IN THE ARMED FORCES TRIBUNAL
(REGIONAL BENCH) KOLKATA

APPLICATION NO. T.A. 214/2010

THIS 28TH DAY OF AUGUST, 2014

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

No.14926198 N Ex Nk Umakanta Dash of 15 Mech Infantry
R/o Vill Barabari, P.O. Chhanipur, District – Cuttack PIN 754202

……Applicant

-Vs-

1. Union of India, Service through the Secretary, Ministry of Defence, South Block, DHQ PO, New Delhi – 110 011
2. The Chief of Army Staff, Army Headquarters, South Block, DHQ P.O., New Delhi-110 011
3 Col Khalid Zaki, C/o Mechanized Infantry Directorate, Army HQ, DHQ PO, New Delhi – 110 011

……..Respondents

For the petitioner : Mr. P.N. Chaturvedi, Advocate

For the respondents : Mr. D.K. Mukherjee, Advocate

O R D E R

Per Justice Raghunath Ray, Member (Judicial):

Conspectus

1. An appeal under Section 15 of the Armed Forces Tribunal Act, 2007 was initially filed by Ex Nk Umakanta Dash, the appellant before the Armed Forces Tribunal, Principal Bench, New Delhi challenging legality of the SCM proceeding as also validity of impugned order of conviction passed in the SCM trial in question. The said appeal was numbered as OA 146/2009. When the matter came up for hearing on 16-8-2010, an objection was raised on behalf of respondents questioning territorial jurisdiction of the Hon'ble Principal Bench, Armed Forces Tribunal since the appellant had been residing in Orissa after his dismissal from service. The aforementioned OA was, thereafter, transferred to this Regional Bench, Kolkata on the ground of lack of jurisdiction vide order dated 7-10-2010 passed by the Principal Bench. The said OA was renumbered as TA No.214 of 2010 before this Regional Bench. This appeal is directed against the order of conviction dated 13-10-2008 passed in a SCM trial whereby the appellant was (i)reduced to the rank, (ii) to suffer Rigorous Imprisonment for nine months to be carried out by confinement in Civil Prison and (iii) to be

dismissed from service and such order of conviction was subsequently promulgated at Babina Cantonment on the same day, i.e. 13th October, 2008.

Factual averments

2. The appellant was enrolled in the Army as a Sepoy in October, 1999 and was subsequently promoted to the rank of Naik. In his memo of appeal it is asserted that he had unblemished record of over 9 years service and was assessed as of exemplary character before the alleged incident. It is averred therein that while he was serving in 15th Mechanized Infantry Unit he had to participate in an exercise Dakshin Shaktis in Rajasthan and he was, in fact, performing the duty of Gunner in Infantry Combat Vehicle (ICV) of Alpha Company of 15 Mechanized Infantry. Capt Tanul Singhal was performing the duty of Officiating Company Commander. On 09-03-2008 the appellant was detailed for a linking Petrol duty of the three Platoon locations of Alpha Company and such detailment, even though not part of his duty, was ordered out of grudge which the officer harboured against him when he was the instructor of the officer. Since such order was given in a malafide manner in order to make the applicant walk a distance of few Kilometers in a desert with full equipment, it was contended that such order was not a lawful command as there was no order or instruction either from Capt Singhal, Superior Officer, nor was it a part of normal routine exercise.

Despite all these, he with his all equipment reported to Capt Singhal and requested the Officiating Commanding Officer to provide him a buddy for safety reasons as he would be passing through civil area (villages) alone at night carrying some items of control stores. Capt. Singhal, without however considering his request for buddy, ordered him to remove the equipment and stand in Attention position (Sabdhan). It was ordered by him that the petitioner had to go on link petrol alone. The appellant, found it very difficult to stand in Sabdhan position for a long time. He, therefore, prayed for exemption because of his knee problem, but he was abused with filthy language by Capt Singhal who also humiliated him in front of the crew members. At about 0130 hrs. the appellant went to wake up the next sentry for duty and informed Capt Singhal about it but he was told to give duty throughout the night. Thus he continued torturing the appellant. He pleaded to the officer that like others he had also not slept for last two nights and requested that he be given rest, but he was again abused with highly objectionable language and was given a slap by the officer. In order to get himself free, the petitioner pushed the Capt Singhal who fell down and picked up a hammer and assaulted him with the said hammer. There was tussle and during tussel the hammer was snatched by him from Capt. Singhal's hand. The incident was, however, reported to the Commanding

Officer in a distorted and fabricated manner. During holding of an on-the-spot enquiry Lt. Col V.M. Bembi also slapped and kicked him repeatedly and when he was lying on the ground his hands and legs were tied with rope.

3. All such factual averments made in the memo of appeal were strongly controverted and denied by the respondents in their affidavit in opposition. It is specifically averred that on 10th March 2008 approx. at 0100 hour while the officiating Company Commander Capt. T. Singhal was briefing the staff personnel during exercise Dakshin Shakti in Rajasthan, the appellant was performing the duties of gunner in the Company Headquarters Infantry Combat Vehicle of alpha Company. He used criminal force against the officiating Commanding Officer. Since the exercise was in progress the appellant was moved to the logistic Support Area pending investigation on termination of the Exercise. It is also contended inter alia therein that on his request Hav. Veerpal Singh and Naik Mukesh Naiding were asked to accompany him on the patrol but the appellant refused to proceed on the patrol. Therefore, for such disobedience of a lawful command by his superior officer, he was asked to stand in Attention position pending reference to higher authorities. The petitioner, however, continued to behave in an insolent manner inquiring as to the nature of offence committed by him and how long he was to stand in attention. It is further

averred that he was asked to give the additional hours of sentry duty for his disobedience of orders and the Company Commander had lawful authority to pass such order. It is also specifically denied that Captain Tanul Singhal ever abused him or got physically involved with him. Rather, Captain Singhal was assaulted by the appellant with a hammer while he was lying on his camp cot in the presence of Naik Mukesh Kumar Dhakad, who wrested the hammer away from him. It is further contended that on termination of the Exercise Dakshin Shakti with effect from 12-3-2008, the preliminary investigation was carried out till the return of the unit to its permanent location at Babina on 21st March, 2008. After taking formal cognizance of the offence there was a charge hearing on a tentative charge u/s 40(a) of Army Act, 1950 (in short Army Act) on 25th March, 2008 for assaulting his superior officer. Capt. Singhal, who had proceeded on Field Engineering Course to College of Military Engineering Pune was recalled and hearing of charge was concluded in his presence on 29th March, 2008. The recording of summary of evidence was carried out on and from 29th to 30th March, 2008. On the basis of summary of evidence prima-facie case was made out against him and he was tried by Summary Court Martial which commenced from 29th September and completed on 30th October, 2008. The appellant was found guilty of charge framed against him and was convicted accordingly.

4. By filing a rejoinder it is contended by the appellant inter alia that he was given unauthorised punishment by Capt. Tanul Singhal violating para 353 of the Regulations for the Army. It was admitted by Singhal that he assaulted the appellant with a hammer. It is further asserted that the use of criminal force had, in fact, been done by Capt Singhal and he was merely trying to extricate from Capt Singhal's clutches in order to save himself from such impending assault. According to him, thereafter Capt. Tanul Singhal had made use of hammer. It is further alleged that the evidence of Naik Mukesh Kumar Dhakad was fabricated. According to him Capt. Singhal and other officers including the Commanding Officer made an endeavour to fix a Non Commissioned Officer (NCO) like him. It is forcefully reiterated by him that the entire disciplinary proceedings since its inception is mired with illegalities and full of arbitrariness and as such the entire SCM proceedings including its findings are liable to be quashed. He is therefore, entitled to reinstatement in service with all consequential monetary benefits.

5. We have very carefully taken into consideration averments made by the parties in the memo of appeal as also affidavit in opposition and rejoinder filed by them together with respective arguments advanced by the learned Counsel of both sides. Mr. T.N. Chaturvedi , learned counsel for the

appellant has argued at length and has also filed written arguments which have been kept with the record after our perusal. Mr. Deepak Mukherjee, the learned counsel for the respondents put forward his oral arguments. He has, however, not filed any written notes of arguments.

DUAL JURISDICTION

6. Mr. P.N.Chaturvedi, ld. counsel for the appellant has pointed out that the appellant had been charged on two counts of charge i.e. u/s 41 of Army Act for disobeying lawful command as also u/s 69 of Army Act for committing civil offence, that is to say, voluntarily causing gravious hurt to the victim contrary to Sec. 325 of IPC. According to him, the appellant had thus to face trial by summary court martial on these two counts of charge. Even though the alleged offence u/s 325 IPC is triable by a criminal court, the competent military authority is also vested with the power for trying such civil offence contrary to 325 IPC in terms of Sec. 69 of Army Act. In this context, he has referred to Sec. 475 of Code of Criminal Procedure, 1973 (in short Cr. P.C.) read with Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 (in short Adjustment Rules) and argues that the prime requirement of law is that whenever any army personnel governed by the Army Act, 1950 commits a civil offence, they are subjected to dual jurisdiction of the criminal court and the court martial.

However, the conflict of jurisdiction has been avoided by enactment of the Adjustment Rules as mandated in Sec. 475 of Cr. P.C.. In support of his contention he refers to two decisions of the Hon'ble Apex court (1) **UOI – vs- E.G.Bursey, AIR 1961 SC 1762** and (2) **Supdt, & Remembrances, State of WB –vs- Usha Ranjan Roy Chowdhury, AIR 1986 SC 1655.**

7. It is further contended forcefully by Mr. Chaturvedi that the instant trial by SCM has been per se illegal and without jurisdiction in view of the fact that 'civil offence' as envisaged in Sec 69 of Army Act cannot be tried under the special law , i.e. Army Act & Rules framed thereunder According to him, only the offences mentioned in sections 34 to 68 of Army Act can, however, be tried under the special law, i.e. Army Act and Army Rules while civil offence defined in section 3(ii) of Army Act is triable by a Criminal Court. By referring to Sec. 4(2) of Cr. P C it is submitted by him that all offences under any other law are required to be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

8. In this context to substantiate this facet of argument, he has invited our attention to the definition of 'civil offence' as given in Sec. 3(ii) of

Army Act which has defined ‘civil offence’ as an offence which is triable by a criminal court. In that view of the matter, a civil offence can only be tried by the criminal court as stipulated in Sec. 26 of Cr. P.C. subject to the special provision as envisaged in Sec. 125 and 126 of the Army Act. According to him, civil offence include all offences which are triable under IPC as also under special law i.e. NDPS Act, Arms Act, 1958 or Prevention of Corruption Act, 1988 etc. In this limb of his argument, his main thrust is that the provision of Sec 4 and 5 of Cr.P.C would be applicable to the appellant for the simple reason that the basic provision of law is that all armed forces personnel are subject to dual set of rules – one subject to criminal law and the other respective service law; in the instant case, Army Act 1950 and Army Rules, 1954. Therefore, it is recognized principle of law that for such offences both the criminal court and court martial have got right to initiate proceedings under the respective Code/Act.

9. The main crux of his argument is that where dual jurisdiction exists, it is legally incumbent upon the appropriate authorities to invoke Sec. 125 and 126 of Army Act. In order to clarify further, he has referred to the relevant portion of Sec. 125 and 126 of Army Act extensively and has sought to impress upon us that lodgment of FIR u/s 154 of Cr PC before the police or a complaint before the Magistrate u/s 190 of Cr PC is a mandatory

requirement for conducting trial for an offence punishable under the IPC. It is further pointed out by him that, admittedly, in the instant case neither any FIR before the police nor any complaint before the magistrate had been lodged by the victim and as such, it is a clear violation of Sec. 4(1) of Cr PC. He continued to argue that a collective reading of Sec. 3(2), Sec. 69 and 70 as also Sec. 125 and 126 of Army Act read with Sec. 4 and 5 of Cr. PC makes it manifestly obvious that whenever civil offence has allegedly been committed u/s 325 of IPC, the statutory procedure stipulated in Sec. 125 and 126 of Army Act read with Adjustment Rules is mandatorily required to be followed. In order to substantiate his argument he has referred to paragraph 10 of the Apex Court judgement in the case of Supdt, & Remembrance, State of WB –vs- Usha Ranjan Roy Chowdhury (supra). It is forcefully submitted by him that the question regarding exercise of jurisdiction by the Court Martial would arise only after the investigation was completed and the police report was available. Further, without resorting to the prescribed procedure under Rules 3 & 4 of the Adjustment Rules the question of exercising an option does not arise at all. He proceeds to argue further that in case of conflict of jurisdiction between criminal court and court martial, the matter is required to be referred to the Central Govt. which shall decide the forum as to where the case shall be dealt with – by army authority or by

criminal court. In the instant case the matter has not been referred to the Central Govt. for choice of appropriate forum for trying the alleged offence u/s 325 IPC. In the absence of such reference, it is emphatically argued by him, that army authority has no locus standi or jurisdiction over the appellant to try him by summary court martial. More so, whenever admittedly, no FIR or complaint has been filed by the victim against the offender. That apart, the entire process followed in this SCM had thus been made nugatory for violation of Art. 14 and 16 of the Constitution of India.

10. Per contra, it is argued by Mr. D.K.Mukherjee, ld. counsel for the respondents that lodgment of FIR before the police or any complaint before the magistrate or army authorities is not a mandatory requirement within the framework of Army Act and Army Rules. There is nothing on record to indicate that the aggrieved officer filed any FIR before the police or complaint before the magistrate and such being position, the question of conflict of jurisdiction of criminal court and court martial does not arise at all. It is forcefully argued by him that whenever both the victim and the assailant are governed by the relevant provisions of army Act and Army Rules there is no scope to raise the issue of purported conflict of jurisdiction between the criminal court and court martial. Of course, if any of the parties was a civilian, the question of filing FIR or complaint may arise, but in the

instant case, there did not exist any such contingencies and the army authorities have exclusive jurisdiction in trying the alleged offence u/s 325 IPC. In this connection Mr. Mukherjee has also sought to rely on the ruling of the Hon'ble Apex Court reported in AIR 1986 SC 1655 (Supdt, & Remembrance, State of WB –vs- Usha Ranjan Roy Chowdhury) (supra) which has also been referred by Mr. Chaturvedi in support of his argument. Mr. Mukherjee argues that if the offence committed falls within the purview of Sec. 70 of the Army Act, 1950, the offender can be tried only by criminal court and according to him, here the provision of Sec. 70 of Army Act is neither relevant nor applicable to the instant case. Mr. Mukherjee concludes his argument with the assertion that the pretrial proceedings as also SCM trial do not suffer from any legal infirmities and order of conviction and sentence impugned, are legally sustainable.

