

**Major E.G. Barsay Vs. the State**

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**Court :** Mumbai

**Decided On :** Jul-27-1957

**Reported in :** (1958)60BOMLR159

**Judge :** Datar and ;Gokhale, JJ.

**Appeal No. :** Criminal Appeal Nos. 254, 255, 257, 258 and 341 of 1957

**Appellant :** Major E.G. Barsay

**Respondent :** The State

**Judgement :**

**Gokhale, J.**

1. [His Lordship after stating the facts of the case, proceeded] : Before I consider the evidence against the accused and the arguments addressed to us at great length on behalf of the accused on the evidence, I think it would be convenient to dispose of first some of the law points which have been argued on behalf of the accused. I may mention that ordinarily we would have expected counsel to address us on law points at the very outset. But Mr. Purshottam informed us that he would address us on the law points after he dealt with the merits of the case against the accused on the basis of the evidence on the record. The first, law point raised by Mr. Purshottam is in connection with the charge. I may mention that in the first instance Mr. Purshottam and Mr. Harnam Singh, who appeared on behalf

of accused No. 2, took exception only to the second and the third heads of the charge. It was Mr. Bhasme, who was appointed on behalf of accused Nos. 5 and 6, who challenged the legality of the entire charge in respect of his clients, and his arguments were thereafter supported by Mr. Purshottam.

2. The main grievance is that so far as the first head of the charge is concerned, it refers to three kinds of illegal acts, the first two of which would fall under Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act. Under Section 5(1)(c) of the said Act, a public servant is said to commit the offence of criminal misconduct in the discharge of his duty if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; and under Section 5(1)(d) of the Act a public servant would also commit the offence of criminal misconduct in the discharge of his duty if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. The argument is that the first two sub-heads of the first charge definitely fall within the definition of Section 5(1)(c) and (d) of the Prevention of Corruption Act; and it is urged that as admittedly accused Nos. 4, 5 and 6 are not public servants, it cannot be said that they could be charged with having agreed to commit these acts. It is no doubt conceded that the first head of the charge is that all the six accused were parties to a criminal conspiracy for the doing of certain illegal acts. But it is contended that since accused Nos. 4, 5 and 6 were not public servants, they could not commit the offence of criminal misconduct under the Prevention of Corruption Act, and therefore their joinder in this trial is illegal. It is also urged that though the third sub-head of the first charge could be framed against accused Nos. 4, 5 and 6, accused Nos. 1, 2 and 3 could not be charged for the offence of committing theft in respect of property which was admittedly under their control as public servants. It is also submitted that not only could accused Nos. 1, 2 and 3 on the one hand and accused Nos. 4, 5 and 6 on the other be not jointly tried, but that the Special Judge under the Criminal Law Amendment Act, 1952, was not competent to try such a charge.

3. It is necessary to examine the provisions of the Criminal Law Amendment Act, 1952, in considering this argument. Under Section 6(1) of the said Act, the State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification to try offences which are specified in Clauses (a) and (b) of that section. Under Clause (a) offences punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947, are included; and under Clause (b) are included any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a). At one stage Mr. Purshottam appeared to submit that under Section 6 it would be public servants alone who could be tried by a Court of a Special Judge. But that contention would not be correct because Sections 162 and 165A of the Indian Penal Code would obviously include in their ambit persons who would not be public servants. Similarly the reference in Clause (b) of Section 6 to any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in Clause (a) would necessarily involve trial of persons who are not public servants. In our opinion, therefore, the Court of the Special Judge would be competent to try offences committed even by persons who are not public servants, provided they fall within Clauses (a) and (b) of Section 6(1) of the Criminal Law Amendment Act, 1952.

