considered by us in the other case. In any event the summary of evidence was recorded and we find there is a substantial compliance. Even otherwise as held in the other case, the recording of summary of evidence is only to find out whether there is a prima facie case to convene the court-martial. In this case also the petitioner did not exercise his option as provided under Rule 25. Therefore there is no violation of mandatory rules so far as the petitioner, who is an officer, is concerned vide Prithi Pal Singh's case. (1983) 1 SCR 393

29. The next submission is regarding the general court-martial proceedings and it is submitted that the Court acted in a biased, malafide, prejudicial and discriminatory manner. In support of these submissions, the learned Counsel asked us to go through the contents of the petitioner's appeal under Section 164(1). It is mentioned therein that the provisions of Army Rules 23 and 25 were not complied with, the charges are defective and that the evidence is not conclusive. It is also mentioned therein that the petitioner complied with only with the wishes of DDOs' namely superiors and that the entire mischief has been created by Major Bali. As indicated in the other case, we cannot re-appreciate the evidence in this Writ Petition. So far as the procedure is concerned even assuming that there was violation of Rules particulary Rules 22 to 25, we are of the view that by itself it does not affect the whole trial. The learned Counsel also referred to certain improprieties in the adjournment of the court and non-administration of the oath. We do not think that these defects, even assuming to be there, would vitiate the trial. The learned Counsel also attacked the convening order of the general court-martial. It must be noted that it is only a document which conveys the

directions of the convening officer in relation to the trial. These defects regarding the signature of the convening officer, we have already dealt with in the other case.

30. Now coming to the confirmation the petitioner contended that the same has not been confirmed by the Chief of Army Staff. We have already referred to Sections 154 and 156. In the counter-affidavit the reliance is placed on these provisions as well as the general warrant of authorisation and also Regulation 472. The effect of these provisions has been considered in the other case. We need not again advert to the same. We, however, find that all the necessary formalities have een substantially complied with. In this context it is also submitted that the promulgation was done before the sentence was confirmed and that left no option with the confirming officer except" to confirm the sentence in its entirety. In the counter-affidavit it is slated that promulgation followed the confirmation and we do not see any reason to doubt the same. In conclusion on this point we hold that the proceedings and sentence have been duly confirmed.

31. The learned Counsel also alleged that discrimination was there against the petitioner at the point of recommendation and in awarding some sentences prior to the final sentence awarded by the general court-martial. It is stated that first sentence of reduction of rank, retrospective recovery of the petitioner's since-drawn salaries, deduction of the petitioner's 25% of the basic pay and ordering of non-release of the petitioner's duly earned pension accrued and other benefits. In our view these are all internal administrative matters. We are unable to see as to how they can constitute the grounds warranting interference in this Writ Petition.

32. The next contention is that the petition submenu under Section 164(1) of the Act was not disposed of before confirmation. We have already dealt with this aspect in the other case. The confirmation is a different aspect.

33. In this case also the learned Counsel relied on the judgments in Ranjit Thakur's case JT 1987 (4) S.C. 93 and Capt. Virendra Kumar's case (1981) 1 SCC 485 and we do not see as to how the observations therein apply to the facts of this case.

34. The main complaint in this case also in about the non- observance of Rules 22 to 25 of the Army Rules. As already noted in Virendra Kumar's case (1981) 1 SCC 485 the facts were different. Likewise in Ranjit Thakur's case JT 1987 (4) S.C. 93 the observation is to the effect that the procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the Summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. But from these observations it cannot be held that each and every kind of defect in the procedure renders the verdict invalid. The object and effect of the Rules should be considered in the context bearing in mind the general principle whether such an incomplete compliance has caused any prejudice to the delinquent officer. Howerer, (sic) in is any violation of mandatory Rules, the necessary benefit of the same should be given to the delinquent. In this case we do not find any such violation. The most of the defect pointed out are common to both the cases and we have already dealt with them in the other case.

35. Before we part with these two cases, we must point out that the most of the main submissions were only about certain alleged lapses in constituting court of inquiry, recording of summary of evidence, issuance of the charge-sheets, convening order and that all these orders not being signed by a duly authorised officer and about confirmation and promulgation of the court-martial findings and sentence and discrimination in awarding of sentence. Assuming for argument sake that there is some substance in all these submissions, yet having given our earnest cosideration, we are unable to see as to how they would affect the trial as such in which both the petitioners duly participated. However, in view of the detailed submissions made oh these aspects we have considered the same to the extent necessary. The main submission as we noticed is about the violation of Rules 22 to 25 dealing with the court of inquiry and recording of summary of evidence. At the risk of repetition we must say that there is no violation of these Rules and at any rate no prejudice has been caused to the petitioner in his defence. However, as already noted the petitioners who were officers did not exercise their options under Rule 25. Therefore the question of violation of Rules 22 to 24 in the manner alleged by them does not arise.

36. In Lt. Col. Prithi Pal Singh Bedi's case2 it is tersely observed in this context that:

Although in respect of persons belonging to the lower category Rules 22 to 24 are mandatory, in respect of persons belonging to the upper bracket the necessary presumption is that he is a highly educated knowledgeable intelligent person and compliance with these rules is not obligatory. But the rules have to be complied with if the officer so requires it. This is quite rational and understandable. An officer cannot be heard to say that he would not insist upon an inquiry in which he would participate and then turn round and contend that failure to hold the inquiry in accordance with the principles of natural justice would invalidate the inquiry.

A further observation which may usefully be noted is as under:

Rules 22,23 and 24 prescribe participation at a stage prior to the trial by court martial, in a trial which is likely to result in deprivation of liberty the body which has ultimately the power to make an order which would result in deprivation of liberty must hear the offender offering full participation. However, the procedure prescribed by these rules is at a stage anterior to the trial by the court-martial. It is the decision of the court martial which would result in deprivation of liberty and not the order directing that the charge be heard or that summary of evidence be recorded or that a court martial be convened.

(emphasis supplied)

37. We find that in the court-martial which is important, the petitioners have duly participated. It must also be borne in mind that the army authorities are entrusted with certain powers and duties under the Act which also enjoined on them certain important responsibilities particularly in the matter of holding the enquiries and trials. The Parliament in its wisdom in exercise of its powers under Article 33 has enacted this law and the officers are to be guided by factors like exigencies of service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the person against whom the offence is committed. Normally having regard to the high office they hold

there should not be any scope to apprehend deliberate lapse or intentional omission on their part. Having carefully considered all these aspects, we do not find any illegalities or material irregularities in the conduct of the trial. For all these reasons both the writ petitions are dismissed. In the circumstances of the cases, there will be no order as to costs.