Discussion/Views

11. In order to appreciate the rival contention advanced on behalf of the appellant as also respondents in its proper perspective it would be apt to quote the definition of civil offence as incorporated in Sec. 3(ii) of Army Act, 1950, which runs as under :-

"3(ii) 'civil offence' means an offence which is triable by a Criminal Court."

However, Sec. 69 of Army Act also lays down that if any person governed by Army Act at any place in or beyond India, commits any civil offence, shall be deemed to be guilt of an offence against the Army Act and, if charged therewith shall be liable to be tried by a court martial. For better understanding of the matter, Sec. 69 of Army Act is quoted below :-

> "**Sec. 69** .- Civil offences .- Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence *shall be deemed to be guilty of an offence against this Act* and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say, -
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> (Emphasis supplied)
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> (a) If the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offences, by the aforesaid law and such less punishment as in this Act mentioned; and
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> (b) In any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as in this Act mentioned."

12. A combined reading of section 3(ii) and 69 of Army Act tends to show that even though Civil Offence is triable by Criminal Court, commission of Civil Office by Army Personnel shall be deemed to be an offence against the Army Act and such offence is triable by a Court Martial. Now, adverting to section 125 of Army Act, we find that both the criminal

court and the court martial have concurrent jurisdiction in respect of such civil offences and it is in the discretion of the officer commanding the army, army corps, division or independent brigade or any other competent officer to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a court-martial, the accused person shall be detained in military custody. For the sake of convenience in discussion section 125 of Army Act is reproduced as under:-

> "**125. Choice between criminal court and court-martial**. – When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, *to direct that the accused person shall be detained in military custody.*
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> (Emphasis supplied)

13. Sec 126 of Army Act, however, deals with the power of criminal court requiring delivery of offender and as such the provisions of the said section are not applicable to the facts and circumstances of the present case wherein the commanding officer of the unit has exercised his discretion to institute the proceedings against the offender/appellant in terms of section 125 of Army Act and it was accordingly decided that the offender/appellant should be tried by court-martial. There is no doubt that Sec. 4(1) and (2) read with Sec 26 of Cr. P.C. govern every criminal proceedings both as

regards the Court by which a crime is to be tried and as to the procedure to be followed. The combined operation of Sec. 4(2) and Sec. 26 is that the offence complained of should be investigated or inquired into or tried according to the provision of the Code where the enactment which creates the offence indicates no special proceeding. For our convenience to appreciate the issue in question, section 4 of Cr PC is quoted as under :-

> "**4. Trial of offences under the Indian Penal Code and other laws** .-(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereafter contained.
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> (2) All offences under any other law shall be investigated, inquired into, tried and *otherwise* dealt with according to the same provisions, *but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*
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> (Emphasis supplied)

14. It is quite evident from subsection(1) of the afore-quoted section that the provision of the Cr.P.C. are applicable where an offence under the Indian Penal Code or any other law is being investigated enquired into, tried or 'otherwise" dealt with. Sub-section (2), however, gives plenary jurisdiction to ordinary criminal courts in the matter of trial of offences under any law other than Indian Penal Code The court vested with general jurisdiction to try all offences cannot have their jurisdiction ousted except by the most clear and unambiguous provision

In fact, by virtue of this sub- section an offence ‘ created under any other law’ shall be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Cr. P.C. but subject to any enactment for the time being in force In such a case the provisions of the Special Law must prevail and the cr. p c. must give way. It is, however also clear from the provision of Section 4(2) of Cr. P.C that in so far the offences under laws other than the India Penal Code, 1860 are concerned, the provisions of Cr. P.C. will apply in their full force subject to any specific or contrary provisions made by the law under which the offence is investigated and tried. In this regard reliance can be placed upon a ruIing of the Hon’ble Apex Court reported in **AIR 1983 (SC) 60 (Mirza Iqbal Hussain vs. State of Uttar Pradesh).** In this appeal by Special Leave the convict appellant Mirza Iqbal Hussain challenged the jurisdiction of the Special Judge to confiscate two Fixed Deposit Receipts of the appellant. He was convicted under Section 5(I) (e) of the Prevention of Corruption Act, 1947 being in possession of the property disproportionate to his known source of income for which he could not satisfactorily account for. In that context of the matter it is held by the Hon’ble Apex Court in para 2 of the Judgement as under :-

> “2. ……None of the provisions of the Prevention of Corruption Act provides for confiscation or prescribes the mode by which an

> order of confiscation may be passed. The Prevention of Corruption Act being totally silent on the question of confiscation, the Provisions of the Cr. P.C. would apply in their full force, with the result that the Court trying an offence under the Prevention of Corruption Act would have the power to pass an order of confiscation by reason of the provisions contained in Section 452 of the Cr. P.C. The order of confiscation cannot, therefore, be held to be without jurisdiction".
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> (Emphasis is ours)

It is an admitted position of law that court martial held under the provisions of special Act i.e. Army Act and Army Rules can also take cognizance and try an offence under the IPC along with offence under the Army Act in the same proceedings.

15. Such being the position of law it is to be held that the relevant provisions of the Cr. P.C. can also be made applicable to investigation/Court Martial trial in respect of civil offences under the Army Act & Rules, if provisions of Army Act are silent on any important procedural safeguards which are required to be made available to the Army Personnel as per the relevant provisions of Cr. P.C. since Civil offences are triable either by the Criminal Court as per provisions of Cr. P.C. & Indian Evidence Act or by Court Martial as per provisions of Army Act & Army Rules. A plain reading of the relevant sections of Cr. P.C. quoted hereinbefore conjointly would make it obvious that if there is a special provision to the contrary in the special law concerned and if the special law is a complete code in itself providing for investigation inquiring and trial of offences, the provisions of

Cr. P.C. stands completely excluded. In view of such exclusion of the code in its entirety subject to any exception made in the Special Law, provisions of Cr. P.C. cannot be ordinarily invoked but on the ground of absence of procedural safeguard in the Special Law, certain provisions of Cr. P.C. can be applied to ensure such safeguards during enquiry/investigation or trial of offences under Special Act. It is held by the Hon'ble Apex Court in a ruling reported in **AIR 1987 SC 1646 (Ajmer Singh vs Union of India)** that if there are enactments which constitute a special law conferring special jurisdiction and power on Court Martial proceeding and also providing a special form of procedure for trial of the offences under the said Acts, Section 5 of Cr. P.C. would operate and the general provisions prescribed in Court would not come into operation. Therefore, the procedure prescribed in the Army Act for holding trial by court martial will apply in supersession of the provision of the Code. It is thus settled position of law that where an enactment provides special procedures for the manner or place of investigation or enquiry into the offences under it such provisions of special law must prevail and no provisions of Cr. P.C. can apply. In this context, we may refer to the decision of the Hon'ble Apex Court reported in **2004(1) Crimes 232 (State vs Ram Saran)**

16. In the light of afore-quoted provisions of law coupled with the afore-cited rulings, we are now to deal with the issue of lodgment of FIR or complaint for commission of alleged civil offence u/s 325 IPC and to examine whether non-compliance of such mandatory requirement would invalidate enquiry/investigation leading to initiation Court-Martial trial as highlighted by Mr. Chaturvedi in course of his lengthy argument. At the outset, it would be apt to refer to Sec. 475 of Cr. P.C. whereby delivery to commanding officer of persons liable to be tried by court-martial is mandated. It would be relevant to quote Sec. 475 of Cr P.C which reads as under:-

> "475. Delivery to Commanding Officers of persons liable to be tried by court-martial.—(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a court-martial; and *when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a court to which this Code applies or by a court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the unit to which he belongs,* or to the Commanding Officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a court-martial.
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> (Emphasis is ours)

> Explanation.—In this section—
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> (a) "unit". Includes a regiment, corps, ship, detachment, group, battalion or company,
> (b) "Court-martial". Includes any tribunal with the powers similar to those of a court-martial constituted under the relevant law applicable to the Armed Forces of the Union.
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> (2) Every Magistrate shall, on receiving a written application for that purpose by the Commanding Officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.
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> (3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situated within the State be brought before a court-martial for trial or to be examined touching any matter pending before the court-martial."

17. To avoid conflict of jurisdiction, the Central Govt. has been authorized in the afore-quoted section to make rules consistent with the Code and the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and any other law relating to the Armed forces of the Union for the time being in force and accordingly, Adjustment Rules were framed in exercise of powers conferred by said section 475 of Code of Criminal Procedure and in supersession of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) rules, 1952. A combined reading of relevant provision of 475 of Cr PC together with Adjustment Rules, it is manifestly clear that as per rule 3 of Adjustment Rules whenever a person subject to military, Navy or air Force or Coast guard law or any other law relating to

the Armed Forces of the Union for the time being in force " is brought before the magistrate and charged with an offence for which he was liable to be tried by court martial or Coast Guard court, as the case may be, such magistrate shall not proceed to try or to commit the case to session unless (a) he is moved thereto by the competent military, naval, air force or Coast Guard authority or (b) he is of opinion, for reasons to be recoded that he should so proceed or to commit without being moved thereto by such authority ". As per rule 4, before proceeding under clause (b) of rule 3 the magistrate is also required to serve written notice upon the CO or the competent military or navy or air force authority, as the case may be, of the accused and until expiry of a period of 15 days from the date of service of the notice he is debarred from framing charge or making an order of conviction or acquittal or committing the case for trial to the Court of session or make over the case for inquiry or trial.

(Emphasis supplied).

18. It is, therefore, quite evident that magistrate's jurisdiction is attracted only when the personnel of Armed Forces is brought before the magistrate.

19. Rule 8 and 9 of the Adjustment Rules deal with circumstances under which a military/naval/air force or coast guard personnel who has committed an offence in respect of which proceedings ought to be instituted before the

Magistrate and the presence of such person cannot be procured except through military/naval/air force or coast guard authorities, the Magistrate by a written notice require the commanding officer of such person either to deliver such person to the Magistrate for being proceeded against according to law or stay the proceedings against such person before the Court Martial and to make reference before the Central Government for determination of the Court to which proceedings should be instituted. Similarly whenever personnel of armed forces has committed an offence which, in the opinion of the competent authority, ought to be tried by a Magistrate in accordance with civil law in force or where Central Government on a reference made in Rule 8 decided that the proceeding of such person should be instituted before a Magistrate, the CO of such person after giving a written notice to the Magistrate concerned delivers such person under proper escort to the Magistrate.

20. In the present case, it is to be noted that the victim who happened to be an army officer did not initiate any proceeding against the offender before the Magistrate in terms of rule 8 of Adjustment Rules and further neither the military authority nor the Central Govt. have decided that proceedings in the present case should be instituted before the magistrate and no written notice has also been issued to that effect in terms of rule 9 of

Adjustment rules. In such view of the matter, we do not find any conflict of jurisdiction for trying the alleged civil offence u/s 69 of Army Act contrary to Sec.325 of IPC framed against the appellant even though both the criminal court and court martial have concurrent jurisdiction in respect of alleged civil offence u/s 325 IPC. It is also noteworthy that admittedly neither the victim army officer nor the offender Army Personnel registered any objection either at pre-trial enquiry/investigation stage or during trial by SCM against Court Martial trial in respect of civil offence u/s 69 of Army Act.

21. Be that as it may, the fact remains whether the procedural safeguards as are available to an accused while being enquired/investigated or tried as per provisions of Cr. P. C by a criminal court should also be made available to the military personnel who is being tried by court martial in respect of civil offences which are triable in criminal court. In that context of the matter, we are to adjudicate whether the lodgment of FIR in the Police Station or complaint either before the magistrate or for that matter before the army authorities can be held to be mandatory for setting criminal law into motion. It would be contextually relevant to refer to a ruling of the Hon'ble apex Court reported in 2001 (9) SCC 82 (**UOI –vs- L D Balam Singh**). For a trial by court martial for committing civil offence contrary to

Sec 18 of NDPC Act 1985, the question came up for consideration of the Hon'ble Apex Court whether mandatory procedural safeguards regarding search and seizure provided u/s 42-50 of NDPS Act applicable to persons to be tried under Army Act. In that context of the matter, it was held by the Hon'ble Apex in para 15 of the Judgement as under :-

> " 15. …… In the event, we clarify, a particular statute is taken recourse to, question of trial under another statute without taking recourse to statutory safeguards would be void and the entire trial would stand vitiated unless, of course, there are existing specific provisions therefor in the particular statute. Needless to record that there were two other civilian accused who were tried by the court at Patiala but were acquitted of the offence for non-compliance with the mandatory requirements of the NDPS Act. Once the petitioner was put on trial for an offence under the NDPS Act, the General Court Martial and the Army Authorities cannot reasonably be heard to state that though the petitioner would be tried for an offence under section 18 of NDPS Act, yet the procedural safeguards as contained in the statutory provision would not be applicable to him being a member of the armed forces. The Act applies in its entirety irrespective of jurisdiction of the General Court Martial or other courts and since the Army Authorities did not take into consideration the procedural safeguards as is embodied under the statute, the question of offering any credence to the submissions of the Union of India in support of the appeal does not and cannot arise. …."
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> (Emphasis is ours)

22. It has, thus, been ruled by the Hon'ble Apex Court that whenever there is concurrent jurisdiction in respect of trial of an offence, the safeguards which are available to the accused before the criminal court wherein trial is conducted following procedure as laid down in Cr P.C is required to be followed strictly during trial before the court martial. It is,

therefore, a mandatory requirement for a trial before the criminal court that for setting law into motion, an FIR before the police u/s 154 Cr. P.C. or a complaint before the magistrate u/s 190 Cr. P.C. is to be filed. It is, however, an admitted position that there is no specific provision within the four corners of Army Act and Army Rules for lodging any complaint before the CO who is required to exercise his discretion for conducting enquiry/investigation/court martial trial in respect of civil offence by holding court martial instead of allowing the army personnel to be tried by a criminal court as per procedure laid down in Cr P.C. At any rate, there are certain procedural safeguards which are made available to the offender while being tried by a criminal court. Before dealing with the main issue in respect of procedural safeguards to army personnel who is being tried under the relevant provisions of Army Act and Rules, it would be convenient to weigh the importance of FIR or complaint in a criminal trial in the scale of procedural safeguards. In fact, the importance of FIR/complaint lies in its being the first recorded statement of the occurrence. It is also the earliest information on which the investigation is commenced. The main object of lodgement of the First Information report before the police or filing of complaint before the magistrate or competent authority for initiation of legal action as per special Act or Rules is to obtain early information regarding

circumstances in which the alleged offence was committed, the name of actual culprits and the part played by them as well as names of eye witnesses, if any, present in the scene of occurrence. The substance of the allegations is thus to be jotted down at the earliest opportunity and such information of commission of cognizable offence is intended to set the criminal law in motion. However, if no written information about commission of cognizable offence under the signature of informant could not be submitted, such information is required to be reduced to writing by the officer in-charge of the Police Station which is to be signed by the person giving it. The absence of FIR, therefore, by itself invariably weakens the prosecution case and also simultaneously denies the accused his right of defence during trial. In such view of the matter, the FIR is the first version of the incident as received by the Police. The statements in the FIR must naturally get their due weight. However, FIR is not the substantial piece of evidence and it can be used only to corroborate or contradict its author. It thus plays a vital role in judging the veracity of the prosecution case. In fact, it largely eliminates the chances of embellishments in prosecution case. It is, therefore, abundantly clear that investigation in respect of commission of cognizable offence commences and proceeds on the basis of FIR which contains information given on the imitative of an informant/victim. Such

information, undoubtedly is of prime value because it shows the materials on which the investigation commenced and the manner in which the occurrence was related when the case was first started. Information received after commencement of investigation is dealt with in Sec. 161-162 of Cr P.C, 1973 whereas as per army rules summary of evidence is recorded. As already indicated earlier, these are not substantial evidence but can be used to impeach the correctness of the testimony of a witness during trial either by court martial or by criminal court, as the case may be. It is thus settled position of law that registration of an FIR under section 154 Cr. P.C. is a mandatory requirement in a police case where commission of cognizable offence has been reported. Admittedly no FIR has been lodged before the police for invoking initial jurisdiction of the criminal court in the present case and the Army Personnel has been tried and convicted by Court Martial.