4. In the first head of the charge all the accused are said to be parties to a criminal conspiracy who had agreed to do certain illegal acts. The essence of a criminal conspiracy is that two or more persons should agree to do, or cause to be done, an illegal act or an act which is not illegal by illegal means, and such an agreement is designated a criminal conspiracy. In this case it is the case of the prosecution that all the accused had agreed that certain illegal acts which are specified in the first charge be committed. The definition of criminal conspiracy under Section 120-A of the Indian Penal Code postulates an agreement to do an illegal act or acts, and it is not necessary that every one of the persons agreeing to do these acts should be capable in law of committing an offence in respect of that act. Under the Explanation to Section 120-A it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object. The essence of the offence of conspiracy is the bare engagement and association to break the law,

whether any act be done in pursuance thereof by the conspirators or not. O'Connell and Ors. v. The Queen (1844) 6 Cl. & P. 155. Under Section 43 of the Indian Penal Code an act would be illegal, among other things, if it is an offence or if it is prohibited by law. It is not necessary that the agreement of conspiracy should be confined to the commission of only a single act; it may comprise the commission of a number of acts. If that be the true position in respect of a criminal conspiracy, we fail to see how the charge framed against all the accused under the first head of the charge would be illegal in any manner if all the accused are charged with being parties to a criminal conspiracy having agreed to do certain illegal acts. The mere fact that accused Nos. 4, 5 and 6 being not public servants would not be guilty of offences under Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act would not introduce any infirmity in the charge. Similarly, it may be that accused Nos. 1 to 3 could not technically be guilty of committing theft in respect of property which was under their control as public servants. But that by itself in our opinion would not introduce any infirmity in the charge.

5. As regards the competence of the Special Judge to entertain such a charge, we do not find any difficulty either. Under Section 6(1)(b) of the Criminal Law Amendment Act, 1952, the Special Judge is competent to try the offence of conspiracy, to commit any of the offences specified in Clause (a) of that section, and there is no dispute that the first two sub-heads in the first charge against the accused fall within the ambit of Section 5 of the Prevention of Corruption Act, 1947. It is true that the third sub-head of the first charge would not fall within the ambit of the provisions of Section 6(1)(a) and (b) of the said Act. But once it is held that the Special Judge is competent to try the offence of criminal conspiracy in respect of illegal acts falling within Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act there would be no difficulty in holding that he would be also competent to try, along with that charge, a charge in respect of any other offence that is not specified in Section 6, but which may be levelled against the accused as a part of the conspiracy. In this connection the provisions of Section 7(3) of the Criminal Law Amendment Act may be referred to. Under that subsection it is provided that when trying any case, a Special Judge may also try any offence other than an offence specified in Section 5 with which the accused may,

under the Code of Criminal Procedure, 1898, be charged at the same trial.

6. Then turning to the second and third heads of the charges against the accused, in our opinion, the contention that accused Nos. 4, 5 and 6 could not be charged with having committed an offence under Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act is well founded. As we have already seen, Section 5(1)(c) and (d) contemplate criminal misconduct on the part of public servants and admittedly accused Nos. 4, 5 and 6 are not public servants. Under Section 5(2) of the Prevention of Corruption Act it is a public servant alone who is punishable for the offence of criminal misconduct in the discharge of his duty. In our opinion, therefore, it was an error in law to have charged accused Nos. 4, 5 and 6 with having committed the offence under Section 5(1)(c) and Section 5(1)(d) punishable under Section 5(2) of the Prevention of Corruption Act read with Section 34 of the Indian Penal Code. The punishing section being Section 5(2) alone, the addition of Section 34, Indian Penal Code, would not make accused Nos. 4, 5 and 6 liable under Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act. As these offences are said to have been committed in pursuance of the criminal conspiracy mentioned in the first head of the charge, in our opinion, it would have been proper if a charge under Section 5(1)(c) and (d) read with Section 109 of the Indian Penal Code had been framed against accused Nos. 4, 5 and 6. According to the prosecution, the part that was played by accused Nos. 4, 5 and 6 as members of the conspiracy was mainly at the receiving end near Talegaon Dabhade Road and they were to arrange for the transport of the goods, and, in our opinion, it would have been proper under the circumstances of this case if a charge of abetment had been framed against accused NOS. 4, 5 and 6. Under Section 107 of the Indian Penal Code, a person abets the doing of a thing, who, inter alia, engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing<sup>1</sup> of that thing. Under the Explanation to Section 109 of the Code, any act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment. As in this case the prosecution case is that accused Nos. 4, 5 and 6 joined accused Nos. 1 to 3 conspiring to do certain illegal acts, in our opinion, it

would have been proper to frame a charge against accused Nos. 4, 5 and 6 under Section 109 of the Indian Penal Code for having abetted the commission of the offence of criminal misconduct under Section 5(1)(c) and (d) of the Prevention of Corruption Act by accused Nos. 1 to 3 and confine the charge of criminal misconduct against accused Nos. 1 to 3 alone. While we, therefore, accept the argument on behalf of the accused regarding the second, and the third heads of charges, we propose to alter the charge to one under Section 109 of the Indian Penal Code read with Section 5(1)(c) and (d) of the Prevention of Corruption Act in case we find that any of the accused Nos. 4, 5 and 6 are guilty of abetment of the offence of criminal misconduct by any or all of the other accused, which must necessarily imply that the offence of criminal misconduct has been committed in consequence of the abetment.

7. Mr. Bhasme, however, contended that the Court could not alter the charge against accused Nos. 4, 5 and 6 to one under Section 109, Indian Penal Code, read with Section 5(1)(c) and (d) of the Prevention of Corruption Act, when they were charged only with the offence under Section 5(1)(c) and (d) punishable under Section 5(2) of that Act read with Section 34 of the Indian Penal Code along with accused Nos. 1, 2 and 3. In support of his argument, he relied on *Emperor v. Raghya Nagya* : AIR1924 Bom432 in which Macleod C.J., following the decision of this Court in *Reg. v. Chand Nur and Pirbhai Adamji* (1874) 11 B.H.C.R. 240, held that when a person is charged with having committed an offence, he cannot be convicted of abetment of the said offence. The learned Chief Justice quoted in this connection the observations of their Lordships in the earlier Bombay case that (p. 325):

It was not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder, he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct from the circumstances constituting the murder itself.

But these two cases are distinguishable from the present case inasmuch as here accused Nos. 4, 5 and 6, along with accused Nos. 1, 2 and 3, are not only charged

with the offence of criminal conspiracy to do certain illegal acts including offences under Section 5(1)(c) and (d) of the Prevention of Corruption Act, but they are also charged with having committed these offences in pursuance of the conspiracy, read with Section 34 of the Indian Penal Code. In our opinion, therefore, it would not be illegal to alter the charge against accused Nos. 4 to 6 to one of abetment of the offence of criminal misconduct, as we are satisfied that no prejudice is likely to be caused to any of the accused by our doing so. The ruling in *Emperor v. Ranchhod Sursang* : AIR1924 Bom502 , where it was held that the Court can convict accused persons of offences under Section 307 read with Section 34 or 114, although they are charged only with offences under Sections 148, 149 and 307 of the Indian Penal Code, would seem to support the view we are taking. In *Begu v. Emperor* : (1925)27BOMLR707 it was held that in view of the provisions of Sections 236 and 237 of the Criminal Procedure Code, a man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. See also *Symo Maha Patro, In re.* ILR(1932) Mad. 903, *Hira v. King-Emperor* ILR(1946) Pat.562, *Debiprasad Kalowar v. Emperor* ILR(1932) Cal. 1192, and *Provincial Government, Central Provinces and Berar v. Gomaji* [1944] Nag. 589.