23. Now turning to another dimension of Mr.Chaturvedi's argument that alternatively a complaint before the Magistrate under Section 190 of Cr. P.C. is required to be filed in order to enable a criminal court to take cognizance of civil offence under section 69 of Army Act on the ground of having initial jurisdiction prior to framing of tentative charge against the delinquent officer and recording of summary of evidence which culminated in SCM trial. We find such argument is not legally tenable. His further contention that since

such complaint has not been filed before the competent Magistrate, there was no question of invoking the relevant provisions of Adjustment Rules is also of no consequence. It is, in fact, beyond our comprehension as to why lodging of FIR in the Police Station u/s 154 Cr. P.C. or filing of complaint before the criminal court under section 190 Cr P.C is necessitated in the present case. In this context it would be useful to look into the power of criminal court requiring delivery of offender as vested under 126 of Army Act and to reproduce the same as under:

> "126. **Power of criminal court to require delivery of offender** – (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, required the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.
> (2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."
>
> (Emphasis supplied)

24. A close reading of the afore-quoted section clearly indicates that the power of criminal court requiring delivery of offender vested under section 126 of Army Act can be exercised only after formation of opinion that proceedings shall be instituted before the criminal court having jurisdiction on the basis of certain materials which are required to be placed before him

by either of the parties of the contemplated proceeding who intend to institute such proceedings in respect of alleged offence. In our considered view, on consideration of relevant materials, such opinion regarding institution of proceeding is to be formed and only thereafter written notice is required to be served upon the officer referred to in Section 125 and at his option either to deliver over the offender to the nearest Magistrate for proceeding against the offender in accordance with law or to postpone the proceedings pending reference to the central government. It is, therefore, abundantly clear from a close analysis of the afore-quoted provision that the basic requirement for invoking the said section is that the criminal court having jurisdiction in respect of alleged civil offence is to form opinion for institution of the proceedings before the Criminal Court only. Therefore it would not be in consonance with the provisions of 125 and 126 of Army Act to accept the argument of Mr.Chaturvedi, that in case of civil offences initiation of proceedings is to be made only before Criminal Court which has initial jurisdiction to take cognizance of offence committed by Army Personnel and it is only after service of written notice by the Magistrate, the Commanding Officer is to exercise his option for proceeding against the offender as per provisions of Army Act. Rather, it has been unequivocally made clear in Section 125 of Army Act that the choice between criminal

court and court martial squarely rests upon the officer and in exercise of his discretion he is competent to decide as to where the proceedings shall be instituted and immediately after taking such decision, the case should be instituted before a court martial. The detention of the offender in the military custody is also to be directed by him in terms of explicit provisions of Section 125 of Army Act. He is thus not required to cause production of the offender Army Personnel before the criminal court even though such court has concurrent jurisdiction. On the other hand as per Rule 3 and 4 of Adjustment Rules a duty is cast upon the criminal court to serve a written notice upon the Commanding Officer before proceeding to try such person or to commit the case to Court of sessions. Importantly, the Magistrate's failure to ensure strict compliance of afore-mentioned rules as prescribed under Adjustment Rules would vitiate the trial as it happened in West Bengal Legal Remembrancer's Case (Supra) The Magistrate's jurisdiction to try the offence or commit the case to the Court of Sessions can only be invoked after service of a written notice allowing the competent military authority clear 15 days' time to respond to such notice as prescribed in Adjustment Rules. On the other hand, Regulation 419 (c) of Army Regulations speaks about the procedure laid down in Sections 125 & 126 of Army Act and para 415 of Army Regulation is to be followed in cases of

civil offences where there exists a dual jurisdiction. It is needless to mention that in case of Concurrent Jurisdiction of Criminal Court and Court Martial, the Commanding Officer is vested with unfettered power to exercise his choice/option to institute the proceeding against the serving Army Personnel before the Court Martial at the first instance. Considering all these we are of the considered view that it is not mandated by any of the provisions of Cr. P.C., Army Act and Rules or Adjustment Rules that initial jurisdiction is vested only upon criminal court for taking cognizance of civil offences and at the subsequent stage of the proceeding pending before the criminal court, the commanding officer is entitled to exercise his option to try the alleged civil offence by court martial.

25. Now adverting to the issue of procedural aspect of filing complaint/FIR for setting criminal law into motion furthering enquiry /investigation in respect of the alleged civil offence in terms of relevant provisions of Act it is to be looked into as to whether Army Act & Rule provide any special procedure for setting the criminal law into motion. It is well settled position of law that procedural safeguards which are normally made available to the offender during trial by a criminal court should also be made available to the offenders who are being tried by court martial trial. As already analysed in foregoing paragraphs, inquiry as defined in 2(g) of

Criminal Procedure Code means every inquiry, other than a trial conducted under the criminal procedure code by a Magistrate or court whereas investigation defined under 2(h) Cr. P.C. includes all the proceedings under the Cr. P.C. for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in his behalf. It is needless to mention that in criminal matters collection of evidence is of supreme importance. Therefore, an investigation means search for material and facts in order to find out whether or not offence has been committed. It does not matter whether it is made by police officer or a custom officer or any Army Officer authorized to investigate in the matter of an offence committed under a law other than the IPC or the Civil Offences as mentioned in 69 IPC. The arrest and detention of a person for the purpose of investigation of a crime forms an integral part of investigation. Every special Act has accordingly laid down its own procedure for inquiry/investigation. In fact, the three terms "investigation', 'inquiry and 'trial' denote three different stages of a criminal case. So far the scheme of Cr. P.C. is concerned a criminal case can be initiated either on the basis of a complaint or a police report. Accordingly, we have discussed the importance of a FIR lodged before a police or a complaint filed before Magistrate for setting the criminal law into motion. In a criminal case, a complaint is one of

the mode in which a Magistrate can take cognizance of an offence. Now the question crops up what are the essential ingredient of complaint as defined in 2(d) of Cr. P.C.. For the sake of convenience in discussion, it would be apt to quote Section 2(d) of Cr. P.C. as under :

> "2. In this Code, unless the context otherwise requires –
> (a) ……
> (b) ……
> (c) ……
> (d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.
> Explanation - ……"

26. A close look to the definition of complaint reveals that a complaint constitutes the allegation of facts. The requisites of a complaint are (i) a written or oral allegation (ii) that some persons known or unknown has committed an offence (iii) it must be made to a Magistrate (iv) it must be made with the object that he should take action. However, the allegations which do not amount to an offence would not be a complaint. It is an admitted position that the Cr. P.C. lays down procedure for the inquiry/investigation and trial of all criminal cases except any special form of procedure prescribed by any other law for the time being in force as laid down in section 5 of Cr. P.C.. In the case in hand the Army Personnel has been investigated and tried by SCM as per procedure laid down in special

Act, but the Act is silent as to how the Army Authorities would take cognizance of cognizable offences viz. civil offences as envisaged in Section 69 of Army Act. Therefore, no special procedure has been provided in the Army Act in consonance with the similar provision of lodging an FIR before the police or complaint before the Magistrate. Even though Army Act and Rules provide special procedures in respect of some other matter of inquiry having provision of Court of Inquiry and, thereafter, recording of summary of evidence etc. which is done either by recording of statement of witnesses by the investigating officer or in complaint case examination of witnesses before framing of charges etc. Similarly Army Act & Army Rules also provide special procedure for holding Court of Enquiry as also recording of summary of evidence after hearing of charge on the basis of tentative charge. As already discussed earlier the provisions of the code will apply to the matters on which the special law is silent. Therefore the necessary provision for filing of complaint indicating the allegations which constitute an offence for taking cognizance by the appropriate Military Authorities for commission of alleged civil offence under section 69 of the Army Act ought to have been there as provided in Section 19 of Cr. P.C. read with Section 2(d) of Cr. P.C.. As a matter of fact, the procedural safeguards as contained in Cr. P.C. would be applicable to the appellant being a member of the

Armed Forces even though tried by Court Martial since such safeguards have not been embodied in the special statute, i.e. Army Act and Army Rules, even though same are available to the Army Personnel whenever tried by a Criminal Court having concurrent jurisdiction in respect of civil offences committed by him. Since Army Act and Rules are silent regarding filing of complaint before the Army Authorities, cognizance of civil offence is to be taken having recourse to statutory safeguards being mandatory requirement as are available in Cr. P.C.. Needless to mention that the appellant was tried under Section 69 of Army Act for civil offence punishable u/s 325 IPC. Admittedly, no complaint was lodged by the informant before the Commanding Officer for taking cognizance of civil offence contrary to Section 325 IPC even though filing of such complaint u/s 190 Cr. P.C. before the Magistrate is a mandatory requirement. Therefore, there was a clear non-compliance with mandatory requirement of Cr. P.C. and procedural safeguards have thus been denied to the appellant prior to taking cognizance of alleged offence u/s 325 IPC and proceeding with the enquiry/investigation or trial in the subsequent stage. Therefore applying the ratio decidendi of Balam Singh's case (supra) we feel constrained to opine that non-compliance of such prescribed procedure as

laid down in Cr. P.C. would invalidate the pretrial enquiry/investigation as also the SCM proceeding & trial.

27. We have also carefully gone through the judgement of the Hon'ble Apex Court in the case of **Major E.G. Barsey** reported in **AIR 1961 SC 1762** and relied upon by Mr. Chaturvedi in support of his contention that the Criminal Court has initial jurisdiction to deal with civil offence defined in Section 3(ii) of Army Act. There is no dispute with the proposition of law as enunciated in the aforesaid ruling of the Hon'ble Apex Court that in case of civil offence both criminal court and court martial have concurrent jurisdiction and further that offences under IPC are triable by criminal courts as mentioned in Sec. 26 of Cr PC, if no option is exercised by the Commanding Officer in terms of Section 125 of Army Act. It would therefore, be contextually relevant to refer to para 18 of Major E.G. Barsay's Judgement (supra) which reads as under :

> "(18) The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in S.2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act, it provides a satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions an accusesd to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under any other law in force in India; nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express

> terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of a same offence, but also provide for successive trials of an accused in respect of the same offence". (Emphasis is ours)

28. Applying the principles of law as enunciated in the afore-quoted para of the Judgement to the present case, we find that the military authorities have opted to exercise their discretion as vested in them u/s 125 of Army Act read with rules 8 and 9 of Adjustment Rules. There is nothing on record to indicate that any of the parties to the court martial proceedings has ever brought it to the notice of the magistrate endeavouring to attract the jurisdiction of the magistrate to try the alleged offence u/s 325 IPC. In that view of the matter, it cannot be said that there exists any lack of jurisdiction in respect of trial by court martial on that score. Mr. Chaturvedi's contention that every personnel of armed forces is subject to dual jurisdiction in respect of civil offence is also legally sustainable. It, however, cannot be said by any stretch of imagination that army authorities had no locus standi or any jurisdiction over the appellant to try civil offences by court martial as argued by Mr.Chaturvedi. True, absence of FIR/complaint has deprived the army jawan/appellant of his right to take contradictions in respect of contents of FIR/Complaint from its author during cross-examination in court martial trial and undoubtedly lodgment of FIR/complaint in criminal

trial can be viewed as one of the procedural safeguards guaranteed by the statute to the alleged offender for conducting his defence during trial in an effective manner. But at the same time, it is to be borne in mind that there is no provision for filing of complaint before the designated Army Officer within the scheme of Army Act and Army Rules. At any rate, Mr. Chaturvedi's argument that in the absence of FIR/complaint before the Magistrate the entire proceedings of court martial are illegal and void ab initio cannot be accepted. His further argument that only criminal courts have initial jurisdiction to deal with civil offences in the legal context of the relevant provision of Cr. P.C, Army Act and Rules as also Adjustment Rules also cannot be accepted. As already pointed out earlier choice between criminal court and court martial is left to the discretion of the commanding officer as mandated in section 125 of Army Act. There is, however, no doubt that there are circumstances where the criminal court is also vested with the power requiring delivery of offender in respect of civil offence in certain eventualities after forming opinion justifying institution of proceeding in respect of alleged civil offences which are triable by a Criminal Court also. In such a situation, he may either ask for option from Commanding Officer as per requirement of Section 125 of Army Act or to deliver over the offender to the nearest Magistrate or postpone the

proceeding before him pending a reference to the Central Government. On a meticulous analysis of the relevant provisions of Army Act and Rules, Adjustment Rules as also Cr. P.C. we do not find anything therein which may lend support to Mr. Chaturvedi's contention that initial jurisdiction to deal with civil offences allegedly committed by Army Personnel is vested only with the Criminal Court and the Commanding Officer is to opt for choice between Criminal Court and Court Martial at subsequent stage.