8. As regards the last head of the charge, the main criticism is that obviously all the accused could not be charged with having committed the offence under Section 381 of the Indian Penal Code. Mr. Amin, Special Counsel appearing on behalf of the State, urged that the proper charge would have been under Section 379 of the Indian Penal Code. But that again would be difficult to sustain so far as accused Nos. 1 to 3 are concerned. The charge under Section 411 of the Indian Penal Code would also appear to be improper so far as accused Nos. 1 to 3 are concerned. But, so far as accused Nos. 4, 5 and 6 are concerned, the charge under Section 411 read with Section 34, Indian Penal Code, would be quite proper and there is no dispute about that either.

9. As regards the contention that all these charges could not be tried together, in our opinion, it is clearly misconceived. The charge is one of conspiracy against all the accused and they are also charged with having committed substantive offences in pursuance of the said conspiracy. Under Section 239(d) of the Code of

Criminal Procedure, persons accused of different offences committed in the course of the same transaction may be charged and tried together. In our opinion, therefore, there is no substance in the argument that the charge suffers from the defect of misjoinder.

10. In support of his argument that the charge is illegal Mr. Purshottam relied on the case of Emperor v. Keshavlal Panchal : (1944)46BOMLR555 . In that case the accused was alleged to have manufactured in his iron foundry some cast iron containers' and screw caps, which were used by other persons for making bombs. One of such bombs was thrown at a police chowkey and exploded causing injury to a police constable, The other two bombs were aimed at other police chowkies on different dates but failed to explode. On these facts the accused was tried at one trial for three offences under Section 6 read with Sections 3 and 4(a) of the Explosive Substances Act, 1908, and was also charged in the alternative with an offence under Section 4(b) of the Act. The trial having proceeded on these charges, an application was made on behalf of the prosecution for dropping the first charge as it contravened the provisions of Section 234(1) of the Criminal Procedure Code. That having been done and the accused having been convicted, it was held that the dropping of the first charge was not warranted inasmuch as the trial having proceeded on an improper charge framed in contravention of the mandatory provisions of the Criminal Procedure Code, could not be rendered legal, by a subsequent amendment of the charge at a late stage. In our opinion this case has no application to the facts of the present case. In this case, as we have already seen, the accused have been charged with the offence of criminal conspiracy and there is no defect in that charge. It is true that accused Nos. 1 to 3 alone should, have been charged with the offences under Section 5(1)(c) and (d) punishable under Section 5(2) of the Prevention of Corruption Act, and the proper charge against accused Nos. 4, 5 and 6 would have been under Section 5(1)(c) and (d) of the Prevention of Corruption Act read with Section 109 of the Indian Penal Code; and though the charge against accused Nos. 1 to 3 under Section 381 or Section 411 of the Indian Penal Code would appear to be misconceived and they would not be liable to be convicted under those sections, we do not think that there is any infirmity in the charge on that account so as to vitiate the trial of the accused.

11. Even assuming, however, that the charge contains errors and irregularities in some respects, we are not prepared to hold that it has caused any prejudice or injustice to the accused. Under Section 537 of the Code of Criminal Procedure, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered because of any error, omission or irregularity in the charge including any misjoinder of charges, unless such error, omission or irregularity has occasioned a failure of justice, and the Explanation to that section provides that in determining whether any error, omission or irregularity has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. In the present case, it is obvious that no objection whatever was taken to the charge in the Court below. As I have already indicated, the point was not even raised in the first instance and it was only when Mr. Bhasme argued the point on behalf of accused Nos. 5 and 6 as regards the legality of the entire charge that Mr. Purshottam supported him on behalf of his client. In the first instance, the objection was only taken as regards the second and third, heads of the first charge. In our opinion the charge as framed which was explained to the accused has not caused any prejudice or injustice and would not warrant the setting aside of the conviction or ordering a re-trial on that ground.