29. In this context it would be relevant to refer to Major E.G. Barsay's case (supra) which was very strongly relied upon by Mr. Chaturvedi. In our considered opinion the said ruling of the Hon'ble Apex Court is of no help to him in the facts and circumstances of the present case. It would be useful for our discussion to quote the relevant portion of para 19 as under :-

> "(19) ……..Though the offence of conspiracy does not fall under S. 52 of the Act, it being a civil offence, shall be deemed to be an offence against the Act by the force of S. 69 of the Act. With the result that the offences are triable both by an ordinary criminal court having jurisdiction to try the said offences and a court-martial. To such a situation Ss. 125 and 126 are clearly intended to apply. But the designated officer in S. 125 has not chosen to exercise his discretion to decide before which court the proceedings shall be instituted. As he has not exercised the discretion, there is no occasion for the criminal court to invoke the provisions of S.126 of the Act, for the second part of S. 126(1) which enables the criminal court to issue a notice to the officer designated in S.125 of the act to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government, indicates that the said sub-section presupposes that the designated officer has decided that the proceedings shall be instituted before a court-martial and directed that

> the accused person shall be detained in military custody. If no such decision was arrived at, the Army Act could not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law".
>
> (Emphasis supplied)

30. Now, turning to Mr. Chaturvedi's most pivotal argument to the effect that since the provisions of Cr P.C apply to all citizens as per Sec 2 of Cr P.C, 1973, any civil offence as defined u/s 3(ii) of Army Act committed by Army personnel is to be inquired into or investigated only on the basis of FIR before the police or complaint before the Magistrate, and the court martial has no locus standai to try civil offence u/s 69 of Army Act.on the ground that Army Personnel committing civil offence are subject to initial jurisdiction of criminal courts, we do not find much substance in it. A bare perusal of section 69 of Army Act would reveal that commission of civil offence by the Army Personnel shall be deemed to be guilty of offence against the Act and if charged u/s 69 of Army Act shall be liable to be tried by a Court Martial. In such circumstances, the question of legal machinery under the relevant provisions of Cr. P.C of being activated and to report the case before the competent magistrate, as suggested by Mr Chaturvedi does not arise at all His further contention that in the absence of FIR/Complaint before the Magistrate, there was no question of conducting proceedings under the Army Rule 22 (hearing of charge), and recording of summary of

evidence under Army Rule 23 and as also, remanding the accused to the higher authorities by his commanding officer in terms of Army Rule 24 does not arise at all is of no Consequence. The legality of holding SCM trial against the appellant on that score alone cannot, therefore, be challenged.

31. Such argument as sought to have been advanced in above paragraph appears to be fallacious for the simple reason that primacy in exercising option has been given to the commanding officer or other competent officer as per Sec. 125 and 126 of Army Act read with relevant provisions of Adjustment Rules. We are unable to understand as to how the Superintendent and LR case (supra) relied upon by both sides, can help Mr. Chaturvedi in substantiating his argument that the court Martial has no jurisdiction to try alleged offence u/s69 of Army Act contrary to 325 I.P.C.in the present case. The validity of trial of three army officers was challenged before the Hon'ble Apex Court in the afore-cited case on the ground that the 4th Addl. Special Court, Calcutta acted without jurisdiction in taking cognizance of the case and proceeding with the trial of three army officers resulting in conviction of one of them and acquittal of remaining two. It was held by the Hon'ble High Court, Calcutta that the special court had acted illegally in taking cognizance of the case and proceeding with the trial of three army officers on the ground that the Ld. Trial Judge failed to follow

the procedures prescribed by the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952. While adjudicating the jurisdictional issue raised before the Hon'ble Apex Court, the phrase "is liable to be tried by the court to which this Code applies or by a court martial" appearing in old Sec. 549(1) corresponding to Sec. 475 of 1973 Code, was interpreted in para 8 of the judgement as under :-

> "8. ….. Accordingly the phrase "is liable to be tried either by a court to which his Code applies or a court martial" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as a court martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal court and the court-martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, Section 549 and the rules made thereunder are attracted to the case in hand"
>
> (Emphasis supplied)

32. It has been observed inter alia further, in the context of non-compliance of rules 3 and 4 of Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952, whereby the special court was required to serve a notice to the army authority prior to taking cognizance of the case, that in view of non-compliance of Sec. 549(1) of Cr. PC 1898 and rules 3 and 4 of Adjustment Rules, 1952, the ordinary criminal court would have no initial jurisdiction to take cognizance of the case and trial by such

court would be vitiated irrespective of lapse of three years from the date of offence resulting in lack of court martial's jurisdiction u/s 122 of the Army Act 1950. In that context of the matter it is held by the Hon'ble Apex Court in para 9 of the judgement as under :-

> "9. Having regard to the enunciation of law to this effect it is evident that the ordinary criminal court would have no jurisdiction to take cognizance of the case and to try the accused in a matter where the procedure prescribed by the Rules has not been complied with. The initial lack of jurisdiction to take cognizance and try the case would of logical necessity vitiate the trial and the order of conviction and sentence would be liable to be quashed as a result thereof. We are therefore unable to accede to the submission urged on behalf of the appellant State that even if the Rules are applicable, having regard to the fact that more than three years have expired from the date of commission of the alleged offence, the trial is not vitiated."
>
> (Emphasis is ours)

33. It has, therefore, been held by the Hon'ble Apex Court that "the mandatory procedure prescribed by the Rules is accordingly obligatory even in respect of proceedings before a Special Court under the West Bengal Act"

34. Fortified with the aforesaid ruling, we are of the considered view that both the court martial as well as criminal court have initial jurisdiction to take cognizance of the alleged offence and further that inquiry/proceeding in respect of alleged civil offence u/s 69 of the Army Act can only be invalidated if the mandatory procedures prescribed by the Rules which are obligatory in respect of proceedings either before the court martial or before

the ordinary criminal court, are not complied with. We, therefore, do not find much substance in Mr. Charturvedi's argument that all such civil offences u/s 69 of Army Act are to be initially investigated/inquired on the basis of either an FIR or complaint and in absence of such FIR/complaint before the Magistrate the court martial proceeding would be invalidated. There is no doubt that army personnel are subject to dual jurisdiction in respect of civil offences u/s 69 of the Army Act committed by them, then in such case both criminal court and court martial have initial jurisdiction for the purpose of commencement of inquiry/investigation leading to court martial trial. Such view stands fortified by the relevant provision of Sec. 425 of Cr. PC as also Sec. 125 of Army Act. In fact, Adjustment Rules have been enacted in terms of Sec. 475 of Cr. P.C. to set at rest the jurisdictional conflict and in fact, the criminal court cannot exercise its initial jurisdiction to deal with civil offence u/s 69 of Army Act unless the army personnel are brought before him or any complaint is lodged before the Ld. Magistrate by the aggrieved party. In that event also the ld. Magistrate is required to serve notice upon the army authorities inquiring as to whether they are inclined to exercise their option in trying the offender. In some cases, the Magistrate in his wisdom may also refer the matter before the central Govt. whose decision in this regard would be final. We are afraid that the relevant

provisions of Cr. PC and Army Rules have thus been misconstrued to give it a negative import and further that the spirit of the relevant provision of Army Act as also Adjustment Rules and Cr. P.C. is that the Ld. Magistrate's jurisdiction at the initial stage can be invoked only when the matter is brought to his notice either by the army authority or by the aggrieved party. On the other hand, whenever any offence is committed by an army personnel against another army personnel, the matter can easily be taken up by the commanding officer or any other competent officer superior to him and the military authorities are not required to refer such case either to the Magistrate or to the Central Govt. whereas the ld. Magistrate's discretion is fettered by the Adjustment Rules which were enacted as authorized by Sec. 475 Cr P.C and he is to comply with the rules so prescribed under the Adjustment Rules by giving notice to the army authorities and in that respect specific time schedule has also been specified in the rules and non-compliance of such prescribed rules by the magistrate or by the Special Judge can be construed as lack of jurisdiction and the entire trial for non-compliance of such rule would be vitiated. But the power of commanding officer appears to be not restricted by any such time schedule or for making any reference to the Central Govt. etc. However, in case of non-appearance of such army personnel against whom a criminal court took cognizance or

the person is required because of filing of any complaint before the magistrate, the army authorities are bound to take appropriate steps against those army personnel.

35. Be that as it may, the fact remains that commanding officer has been empowered by the Act and Rules to exercise his option and if such option is exercised in the affirmative in respect of trial of civil offence, the criminal court is debarred from taking cognizance of alleged civil offence or tying such offence.

36. Mr. Chaturvedi, ld. counsel for the appellant seems to have overlooked the most important aspects of Sec. 5 of Cr. P.C while insisting upon lodgement of FIR before the police or complaint before the magistrate. In this context, we would like to refer to the ruling of the Hon'ble Apex Court reported in 2003(12) SCC 578 **State (Union of India, Appellant -vs- Ram Saran, Respondent**). In the aforementioned case, the Assistant Commandant of Central Reserve Police Force convicted a CRPF personnel u/s 10(*m*) of CRPF Act, 1949. Such conviction was challenged before the ld. Sessions Judge initially and it was held by the ld. Sessions Judge that the Assistant Commandant had no jurisdiction to record conviction and impose sentence since magisterial powers after separation of judiciary from the executive in 1973, can be conferred upon the Judicial Magistrate either of

First class or 2nd Class only by the High Court and further that the Central Govt. or the State Govt. had no power to vest any person with powers of Judicial Magistrate of any class. By referring to Sec 5 of the Cr. P.C it was observed that the expression " in the absence of specific provision to the contrary" used therein did not render Section 16(2) of the RPF Act redundant. The findings of the ld. Sessions Judge were upheld by the Hon'ble Himachal Pradesh High Court. In Crl. Appeal preferred by the UOI the Hon'ble Apex Court was pleased to set aside the concurrent findings of the ld. Sessions Judge and High Court and it was held inter alia in paragraph 5 of the said Judgement as under :-

> "…… Consequently, what is purported to be done by these provisions is merely to refer to the nature and extent of powers possessed by such authorities under the other laws being made available to the authorities designated under this Act, for discharging their duties under this Act, without exhaustively enumerating the details of all such powers or without re-enacting all such provisions in detail as part and parcel of this law, the Act, and not to constitute them to be or empower them as Magistrates as such for all or any of the purposes for which courts of ordinary criminal justice have been constituted under the Code. Section 5 of the Code sufficiently protects the authorities empowered to function and exercise powers under the act from any such challenge as are directed against them in this case. The fallacy in the reasoning of the courts below lies in their superficial and cursory nature of consideration undertaken therein without reference to the competence and powers of Parliament to specifically and specially provide for trial and punishment of offences separately created under a special enactment of Parliament, in a manner distinct and separate from the method of trying other ordinary criminal offences under the general criminal law of the country."
>
> (portion underlined for emphasis)

37. Relying upon the afore-quoted observations of the Hon'ble Apex Court, it can emphatically be said that in the instant case the Commanding Officer, being the Competent Authority arrived at a decision that the appellant should be tried by court martial. In that view of the matter the criminal court is not required to exercise its ordinary jurisdiction in the manner as provided by law. As a sequel to foregoing discussion we are not prepared to accept Mr. Chaturvedi's argument that since the Criminal Court had initial jurisdiction to deal with civil offence, non-filing of complaint before the Magistrate or non-registration of FIR has invalidated the SCM proceeding. We also do not find much substance in his argument that Army Authorities had no locus standi or any jurisdiction over the appellant to try by Summary Court Martial. We are, therefore, of the definite view that the Army Authorities are quite competent to hold Court Martial within the framework of Special Act, i.e. Army Act and Rules and to exercise their special jurisdiction vested upon them after exercising their option to try Court Martial at the first instance and the contention of initial jurisdiction of Criminal Court or lodgement of FIR before the Police or Complaint before the Magistrate is not supported either by the relevant provision of Cr. P.C, Army Act and Rules or Adjustment Rules. We do not perceive any conflict

of jurisdiction between the Criminal Court and Court Martial in this case as sought to have been contended by Mr.Chaturvedi.

38. In such view of the matter, we are unable to accept Mr. Chaturvedi's contention that civil offence committed by an army personnel against another army personnel can only be tried after exercise of initial jurisdiction by the Magistrate on the basis of lodgment of FIR u/s 154 or complaint u/s 190 of the Cr. P.C..

39. It is also contextually relevant to refer to the **saving** clause as enunciated in Sec. 5 of Cr. P.C, 1972 which reads as under: –

> "Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force"

A close analysis of the afore-quoted saving clause broadly reveals that there are three components in Section 5 of Cr. P.C.. Firstly the code generally governs the matter covered by it. In the second place, if a special or local law exists covering the same area, this later law will be saved and will prevail upon. The third component clinches the main issue making it clear that, if there is a specific provision to the contrary, then that will override the special or local law.

40. It is now well settled proposition of law that where a special law provides exclusive procedure for dealing with offences under such law, the application of code is excluded as per section 5 and where special law has not excluded entirely the application of code and empowered the officers under special law also to deal with the offences, it cannot be said that application of code in toto stands excluded particularly when special law confers powers on both the officers under the Cr P.C as also Special Act. It is, therefore, quite evident that unless there is 'a specific provision to the contrary' in the special law concerned and if special law is a complete code in itself providing for investigation, inquiry and trial of offences, the provisions of code completely stand excluded. In that context of the matter we may refer to the relevant Chapters of Army Act, Navy Act and Air Force Act which embody a completely self-contained comprehensive code specifying various offences under these Acts and prescribing procedure for detention and custody of offenders, investigation and trial of offences by Court Martial. Those Special Acts also deal with the punishments to be awarded for various offences, confirmation and revision of the sentences imposed by Court Martial, the execution of such sentences and grant of pardons, remissions and suspension in respect of such sentences. These enactments, therefore, constitute a special law in force conferring Special

Jurisdictions and Powers on Court Martial and prescribing Special form of procedure for trial of offences under those Acts. The effect of section 5 of the Criminal Procedure Code is thus to render the provisions of code inapplicable in respect of all matters covered by such Special Law (vide AIR 1987 SC 1646)(supra)..

Absence of complaint – Jurisdiction of Court to take cognizance of an offence

41. As a general rule any person having knowledge of the commission of an offence may set law in motion by a complaint even though he may not be personally interested or affected by the offence.

42. The underlying principle behind the registration of FIR in the Police Station in respect of cognizable offence under section 154 Cr P.C on the basis of oral or written information is to provide a safeguard to the accused during inquiry/investigation/trial. Similarly, a complaint of facts constituting an offence filed before the Magistrate could prevent embellishment/exaggeration in the subsequent stage of enquiry/investigation/trial and further to afford an opportunity to the defence to take contradictions from the author of the FIR/Complaint during trial. In fact, one statutory requirement of section 154 Cr P.C is to reduce in writing the information given to the police orally and to obtain the signature of the

informant. Section 190 of Cr P.C also provides identical safeguards to the accused by making it quite obvious that only upon receiving a complaint of facts which constitute an offence the Magistrate is empowered to take cognizance. It would be appropriate to reproduce section 190 of Cr. P.C. which reads as under :

"190 (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence –

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try".

43. On a meticulous dissection of the afore-quoted provision it is manifestly clear that the section under reference lays down conditions requisite for initiation of criminal proceedings. One of such essential conditions is the presentation of a complaint before the Magistrate and on

receipt of such complaint the Magistrate is to take cognizance. In legal parlance the act of taking cognizance is with reference to offences and not with reference to offender/accused. In fact, the Magistrate is bound to take cognizance on a proper complaint. Rather it is well settled position of law that when a formal complaint is necessary by statute, cognizance cannot be taken in any other way. As a matter of fact use of word 'cognizance' means taking judicial notice of an offence on receipt of a complaint which necessarily means setting the criminal law into motion. In other words, a prosecution commences when the complaint is made. A complainant or a person making complaint merely sets the machinery of the court in motion. It is also pertinent to mention here that a complaint is one of three ways in which cognizance by the court may be taken under 190 of Cr P.C. These three ways are :

i) Upon complaint

ii) Upon police report which means the report made under 173 Cr. P.C

iii) Upon information or on the Magistrate's own knowledge or suspicion

44. It is to be borne in mind that the Cr. P.C. is a code of procedure and like all procedural law, it is designed to further the ends of justice and not to frustrate them by introduction of endless technicalities. The object of Cr P.C

is to ensure that an accused person gets a full and fair trial as per certain established principles of procedure that accord with our notion of natural justice. In fact, disregard to a provision of vital nature is fatal to the trial and such trial at once invalidate the conviction. However, others if not vital, whatever the irregularity it can be cured and in that event the conviction must stand unless the court is satisfied that there was prejudice.

45. The absence of complaint must have a tangible legal consequence since the accused is likely to be prejudiced as a result thereof when there is no scope of considering the logic which is statutorily required to set the law into motion. In fact, a Court can take cognizance of an offence only when conditions requisite for initiation of proceedings before it as set out in Chapter XIV of Cr. P.C. are satisfied.

46. It is, however, of paramount consideration to scrutinize now as to whether there is any specific provision in the Scheme of Army Act for filing complaint as defined in section 2(d) of Cr. P.C for setting the law into motion. It is a basic legal/statutory requirement for initiation of proceeding in respect of civil offence u/s 69 of Army Act. Such procedural safeguard is provided in the Cr P.C in the interest of justice and fair play. But, Army Act is totally silent about filing of complaint before the appropriate military authorities prior to taking cognizance of alleged offence u/s 69 of Army Act.

In such view of the matter, we have no other alternative but to opine that the procedural safeguard of filing a complaint as embodied in Cr P.C under section 190 Cr P.C read with 2(d) of Cr P.C applies mu-ta-tis-mu-tan-dis in its entirety for invoking jurisdiction of Court Martial. The Army Authorities however, did not take into consideration the procedural safeguards as mandated under the afore-mentioned sections of Cr. P.C. at the time of taking cognizance of any civil offence. Such being the factual position in the present case a mandatory requirement of filing complaint before the Commanding Officer which is one of the requisite conditions for taking cognizance on the basis of complaint has not been satisfied. The appellant being Army Personnel cannot be denied such safeguards which would have been available to him had he been tried by a Criminal Court. Such safeguard has, however, been denied to him during Court Martial trial since specific provision of filing complaint has not been inserted in the Army Act and rules. In such a situation cognizance was taken by the Army Authorities without receiving any complaint and without taking recourse to statutory safeguards, inquiry/investigation/trial was also conducted. In such view of the matter being fortified with the ruling of the Hon'ble Apex Court in L.D. Balam Singh's case (supra), we feel constrained to opine that the SCM proceedings in the present case stood vitiated for not resorting to statutory

safeguards envisaged in Cr. P.C. during initiation of proceeding for commission of civil offence under section 69 of Army Act contrary to Section 325 IPC.

NON COMPLIANCE OF ARMY RULE 22,23 & 24

47. As a sequel to his argument on the issue of dual jurisdiction of both the criminal court as also of court martial, to try civil offence allegedly committed by Army Personnel, it is next argued by Mr. Chaturvedi that there could not have been any proceeding under Army Rules 22, 23 and 24 since there was non-compliance of the relevant provisions of Army Act and Adjustment Rules coupled with the provision as enshrined under Sec. 475 of Cr P.C which are mandatory in nature and are required to be complied with without any exception or reservation. Therefore, non-compliance of the aforementioned provisions, has, in fact, invalidated the entire pre-trial proceedings as also the court martial proceedings. It is further argued by him that mandatory statutory provisions indicating the dual jurisdiction in the case of army personnel are required to be resolved by Sec. 125 and 126 of Army Act read in conjunction with Adjustment Rules, 1978. But according to him, there is nothing on record to indicate that those mandatory provisions have strictly been complied with. As already indicated earlier, it is an admitted position that there exists no FIR before the Police or

Complaint before the Magistrate and as such it is manifestly evident in this case that prima facie the authorities have not cared to resolve the issue pertaining to dual jurisdiction of criminal court as also of court martial. In such circumstances, he has focused his argument mainly on his contention that inasmuch as the initiation of inquiry/investigation at pretrial stage being illegal and without jurisdiction, there cannot be any compliance with Rule 22,23, and 24 of Army Rules consequently and also holding of summary court martial must be declared as not in conformity with the procedure as laid down in Sec. 475 of Cr P.C coupled with relevant provisions of Sec. 125 and 126 of Army Act and Adjustment Rules.

48. That apart, it is also argued by him that in view of findings of the Hon'ble Apex Court in the case of **UOI –vs- Charanjit S Gill & Ors** reported in (2000) 5 SCC 742 to the effect that unless "Notes" to Army Rules are repugnant to the statutory provisions, such Notes have statutory force. He has, thereafter, referred to the relevant Note 3 to Sec. 41 of Army Act in order to explain the term "Lawful Command". According to him, the basic ingredients of "Lawful Command" are as under :

i) The command must be a specific command to an individual i.e. it must be capable of individual execution by the person to which it is addressed;

ii) Such command must be justified by military as well as by civil law and usage;

iii) The command must relate to military duty, that is to say, disobedience to it must tend to impede, delay or prevent military proceedings;

iv) The disobedience must have reference to the time at which the command is to be obeyed. If the command be a lawful command and demands a prompt and immediate compliance, hesitation or unnecessary delay in obeying it must be sufficient to constitute an offence under section 41 of Army Act

It is contended by Mr. Chaturvedi that out of all these essential ingredients, the most important basic requirement is that the command must relate to military duty and its disobedience must tend to impede, delay or prevent military proceedings.

49. In his estimation in the present case, the command given by Capt. Singhal to the appellant was not lawful since it does not relate to military duty. Rather it was intended to inflict punishment upon the appellant out of grudge as is evident from the factual matrix unfolded during pretrial proceeding as also SCM trial itself. It is argued by him that there is nothing on record to indicate that there was any act of willful and deliberate

disobedience by the appellant towards his superior officer as clarified in Note 4(1)(b) to section 41 of Army Act.

50. Adverting to the question of non-compliance of Rule 22 of Army Rule it appears from para 3 of Appendix to AO 24/94 (page No.95 of original record of SCM proceedings) that the hearing of charge as required under 22 of Army Rules commenced on 25th March, 2008 at 1130 hrs., whereas the appellant signed the record of proceedings before the Commanding Officer on 29th March, 2008. It is, therefore, quite evident on the face of record that the hearing of the charge proceedings was not carried out at all in the presence of the appellant as mandated in Rule 22 of Army Rules. More so, whenever in paragraph 14 of their affidavit-in-opposition also respondents have clearly asserted in unequivocal term that "……formal cognizance of the offence was taken and hearing of the charge commenced on 25th March 2008 on a tentative charge sheet under Army Act Section 40(a) for assaulting his superior officer". It is further averred therein that the "hearing of the charge was completed on 29th March, 2008 to record the statement of Capt Tanul Singhal who had proceeded on Field Engineering Course to College of Military Engineering, Pune and was recalled". Such averment in affidavit in opposition made by the respondents clearly tends to show that on the 1st and 2nd day when the charge hearing was commenced i.e. on 25th

March & 28th March, 2008 the appellant was not present. The hearing of charge, however, continued even in his absence. On the last day of hearing of charge i.e. on 29th March, 2008 the presence of appellant can be confirmed from his signature appearing on the record of proceedings. A close look to the relevant column No.4 of Appendix A to AO 24/94 reveals that on 24th March, 25th March and 28th March as many as five witnesses were heard orally by C.O. in the absence of the appellant. However, on 29th March, 2008, i.e. the last day of hearing Capt Tanul Singhal was examined in presence of the appellant and his cross examination was declined as is evident from the noting of the Commanding Officer in the last column of the table under Sl No.4. It, however, appears from the relevant column that the cross examination of these two witnesses was declined. Interestingly, in the same column it is noted by CO that the witnesses who were examined on 25th March were cross examined by the appellant by putting yes, even though there is nothing on record to indicate that the appellant was present during the charge hearing, i.e. on 25th and 28th March, 2008. It is, however, mechanically recorded at the 2nd page of the proceeding as under :

> "5. The accused was informed by me that he was at liberty to make any statement and can call any witness in defence. A brief of the statement made by the accused is attached as Annexure II to this form or the accused decline or to make any statement."

The Commanding Officer, however, did not indicate in the record of the proceeding as to whether the statement of the accused in defence was recorded by him or the accused wanted to call any witness in defence. It is also not indicated as to whether the accused declined to make any statement before the Commanding Officer. At any rate, no statement of accused is available as Annexure II being attached as Annexure II to the Record of Proceeding even though it was noted so in the Record of Proceeding by the Commanding Officer. It is not clear to us as to how as many as six witnesses could be heard orally by affording an opportunity to the accused to cross examine those witnesses orally. Mr. Mukherjee, learned counsel for the respondents has sought to argue that Rule 22 of Army Rule does not make it obligatory for the Commanding Officer to record the statement of witnesses in writing. In this context it would be useful to reproduce Rule 22 of Army Rule under the Chapter V which deals with investigation of charges and trial by Court Martial as also power of Commanding Officers as under :

> "[22. Hearing of Charge – (1) Every charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence.
> Provided that where the charge against the accused arises as a result of investigation by a Court of Inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

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

*****

(Emphasis supplied)

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time –

(a) dispose of the case under Section 80 in accordance with manner and form in Appendix III, or

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

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

(d)If the accused is below the rank of warrant officer, order his trial by a summary court-martial;

****

(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge(s) on the basis of the evidence so taken as well as the investigation of the original charge.]

> **Explanation** – where an officer, other than the commanding officer, proposes to proceed against an accused under Sec.80 of the Act, the provisions of sub rules (1) to (3) of this rule shall, in so far as they are applicable, may be compiled with by such officer.

51. A plain reading of the afore-quoted rule clearly makes it obligatory on the part of the commanding officer to consider evidence on record prior to dismissing a charge brought before him and to opine as to the offence under the act has actually been committed and further he is to be satisfied that the charge ought not to be proceeded with. The entire emphasis for forming his opinion about the justification for not being proceeded with the charge and dismissing the same only on proper consideration of evidence. True, every charge against the person subject to the Army Act shall be heard by the Commanding Officer in the presence of the accused. By no stretch of imagination it can be concluded that the Commanding Officer is to hear the witness orally and he is not required to record the statement of witnesses in course of hearing of the charge. It is also a mandatory requirement as per Rule 22 of Army Rule that full liberty should be afforded to the accused to cross examine any witness against him and also to call such witness and make such statement as may be necessary for the defence. "**The evidence**" as referred to in Rule 22(2) of Army Rule is the basis on which the Commanding Officer is to form his opinion on the question of validity of the

charge. The word "**evidence"** therefore plays a very crucial role in deciding the fate of the delinquent Army Personnel on the question of proceeding with the charge against him. The word '**Evidence**' in the popular sense means that by which facts are established to the satisfaction of the person who is enquiring. In that context of the matter, we are to look into the meaning of evidence as defined in Section 3 of the Evidence Act, which is reproduced as under:"(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) [all documents including electronic records produced for the inspection of the Court]. Such documents are called documentary evidence".

52. **Evidence**, therefore, means the testimony whether oral, documentary or real which may be legally received in order to prove or disprove some fact in dispute. [Phipson on Evidence to 15th Edn 2000]. Further, the juristic conception of the term **Evidence** in the case of the oral testimony of a witness is that the party against whom it is used has the right of cross examining the witnesses. So long the accused is not allowed the right of cross examining the witnesses, any statements made by them can only be described as statement, but cannot be dignified with the name of evidence. The definition of **evidence** covers (i) the evidence of witnesses and

(ii) documentary evidence. Such being the legal position, we are unable to concede to the contention of the learned counsel for the respondents that statements of witnesses need not be recorded in writing since Rule 22 of Army Rule does not say so. It is absurd to suggest that hearing of witnesses orally would be sufficient to comply with the mandatory requirements of Rule 22 of Army Rule and further that during oral hearing of witnesses by the Commanding Officer, accused could be able to cross examine them to prepare his defence. Such oral hearing of the witnesses by the C.O. without recording their statements in writing cannot and should not ensure compliance of Rule 22(2) of Army Rule for the simple reason that he is mandated as per Rule 22(2) to take into consideration the evidence on record for satisfying himself that the charge ought not to be proceeded with or ought to be proceeded with as per 22(3).

53. Army Rule 22 contemplates that the statement of witnesses has to be recorded in the presence and hearing of the accused in order to enable him to cross examine such witnesses. It is admitted by Respondents in para 4(ii) of their affidavit-in-opposition that hearing of charge commenced on 25th March, 2008 and hearing of charge was completed in the presence of Capt. Tanul Singhal on 29th March, 2008. It is also evident from the Appendix A to AO/94 that the appellant signed the proceeding on 29th March 2008, i.e.

the date when Capt Singhal was also present at the time of hearing of charge. The respondents' contention that witnesses were examined orally on 24th March 2008, 25th March and 28th March and accused was also given the opportunity to cross examine the witnesses orally appears to be a myth. As discussed earlier such oral statement of witnesses cannot be given the status of evidence as defined in the section 3 of Evidence Act. Such being the position of law there cannot be any compliance of Rule 22(2) of Army Rules wherein it is obligatory on the part of the Commanding Officer to form his opinion that "the evidence does not show that an offence under the act has been committed" for the purpose of dismissal of charge. Since there was no evidence as per the requirement of Rule 22(2) of Army Rule it can safely be concluded that the hearing of charge could not be proceeded with as stated in Rule 22 of Army Rule. More so, whenever admittedly there was no Court of Enquiry against the appellant wherein the provision of Rule 180 has been complied with in respect of the appellant. In such circumstances, the CO had no scope to dispense with the procedure laid down in sub rule (1) wherein the commanding officer was under legal obligation to give full liberty to cross examine witnesses in course of hearing of charge under Rule 22 of Army Rules. Similarly there was a gross violation of Army Rule 23 wherein the evidence of witness in the summary of evidence was not recorded in

petitioner's presence nor was he given an opportunity to cross-examine them. It has, however, been mechanically commented at the end of every witnesses statement that accused declined to examine. The signature of the accused is, however, conspicuously missing. It strains our reason to believe that even though serious allegations were levelled against the appellant, he would not be interested to cross examine any witness to clarify and defend his own stand. There was a stark violation of Rule 23 at the stage of recording of summary of evidence by denying an opportunity to cross examine the witnesses to the appellant.

54. Another most disturbing feature is that, even though it is mandated under Rule 24 of Army Rules that on consideration of summary of evidence so recorded under Rule 23 of Army Rule, the Commanding Officer is either (i)to remand the accused for court martial or (ii) refer the case to proper superior military authority or (iii) if he thinks it desirable rehear the case and either dismiss the charge or dispose of it summarily, C.O. did not consider the summary of evidence in its proper perspective. Strangely enough, Headquarter 21 Corps ordered the CO to record additional summary of evidence, presumably to fill in the gaps by asking certain questions to Capt Tanul Singhal and to record evidence of Lt Col V.M. Bembi even though the Hq 21 does not have powers to usurp CO's statutory power and direct

him to record additional evidence in a particular manner. In fact, there is no provision under Army Rules to record additional summary of evidence. At any rate, recording of additional summary of evidence causes immense prejudice to the accused while it gives ample scope to the prosecution to concoct the evidence as it suits them. The respondents have thus sought to make a huge improvement in the statement of Capt. Singhal. Due to such improved version of Capt. Singhal recorded during additional summary of evidence, tentative charge has been recast to the advantage of the prosecution. It is, therefore, quite evident both factually and legally that the relevant provisions as envisaged in Rule 22, 23 and 24 have not been complied with

55. We are now to consider the resultant effect of non compliance of Army Rules 22, 23 & 24 in the light of Judicial pronouncements of the Hon'ble Apex Court. In this context reliance can be placed upon oft quoted land mark judgement of the Hon'ble Apex Court reported in **AIR 1982 SC 1413 (Lt Col Prithi Pal Singh Bedi – Petitioner vs UOI & Others – respondents).** In para 37 & 38 of the aforecited ruling it is held by the Hon'ble Apex Court as under :

"37. ……..Rules 22 to 24 are mandatory in respect of every person subject to the act other than an officer…….The opening words of Rule 22 clearly demonstrate the mandatory applicability of the

provisions in the Rules 22 and 23 in case of persons subject to act other than officers".

" 38. …….now, in respect of such persons belonging to the lower category it is mandatory that Rr 22, 23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the inquiry…….Rules 22, 23 and 24 prescribe participation at a stage prior to the trial by the Court Martial".

56. It has, therefore, rightly been contended by the learned counsel for the appellant that failure to comply with the rules 22, 23 and 24 has denied the appellant an opportunity to persuade the commanding officer to dismiss the charge under sub rule 2 of Rule 22 and on his failure to do so he could have urged the commanding officer under rule 24 either to refer the case to the superior Military Authority or to rehear it and dismiss the charge and such denial of opportunity vitiates the subsequent trial by SCM as ruled by the Hon'ble Apex Court in the afore-cited ruling.

57. Fortified with the principles of law as laid down in Prithi Pal Singh's case (supra) it is to be opined that the requirement of rules 22 to 24 are mandatory in case of Army Personnel who are governed by Army Act. In view of non compliance of Rules 22, 23 and 24, we cannot but hold that the pretrial investigation proceedings as also SCM trial itself stood vitiated.

58. Even though the validity of the instant SCM proceeding/trial has not been upheld on afore-mentioned grounds, we are, however, to proceed to re-appreciate the entire evidence on record since a duty is cast on the Appellate

Court to record its findings on the justifiability of the Appellant's conviction and sentence passed thereupon. Re-appreciation of evidence by the Appellate Court is thus necessitated.

EVALUATION OF EVIDENCE

59. In support of the prosecution case, as many as eight PWs were examined, while none was examined as DW from the side of the defence, even though the appellant purportedly submitted his defence statement during SCM trial. The prosecution has also sought to rely upon three Material Exhibits (Hammer, Camp Cot, Sleeping bag) and three paper Exhibit (X-ray & prescription, copy of summon and statement of Dr. Nitin Shah together with his Doctor's advice) in order to substantiate its case.

60. Mr.Chaturvedi, learned counsel for the appellant submits that in the tentative Charge Sheet there was no charge of using criminal force to a superior officer and it was simply a charge of assaulting a superior officer by picking up the hammer to strike the said officer. According to him, there is no iota of evidence to establish the charge of causing grievous hurt to Capt Singhal. It is submitted by him that ingredients of grievous hurt as defined in Section 320 of the IPC have not been satisfied. There are eight kinds of hurt which are designated as grievous in Section 320 of IPC, but alleged injury has not been covered by any of the clauses of Section 320 of the IPC. In this

connection he has referred to the ocular evidence of PW 1, Capt. , the injured and submits that he did not take any medical assistance at the place where he was allegedly assaulted. It is pointed out by Mr. Chaturvedi that the victim as PW 1 has stated that he left the exercise location and proceeded for All Arms Officers Combat Engineering Course at the College of Military Engineering, Pune on 10-3-2008 at 1100 hrs. It is astonishing to note that without undergoing medical treatment for his grievous injury in Rajasthan, he proceeded towards Pune to attend a training course. He has further assailed the evidence of PW 1 on the score that he got his right hand wrist examined at Shah Accident Hospital, Pune by Dr. Nitin Shah on 15-3-2008 on the ground that instead of being treated in Military Hospital, Pune, he preferred to attend a private hospital. According to Mr. Chaturvedi, as a Military Officer he ought to have taken medical treatment from Military Hospital which is normally done by Army Jawans and Officers. Even Dr. Nitin Shah who reportedly rendered medical treatment was not examined on behalf of the prosecution either in recording of Summary of Evidence or during SCM trial. It is, therefore, submitted by Mr.Chaturvedi that there does not exist any medical evidence and the rest evidence on record is hearsay and as such same is not admissible under Indian Evidence Act, 1872. According to him, evidence of Sunil Nikam, PW 8 is also of no avail

since the Expert opinion could be considered only on examination of the Doctor who attended the patient and nobody else. Even Dr Sunil Nikam could not say as to how the victim sustained injury by a hammer. According to him, no evidence has been brought on record to indicate when injury was sustained by the victim who used the hammer and under what circumstances the hammer was used. It is argued by him that it had not been brought on record through the cogent and admissible medical evidence that the injury sustained by the victim was the result of incident of 9/10-3-2008. Therefore the charge of causing grievous hurt contrary to 325 IPC could not be substantiated through the evidence of eight PWs and one CW and relevant Exts produced on behalf of the prosecution.

61. Mr.Mukherjee, learned counsel for the respondents, however, submits that, if medical evidence does not justify framing of charge under section 325 IPC, there is no legal bar for the Court to recast the charge for a lesser offence under section 324 IPC which deals with voluntarily causing hurt by dangerous weapons and means. It is forcefully submitted by Mr.Mukherjee that there was a lawful command of superior officer and such lawful command was disobeyed by the appellant and further that there is sufficient evidence on record to establish that grievous hurt was caused to Capt. Singhal by the appellant. He, therefore, concluded his argument by asserting

that evidence both oral and documentary which have been brought on record has substantiated both counts of charge under section 41(1) of Army Act and Section 69 of Army Act contrary to section 325 IPC during SCM trial. Therefore, appellant's conviction and punishment imposed by SCM are legally sustainable.

62. We are now to scrutinize the entire evidence on record with reference to rival submission made on behalf of the parties. During SCM trial nine witnesses were examined and they can broadly be categorized under three heads with their respective profile :

I. Army Officers and Personnel :

(i) Victim – Capt Tanul Singhal, PW 1

(ii) Sole eye witness : Naik Mukesh Kumar Dhakad, PW 2

(iii) Post Occurrence witnesses :

a)Havilder Veer Pal Singh, PW 3 (b) Naik Mukesh Naiding PW 4

(iv) Witnesses visiting the PO after being reported about the alleged incident :

a)Naik Uma Shankar, PW 5 and (b) Sepoy Jogen Mochari, PW 6

(v) Preliminary Investigating Military Officer : Lt.Col Birendra Mohan Bembi, 2nd in command, 15 Mechanised Infantry Regiment, PW 7

II**. COURT WITNESS** : Naik Pawan Kumar of 15 Mechanised Infantry Regiment, CW 1

III. CIVILIAN WITNESS : Dr. Sunil Nikam, PW 8

63. Naik Pawan Kumar, 15 Mechanised Infantry Regiment has been examined as the solitary Court Witness No.1 who caused service of summons upon Dr. Nitin Shah and Dr. Sunil Nikam of Shah Accident Hospital at Pune. Dr. Nikam has been examined as PW 8. He proved the written statement of Dr. Nitin Shah along with the advice of his physician as Exhibit 3. One defence statement purportedly made by the appellant does not bear his signature but it carries the endorsement that accused declined to sign the statement.

64. PW 1, the victim officer has narrated the back ground facts leading to alleged assault which took place on 10th March, 2008 at about 0115 hours. He narrated the alleged incident of assault in his deposition as under:

"…….The Hammer was weighed in the presence of the Court and was found to be of 4.25 Kgs. I instinctively raised my hands to ward off the blow, which landed on my right hand wrist. I raised an alarm by shouting for help. Simultaneously, I changed my position on the camp cot and moved my legs which were inside the sleeping bag towards Naik Umakanta Dash to defend myself. As a result, the subsequent blows fell on softer portion of my legs and on the camp cot as I deftly avoided the blows ……"

65. It further transpires from his testimony that in response to his cries for help Naik Mukesh Dhakad, PW2 came to his rescue and wrested the

hammer away from the appellant while he was about to hit him another time with the hammer. In response to queries by the Court, PW 1, the victim divulges that Naik Umakanta Dash delivered about 10-12 blows of the hammer, most of which were deflected by him on to the camp cot using his limbs. On being asked by the Court as to why he did not report to the Military Hospital at Pune, the victim officer replied that since he was keen to complete the course which he was attending, and did not want to be returned to the unit on medical grounds, therefore, he reported to a Civil Hospital. It is also admitted by him in response to a specific question by the Court that he did not specify the circumstances of the incident to Dr. Nitin Shah.

66 PW 2, Naik Mukesh Kumar Dhdakad, deposes that he saw Naik Umakanta Dash raising a hammer and then hitting Capt Tanul Singhal with it and that before he could again strike with the hammer he immediately rushed to Naik Umakanta Dash and wrested the hammer away from him and pushed him away from the officer.

67 Havilder Veer Pal Singh, PW 3, however, reached the PO at 1:30 hrs when he found Capt Tanul Singhal lying in the camp cot in a sleeping bag and he was informed by the victim that he had been hit by a hammer by Naik Umakanta Dash and pointed out the hammer to him lying on the ground next to the camp cot. Another post occurrence witness Naik Mukesh

Naiding, PW4 testifies that he was informed about the incident by Sepoy Jogen Mochari and after getting such information he visited the PO and found that the victim was sitting on the camp cot which was torn at places. He also saw the hammer lying near the camp cot. He, however, did not say as to whether the alleged assailant was at the PO when he reached there. Another post occurrence witness namely Naik Uma Shankar PW 5 DEPOSES that at about 130 hrs on 10th March, 2008 he rushed to the PO from ICV (Infantry Combat Vehicle) in response to cries of bachao and found the victim lying on the camp cot unzipping his sleeping bag and trying to seat up. The injured told the witnesses that he had been hit by Naik Uma Kanta Dash with the hammer. The deponent, however saw that the right hand of the officer was swollen and he applied mustard oil on it. Sepoy Jogen Mochari who was performing the duties of Reserve Driver of the Coy HQ, Infantry Combat Vehicle (ICV) deposed that approximately at 1:30 hrs. on 10th March, 2008 he heard a commotion and someone shouting Uma Uma. He rushed from ICV to the PO and saw that Capt Tanul Singhal was lying on the camp cot and was opening the zip of the sleeping bag and trying to get up. He also saw that Naik Uma Kanta Dash was standing 5/7 ft away along with Naik Mukesh Kumar Dhakad and the hammer of the ICV was

lying on the ground near the camp cot. He was told by the injured that Naik Uma Kanta Dash had hit him with the hammer.

68 Dr. Sunil Nikam, PW 8 deposes that he was present at Shah Accident Hospital at Pune when the victim was medically treated by Dr. Nitin Shah. He proved the written statement of Dr. Nitin Shah along with the advice of his physician not to attend the Court on the ground of his heart ailment (Ext 3). A close look to the testimony of PW 8 reveals that the victim was admittedly not medically treated by him. He has sought to assert that in his presence the victim was treated by Dr. Nitin Shah of the same hospital at Pune where he also worked as a Doctor. In order to test the veracity of such evidence we are to take into account the statement of the victim made during recording of summary of evidence on 30th March, 2008. We, however, find that he did not make any whisper within the four-corners of his summary of evidence that he was medically treated by Dr. Nitin Shah at Pune. He has thus not mentioned the names of Dr. Nitin Shah or Dr. Sunil Nikam as his attending Surgeon at Pune. It is also mysterious to note that he remained silent about his purported medical treatment by Dr. Shah in Shah Accident Hospital at Pune in the presence of another doctor namely Dr. Sunil Nikam even when his first additional statement was recorded on 19th May 2008. He simply said towards the close of his additional summary of

evidence that he got himself examined by a Civil Doctor without disclosing even the name of doctor and other relevant particulars pertaining to his medical treatment.. Subsequently, after the lapse of about more than four months after the date of alleged incident in his second Additional Summary of evidence recorded on 8th August, he divulged for the first time that got examined by Dr. Nitin Shah himself at Shah Accident Hospital at Pune. It is also not stated that Dr. Nitin Shah examined him in presence of Dr. Nikam. It is beyond our comprehension as to why the victim officer withheld the names of doctors when he was examined earlier twice on 30-3-2008 and on 19th May, 2008. Such inexplicable conduct of the victim military officer seriously affects his credibility as also authenticity of medical papers purportedly obtained from a Civil Hospital. It, therefore, strains our reason to believe that he was actually examined by Dr. Nitin Shah in the presence of Dr. Nikam. In such circumstances Dr. Nikam's testimony cannot be accepted as legally admissible medical evidence since the victim has never stated that he was under the medical treatment of Dr. Nikam at any point of time and, in fact, Dr. Nikam also did not claim that he rendered any medical treatment to the injured officer at the relevant point of time.

69 Another most disturbing feature of the prosecution case is that of the victim's statement on the gravity of alleged offence recorded during

summary of evidence on 30th March, 2008 which stands sharply contradicted by his own self in his Additional Summary of Evidence recorded on 19th May 2008. In his summary of evidence he has categorically asserted as under:

"…….After almost 10-12 relentless blows of the hammer, No.14924824 N Naik Mukesh Dhakad rushed to the spot, and wrested the hammer away from him, while he was about to hit me another time with the hammer. It was a murderous assault and it could have taken my life ……."

70. The most sorry state of affairs is the victim's subsequent endeavour to project the alleged assault in a different manner with a specific admission that the aforementioned version was an exaggerated one. It is also evident from the testimony of the sole eye witness and post occurrence witnesses that they have, however, sought to improve their respective version when they were examined in SCM Proceeding. The most intriguing part of evidence adduced by the victim himself as also other subordinate jawans who were working under his supervision and control is that such evidence is not in conformity with their earlier narration of the alleged incident of assault which was recorded during summary of evidence. The credibility of the sole eye witness and other post occurrence witnesses has seriously been impeached since diametrically opposite version of the incident has, in fact, been depicted by the victim himself in subsequent stages of recording of two

additional summary of evidence. It would be relevant to reproduce his second additional summary of evidence recorded on 8th August 2008 which reads as under :

"9. The circumstances of the incident may have caused me to exaggerate the intent of the accused. On further reflection, it would be inappropriate to ascribe it an intent of 'murderous assault' as stated by me earlier. It would be more appropriate to state that it was meant to cause me a grievous injury."

71. The afore-quoted statement of the victim clearly displays a peculiar state of mind which prompts him to admit candidly that he exaggerated the basic version of the incident and reflected over the issue of exaggeration consciously. He describes such exaggeration as inappropriate. It is most unfortunate that the victim of the incident intended to determine the nature of assault sometimes as murderous and a few months thereafter abruptly changed his own version by asserting that it was not a murderous assault. Rather it caused him a grievous injury. Pausing for a moment it may be noted here that credence and weight of the victim's evidence lies in his faithful and true narration of the happenings of the incident without resorting to exaggeration or embellishment

72. A meticulous analysis of the statement of victim reveals that in stead of accurate and factual representation of the alleged incident, he intended to embellish the bare fact with imaginative zeal. Such conduct of the victim officer, in fact, lends support to the defence allegation that since the day

when the appellant was his instructor, the victim bore a grudge against the appellant. At any rate, such testimony of the victim is, in fact, is bereft of any evidentiary value. Rather, it seriously impeaches credibility of the injured witness. In our considered view, the victim officer appears to be a wholly unreliable witness. As already pointed out earlier, the basic version of the incident has not been brought on record in the shape of a complaint and in the absence of such complaint, the defence has also been deprived of his procedural safeguards which could have been made available to him in a criminal trial held in consonance with the relevant provisions of Cr. P.C. Be that as it may, the fact remains that there are major discrepancies in the statement of the victim, the eye witness and post occurrence witnesses during recording of summary of evidence, additional summary of evidence on two occasions and all these inconsistencies/discrepancies taken together into account lead us to opine that these discrepancies/inconsistencies are fatal in nature and have considerably eroded reliability of the testimony of the victim officer, PW1, the sole eye witness PW2 and other post occurrence witnesses, PW 3, 4 and 5 on the basic version of the incident of assault so depicted during SCM trial. We fail to comprehend as to how '10/12 relentless blow of a hammer' weighing 4.5 kg caused hairline fracture only as sought to have been suggested by a doctor, PW 8 in whose presence

the victim was medically treated by another doctor. Admittedly, the incident took place on 10th March, 2008. However, purported x-ray plate suggests that the victim was x-rayed on 26th March, 2008, i.e. after the lapse of almost 2 weeks from the date of alleged incident. We are unable to reconcile with the situation that a Military Officer who was allegedly assaulted ruthlessly by a hammer causing murderous assault/grievous injury would rush to Pune Civil Hospital for medical treatment instead of availing himself of emergent medical treatment in any Military Hospital of Rajasthan on the plea of attending All Arms Combat Engineering Course at College of Military Engineering, Pune on 10th March, 2008 at 11 am, i.e. the date of incident. As already stated earlier, when he was asked by court to explain such anomalous position, he feebly tried to explain the same by merely saying that he was keen to complete the course and as such he reported to a Civil Hospital. Explanation, if plausible, is acceptable. We are afraid, that explanation as put forward by him is neither plausible nor believable for the simple reason that being a Military Officer, his first preference should have been to get himself medically treated in any military hospital near the place of occurrence in Rajasthan, if he had actually any such grievous injury. In our considered view, there was no Medical evidence worth the name to substantiate the prosecution case of grievous hurt. It has rightly been pointed

out by Mr. Chaturvedi that there is neither any medical evidence nor any convincing ocular evidence to establish that there was grievous hurt on the person of the victim officer as designated in eight clauses of 320 IPC.

73. Lt. Col V.M. Bembi, second in command 15, Mechanised Infantry Regiment as PW 7 deposes that he was directed by the Commanding Officer to investigate the incident involving Capt Tanul Singhal, Offg. Company Commander, ALFA company and his Crew Member Naik Umakanta Dash at their exercise location near Phulasar, Rajasthan. It transpires from his deposition that he interrogated both the victim as also alleged assailant and thereafter he took away the appellant with him to the Battalion since the Exercise was in progress pending further investigation. It is contextually relevant to mention here that on the basis of such preliminary investigation tentative charge was framed against the appellant on 25th March 2008 as under :

" **TENTATIVE CHARGE SHEET**

The accused No.14926198N Nk (Gnr) Umakanta Dash or 15 MECH INF, C/O 56 APO is charged with :-

Army Act Sec 40 (a) **ASSAULTING HIS SUPERIOR OFFICER**

In that he,

at exercise area near Phulasar (Rajasthan) during Exercise Shakti on Night 09/10 March

2008 assaulted IC-64601M Captain Tanul Singhal, his Officiating Company Commander to wit, raised a hammer to strike the said Officer.

Station : Babina Cantt.
Dated : 25 Mar 2008

Sd/- Khalid Zaki
Colonel
Commanding Officer
15 MECH INF"

74. It is pertinent to mention here that PW 7, 2nd in command being deputed by the afore-mentioned Commanding Officer rushed to the PO and reached there at 5-30 am, i.e. within about four hours from the time of alleged occurrence. During cross-examination by the accused it is also admitted by him that he took him to the Commanding Officer next day. It appears that on completion of preliminary investigation he reported details of the incident to the Commanding Officer and Tentative charge against the appellant was framed accordingly.

75 A close analysis of tentative charge tends to show that there was an attempt to strike the victim officer with a hammer. In our considered view the tentative charge sheet reflects the untainted basic version of the incident based upon preliminary investigation conducted at the spot within 4 hours of the incident. There is no whisper about '10/12 relentless blows of hammer'

inflicted upon the victim officer. There is also no allegation of disobedience of lawful command.

76. However, charge-sheet containing two counts of charge which was ultimately served upon the appellant practically bids adieu to basic version of the incident and accommodates exaggerated and embellished version of the incident and the same is being reproduced as under :-

"CHARGE SHEET

The accused No.14926198N Naik (Gunner) Umakanta Dash of 15 Mechanised Infantry is charged with :

First Charge

Army Act Section 41(1) — DISOBEYING IN SUCH MANNER AS TO SHOW A WILFUL DEFIANCE OF AUTHORITY, A LAWFUL COMMAND GIVEN PERSONALLY BY HIS SUPERIOR OFFICER IN THE EXECUTION OF HIS OFFICE

in that he

at Phulasar on 09 March2008, at 1930 hrs. when ordered by IC-64601M Captain Tanul Singhal, the Officiating Company Commander, to carry out link up petrol to all the three platoon Infantry Combat Vehicle locations of the Company, did not do so.

Second Charge

Army Act — COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, VOLUNTARILY CAUSING GRIEVOUS HURT, CONTRARY TO SECTION 325 OF THE INDIAN PENAL CODE

in that he,

at Phulasar, on the night of 09/10 March, 2008, voluntarily caused grievous hurt to IC-84601M Captain Tanul Singhal of the same unit, by hitting him with a hammer.

Place : Babina Cantt
Dated 21 Sep 2008

Sd/- Khalid Zaki
Colonel
Commanding Officer
15 MECH INF

'To be tried by Summary Court Martial'

Place : Babina Cantt
Dated 21 Sep 2008

Sd/- A. Krishnan
Brig
Cdr 34 Armed Bde "

77 There is no doubt that the materials and circumstances brought on record during recording of summary of evidence are to be taken into consideration at the time of framing charge but such consideration does not necessarily mean that there would be descent burial of the actual happenings which took place at the material point of time and the offender would be tried on the basis of concocted story elaborated with absurd details.

78. As a matter of fact, the juxtaposition of tentative charge sheet and charge sheet would reveal a grim picture especially when it is found that the tentative charge speaks about a mere attempt by raising a hammer to strike the said officer while the final charge sheet introduces a different story of voluntarily causing grievous hurt by hitting him with a hammer. Turning to

the victim's summary of evidence, First Additional Summary of Evidence and Second Summary of Evidence recorded on different dates, sometimes we find grave allegation of murderous assault and, thereafter, abruptly shifting of allegation to grievous injury and again in evidence tendered by the victim himself during SCM trial it is a case of '10/12 relentless blows with a hammer causing grievous hurt'. All these conflicting circumstances taken together into account, in fact, evoke suspicion in the mind of the court about the genuineness of the prosecution story. That apart, major contradictions which are clearly deducible from the ocular evidence adduced by the victim officer himself at various stages of the proceeding at different point of time as enumerated herein before dealt a fatal blow to the substratum of the prosecution story and has thereby severely shaken the root of the prosecution narrative on the vital issue of grievous hurt/injury/hairline fracture etc. caused by several blows of a hammer weighing 4.5 kgs. We are sometimes at a loss to find out the exact nature of alleged injury which has been described as grievous hurt/injury by some of the witnesses and by a few other witnesses as grievous injury while documents purported to be issued by a doctor of Civilian Hospital speaks about hairline fracture only. It is astonishing to note that the victim military officer, even though allegedly sustained grievous hurt on right hand/right wrist, got himself treated only

after 5 days of incident during which period he had travelled from Exercise location in Rajasthan to CME Pune in various modes of transport and would have been using his right hand during his road journey from Rajasthan to Pune. Had he been grievously hurt, he would have been hospitalized on 10th March itself. In fact, it is improbable that one can travel such long distance and remain at least for several days without a medical treatment with the fracture of right hand wrist. Against such factual backdrop Mr. Chaturvedi's contention that injury whatsoever was not caused to the military officer during the incident and injury if any, might have been caused subsequently after the incident deserves serious consideration.

79. We have also carefully considered Mr. Mukherjee's submission, that charge u/s 325 IPC should be altered to a charge u/s 324 IPC which is a lesser offence with reference to evidence on record both oral and documentary coupled with other relevant surrounding circumstances on record. Undisputedly, such alteration of charge by the court in its discretion is legally permissible in terms of section 216 Cr. PC. We, however, donot find sufficiently strong corroborative evidence and circumstances on record justifying such alteration of charge at this stage. We are, therefore, unable to accept Mr. Mukherjee's submission on that score.

80. Now the question crops up as to whether commission of Military offence under section 41(1) of Army Act has been proved as per legal requirement mandated in this section itself with reference to materials and circumstances on record. By referring to Note 4(1)(b) appended to Section 41 of Army Act, it has rightly been pointed out by Mr.Chaturvedi that the prosecution has failed to prove that, alleged disobedience was "willful and deliberate" since it is to be "distinguished from disobedience arising out of forgetfulness or misapprehension (which might, however be punished under AAS 63)" as per requirement of 4(1)(b) to Section 41 of Army Act. We also do not find any iota of evidence on record in this regard to satisfy legal requirement as stipulated in Section 41(1) of Army Act and subsequently clarified through Note 4(1)(b) appended thereunder. That apart, Note 2 to Section 41 of Army Act prohibits that an offence under this Section cannot be made the subject of a joint charge. Despite such prohibition, this offence has been subjected to a joint charge under section 69 of Army Act in this case. Such irregularity cannot be brushed aside lightly. The materials on record might be found sufficient to constitute a different military offence under section 63 of Army Act. Be that as it may, considering all these, we are, therefore to hold that the prosecution has not succeeded in bringing

home the charge under section 41(1) of the Army Act for commission of the said military offence beyond a shadow of doubt.

81. On a wholesome appreciation of both ocular and documentary evidence coupled with other relevant attending circumstances we are of the considered view that the prosecution has miserably failed to establish the first count charge under section 41(1) of Army Act as also the second count of charge framed under 69 of Army Act, i.e. commission of civil offence by voluntarily causing grievous hurt contrary to section 325 of Indian Penal Code at Phulasar on the night of 9/10 March, 2008 by adducing cogent, consistent and convincing evidence against the appellant beyond any shadow of doubt.

FINDINGS :

82. As a corollary to our foregoing discussion we cannot but hold that civil offence as defined in 2(ii) of Army Act is triable by both Criminal Court and Court Martial since both of them have concurrent jurisdiction to try such Civil offences u/s 69 of Army Act. Accordingly, alleged offence u/s 69 of Army Act contrary to section 325 IPC has been tried by SCM in the present case and there does not exist any scope for jurisdictional conflict in view of explicit provisions of section 125 of Army Act read with Rule 3 and 4 of Adjustment Rule which have been enacted in terms mandates of section

475 Cr PC. Viewed in the light of specific discussion made in foregoing paragraphs 27, 28 and 29, it is held that the afore-mentioned provisions of relevant Act and Rules have provided leeway for resolving conflict of jurisdiction between Criminal Court and Court Martial. It is fallacious to suggest that initial jurisdiction in respect of alleged civil offence always lies with the criminal courts and proceedings for commission of civil offence cannot be initiated by the Army Authorities at the first instance since every personnel of Armed Forces are subjected to dual jurisdiction, We are, therefore, to hold that since the Commanding Officer or any other competent officer has been vested with the power of exercising option under section 125 of Army Act, it cannot be legally construed that the civil offence u/s 69 of Army Act committed by Army Personnel are always subjected to initial jurisdiction of Criminal Court and registration of FIR in the Police Station or filing of complaint before a Magistrate is a mandatory requirement in all such cases.

83 Rather, on the question of lodgement of FIR before the Police Station u/s 154 Cr. P.C or before the Magistrate under Section 190 CPC in respect of Civil Offices to be investigated by Army Authorities and tried by Court Martial, we are to hold that the effect of saving clause under section 5 of Cr P.C has rendered the appropriate provisions of Cr. P.C inapplicable in

respect of all maters covered by the relevant provisions of Army Act which is a special law except those about which the special statute is silent. Having held as such we are, to hold further that it is, however, settled proposition of law that if the Special Act is silent about any safeguard which is mandatorily followed in Criminal Trial in terms of the relevant provisions of Cr. P.C. such safeguard must also be made available to the Army Personnel during enquiry/investigation/Court Martial trial since both the Criminal Court and Court Martial have concurrent jurisdiction in respect of alleged civil offences committed by the Army Personnel. In that context of the matter we must hold that the filing of complaint constituting civil offence before the Commanding Officer or any competent officer is a sine qua non for taking cognizance of cognizable offence and initiating criminal proceeding u/s 325 IPC against the offender governed by the Army Act and Army Rules. Importantly, Army Personnel being enquired/investigated and tried by Court Martial cannot be denied such statutory safeguard which arose out of filing of complaint as defined in Section 2(d) of Criminal Procedure Code, since such safeguard is made available to the Army Personnel who is being enquired/investigated and tried by a criminal court after registration of FIR or filing of complaint before the Magistrate. In such view of the matter, we are, therefore, to hold that the mandatory procedure of filing complaint as

prescribed by Cr. P.C is obligatory even in respect of proceedings before Court Martial under the Army Act and Army Rules. Rather, submission of complaint narrating facts, which constitute civil offence by the victim before the Commanding Officer or any other competent officer is a condition precedent to set the criminal law into motion by taking cognizance of civil offence and proceeding to enquire /investigate the alleged commission of Civil Offence against the Army Personnel. The filing of complaint is, thus, a mandatory requirement in holding a legally valid SCM trial. In other words, failure to comply with such mandatory requirement and thereby denying procedural safeguard to the Army Personnel during enquiry/investigation would render such enquiry/investigation as also trial void ab initio and, undoubtedly invalidate the SCM.

84. Viewed in the light of above findings we cannot but hold that in the absence of complaint purported initiation of criminal proceeding u/s 325 IPC for commission of civil offence and subsequent enquiry/investigation could not be done in accordance with the relevant provisions of Cr PC which provide procedural safeguard to the accused and its denial to the appellant during SCM trial in the present case has caused serious prejudice to the appellant. Such denial of procedural safeguard to the appellant cannot be treated as a mere procedural irregularity which can be protected under

section 149 of Army Rule for the simple reason that denial of procedural safeguard to the appellant in Court Martial trial has caused grave injustice to the appellant, who is governed by Army Act and Rules which are totally silent about such procedural safeguard in the Scheme of Army Act & Army Rule.

85. In that view of the matter, the Army Authorities' failure to take into consideration the procedural safeguards as embodied in Cr. P.C. and its denial in a proceeding under Section 325 IPC for commission of alleged civil offence during SCM trial by not taking resort to procedural safeguard has entailed a disastrous consequence. We therefore, feel constrained to hold that in such circumstances the entire SCM trial whereby the appellant was tried and convicted stood vitiated [vide 2001(9) SCC 82 (Union of India vs L.D. Balam Singh)] (supra).

86. As already discussed in preceding paragraphs there was a gross violation of Section 22, 23 and 24 of Army Rules which are required to be followed mandatorily before remanding the appellant for trial by a SCM in terms of Section 24 of Army Rules. Having regard to the facts and circumstances as unfolded at the stage of hearing of charge u/s 22 of Army Rule, we are to hold that even though the charge hearing commenced on 25th March, 2008 at 11-30 hrs and such hearing of charge including examination

of witnesses orally by the C.O. continued on 28th March and 29th March, 2008, the appellant was present only on the last date of hearing of charge, i.e. on 29th March 2008 and signed the proceedings as is evident from Appendix 'A' to AO 24/94, i.e. the 'Record of Proceedings' before Commanding Officer under Army Rule 22 (page 95 of original SCM proceeding). It is established and firmly established from the said record of proceedings that the charge hearing for first two days, i.e. 25th March & 28th March, 2008, when five witnesses were stated to have been orally examined by the C.O. was done in the absence of the appellant. Such being the factual position the appellant had no opportunity to cross-examine those witnesses during hearing of charge in terms of Section 22(1) of Army Rules since it was not within the competence of the Commanding Officer to dispense with the procedure in sub rule (1) of Rule 22 of Army Rule in view of the admitted factual position that the provisions of Rule 180 had not been complied with as admittedly no court of enquiry was held in the present case. In that context of the matter we are to point out here that the statement of witnesses is recorded in writing during Court of Enquiry and the accused is given an opportunity to cross-examine those witnesses as per requirement of Rule 180 of Army Rules whenever procedure in Sub Rule (1) of Rule 22 stands dispensed with on fulfillment of requirement of Rule 180 of Army

Rule. The witnesses cannot and should not, therefore, be examined orally and the statement of witnesses must be recorded in writing to satisfy the mandatory requirement of cross-examination of witnesses. In our considered view the import of Rule 22(1) of Army Rule is to hear the accused orally during hearing of charge and by no stretch of imagination it can reasonably be construed that Rule 22(1) of Army Rule provides for oral hearing of the witnesses for the simple reason that in such a situation the mandatory requirement of cross-examination of witnesses by the accused cannot be satisfied. That apart, the Commanding Officer is mandated in Rule 22(2) of Army Rule to consider the **EVIDENCE** in order to form an opinion as to whether it is a case of dismissal of charge and, thereafter, only he is to be satisfied that the charge ought not to be proceeded with. In such circumstances, it is held that there is no scope for the CO to hear witnesses orally and their evidence is to be recorded in writing to comply with the mandatory requirement of Rule 22(1) as envisaged therein in unequivocal language : "The accused shall have full liberty to cross-examine any witnesses against him, and to take such witness to make his statement as may be necessary for his defence". Considering all these legal and factual aspects it is held that the provisions of Rule 22 (1), (2) and (3) which are mandatory in nature have not been complied with. We are to hold further

that the CO has proceeded to frame charge mechanically without exercising his discretionary power vested upon him under Rule 22 of Army Rule. Another glaring procedural lapse is also detected while taking down the Summary of Evidence as per procedure stipulated in Rule 23 of Army Rules. Additional Summary of Evidence of the victim officer, PW 1has been recorded on two occasions, i.e on 19th May, 2008 and 8th August, 2008. Additional summary of evidence of Dr. Nitin Shah was also recorded on 2nd August, 2008. Rule 23 of Army Rule lays down the procedure for taking down the summary of evidence and none of the sub rules of Rule 23 of Army Rules, however, speaks anything about recording of additional summary of evidence and as such recording of additional summary of evidence twice especially in respect of the victim whose summary of evidence was already recorded following the procedure as prescribed in Rule 23 of Army Rule is not in conformity with prescribed procedure. In our considered view such deviation from the prescribed procedure has been made in this case for embellishing/improving statements given by the victim in Summary of evidence recorded as per procedure. In such circumstances we are to hold that the procedure for taking down of summary of evidence as prescribed in Rule 23 of Army Rules has not been followed properly and such deviation is fatal for the prosecution.. In such circumstances,

consequent remand of accused under Rule 24 of Army Rule has also been vitiated for non-compliance of Rule 22 and 23 of Army Rules. It is, therefore, held that non-compliance of Rules 22 to 24 of Army Rules which are mandatory in nature in respect of the appellant, who happens to be Army Jawan has invalidated pre-trial inquiry/investigation proceedings as also SCM trial (vide **AIR 1982 SC 1413 – Lt Col Prithipal Singh Bedi vs Union of India and others)**.

87. We have critically evaluated evidence of PWs as also material exhibits and also paper exhibits relied upon on behalf of the prosecution and on ultimate analysis of evidence and circumstances on record as made in preceding paragraphs, we cannot but hold that both the counts of charges under section 41(1) as also 69 of Army Act, contrary to Section 325 of Indian Penal Code have not been proved against him beyond reasonable doubt. Since the prosecution failed and miserably failed to bring home the charges under section 41(1) and 69 of Army Act contrary to Section 325 of Indian Penal Code during SCM trial, the impugned order dated 13th October, 2008 sentencing him to (i) reduction in rank (ii) rigorous imprisonment for 9 months and (iii) dismissal from service, which was promulgated on the same day, i.e. 13th October 2008 is not sustainable legally and is liable to be quashed.

DECISION

88. As a sequel to our foregoing findings we are to hold that the findings of SCM as promulgated by Promulgating Authority and countersigned by the Reviewing Officer are neither factually nor legally sustainable. In such view of the matter, the impugned order of conviction passed by the SCM against the appellant is liable to be quashed and the appellant is entitled to an order of acquittal.

89. In the result, the impugned findings and conviction holding the appellant guilty of the first charge under section 41(1) of Army Act as also 2nd charge under section 69 of Army Act contrary to Section 325 IPC, awarding punishment of reduction in rank and to suffer R.I. for 9 months as also dismissal from service and subsequently promulgated by the promulgating authority are hereby set aside. Consequently the appellant is found not guilty of both counts of charges as levelled against him and acquitted of the said charges accordingly.

90. In view of his acquittal of the charges his prayer for re-instatement is now required to be taken into consideration in its proper perspective. It, however, appears that the appellant who had unblemished record of service had put in about nine years service prior to his dismissal. It further appears that after his dismissal in the year 2008 six long years have silently elapsed.

In such circumstances it would not be appropriate to re-instate the appellant physically in Armed Forces, wherein Army Personnel and Officers are to maintain strict discipline in their entire tenure of service. In the circumstances, the next question, therefore, crops up naturally as to what relief should be granted to the appellant since order of conviction being ultimately found to be not legally sustainable against him stands quashed. However, the appellant has been out of service for the last six years or so, and as such his physical reinstatement in the Army being a disciplined force does not appear to be feasible at this distant point of time. In such circumstances, we are of the considered view that the ends of justice would be sufficiently served if the reliefs sought for is moulded in the light of changed circumstances in which the appellant has now been placed. In this context reliance can be placed upon a ruling of a Division Bench of the Hon'ble Delhi High Court reported in 140 (2007) Delhi Law Times 26, wherein it is ruled as under :

> "11. …….This court could, therefore, mould the relief in such a manner that the petitioner gets his service pension without even directing the petitioner's reinstatement in service or granting any other pensionery benefit to him…….We are of the view that the minimum which the petitioner must be held entitled to, is the service pension and other benefits due upon completion of the 15 years of service in the Indian Army. This can be achieved by directing that instead of the petitioner's discharge taking effect on the date mentioned in the impugned order, the same shall take effect on the date he would have completed 15 years of pensionable service,,,"

91. The principles of law as enunciated therein has subsequently been followed by the Principal Bench, AFT in Ex-Major Narender Pal's case reported in 2011 (1) AFTLJ 94, wherein the sentence of dismissal was modified to release from service from the date he attained the pensionable service. Fortified with the afore-cited rulings, we are of the considered view that the ratio decidendi of afore-quoted rulings are squarely applicable to the facts and circumstances of the present case. It appears that the appellant has rendered nine years of active service and he would have completed his pensionable service by September 2014, had he not been dismissed because of his conviction vide impugned order 13th October, 2008. On completion of 15 years of qualifying service the Army Jawans are entitled to pension in the Indian Army. Since the appellant has now been acquitted of the charges, it would be quite in consonance with the principles of equity and fair play that instead of physical reinstatement he should at least get his pension and other pensionery benefits admissible under rules on completion of pensionable service on the basis of his notional continuance in service till the date of completion of qualifying pensionable service. Keeping that aspect of the matter in view, we feel inclined to treat the post dismissal period of six years as notional continuance in service till the date of completion of qualifying pensionable service.

DIRECTION

92. In the premises, the instant Appeal (TA 214 of 2010) stands allowed on contest with the following directions:

a) The appellant be notionally reinstated and allowed to serve notionally till completion of 15 years of qualifying service for being entitled to pension in the Indian Army.
b) He will be deemed to have retired on completion of pensionable service as per Pension Regulation and Rules w.e.f. 30th September,2014.
c) The appellant shall be entitled to all retiral/pensionable benefits admissible under rules on completion of Pensionable Service.
d) The Pension Sanctioning Authority shall proceed to sanction pension in terms of foregoing directions with utmost expedition within 120 days from the date of receipt of this order.
e) Respondent No.1 is to pass necessary direction upon PCDA(P) Allahabad for issuance of PPO in favour of the appellant in order to ensure release of monthly pension and other allied pensionery benefits as admissible under Pension Regulations within 120 days from the date of communication of this order to the appropriate Pension Sanctioning Authority.
f) No arrears of salary however, shall be paid to the appellant for such notionally extended period of service.

93 There will be no order as to costs.

94. Let the relevant summary trial proceedings in original be returned to the respondents under proper receipt.

95. Let a plain copy of this order be furnished to the parties free of cost on observance of usual formalities.

(LT. GEN. K.P.D. SAMANTA) (JUSTICE RAGHUNATH RAY)
ADMINISTRATIVE MEMBER JUDICIAL MEMBER