12. Mr. Amin on behalf of the State relied on a ruling of the Supreme Court, H N. Rishbud and Inder Singh v. The State of Delhi : 1955 CriLJ526 , in support of his argument that there would be nothing wrong in a joint trial, before the Special Judge, of public servants and persons who are not public servants, provided the offences fell within the ambit of the provisions of the Criminal Law Amendment Act, 1952. In the above case it appears that there were three appeals before their Lordships of the Supreme Court and in one appeal, namely, Appeal. No. 95 of 1954, only three of the accused were public servants. The charges against all the accused were under Section 120-B and Section 420 of the Indian Penal Code and Section 7 of the Essential Supplies (Temporary Powers) Act, 1946, while in respect of such of the accused as were public servants they were also charged under Section 5(2) of the Prevention of Corruption Act, 1947. That appeal was undoubtedly dismissed, but the main point that has been considered by the Supreme Court in that case was as to the legality of the investigation, and the

question of joinder of charges was not raised at that stage. It seems that the matter had been taken before their Lordships of the Supreme Court at the stage of quashing the proceedings. This ruling, therefore, would not be of any material assistance in the decision of that, question.

13. In *Willie (William) Slaney v. The State of Madhya Pradesh* [1945] 2 S.C.R. 1140, it has been observed that like all procedural laws the Code of Criminal Procedure is designed to subserve the ends of justice and not to frustrate them by mere technicalities. The Code regards some of the provisions as vital and others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the charge or even a total absence of a charge in the curable class. The object of the charge is to give the accused notice of the matter he is charged with and does not touch jurisdiction. If the necessary information is conveyed on the basis of the charge and there is no prejudice, the trial would not be invalid. In the case before the Supreme Court a separate charge in the alternative was not formally reduced to writing. In the present case undoubtedly there are some errors in the charge as framed; but, in our opinion, especially in view of the fact that no objection was raised at the stage of trial as regards the legality of the charge and as no prejudice seems to have been caused to the accused, we see no reason why we should interfere in appeal on the ground that there are some irregularities and errors in the charge.

14. The second point as regards the legality of the trial is raised under the provisions of the Army Act, 1950, by Mr. Purshottam on behalf of accused No. 1. That again is a point which has been raised for the first time in appeal challenging the jurisdiction of the Special Judge to entertain a charge against accused No. 1. No doubt notice in respect of this point was served on the learned Special Counsel for the State, but this point was argued after a full-dressed argument on the merits. Mr. Amin, the learned Special Counsel on behalf of the State, contended that even though this was a law point, we should not allow it to be raised at the stage of appeal. As the point is one of law and is alleged to strike at the very competence of the trial Court to try accused No. 1, we allowed Mr. Purshottam to argue that point. The learned Counsel has urged that under the provisions of the Army Act, which would apply to accused No. 1 alone, he could not be tried by the ordinary

criminal Court for the offences with which he was charged. The submission is that accused No. 1 could be tried by the court-martial alone under the provisions of the Army Act. Alternatively it was argued that even assuming that the ordinary criminal Court has jurisdiction over the offences alleged to have been committed by accused No. 1 along with others, the provisions of Sections 125 and 126 of the Army Act read with the relevant Rules framed under the Act, have not been complied with.

15. In order to examine these submissions, it would be necessary to deal in some detail with the provisions of the Army Act, 1950, and the Rules made thereunder. Section 2(1) of the Act gives a list of persons who are subject to the Act. Under Section 3(ii) 'civil offence' is defined as 'an offence which is triable by a criminal Court', and under Section 3(viii) 'criminal Court' is defined as 'a court or ordinary criminal justice in any part of India, other than the State of Jammu and Kashmir.' Under Sub-clause (xviii) 'offence' means any act or omission punishable under the Act and includes a civil offence as hereinbefore defined. Chapter VI of the Army Act gives a list of offences and, according to Mr. Purshottam, Sections 34 to 68 deal with offences 'which are triable by a court-martial alone, while Section 69 deals with civil offences over which there would be concurrent jurisdiction both of the military Court as well as the ordinary criminal Court. Section 70 deals with civil offences not triable by court-martial, but the provisions of this section are further subject to certain exceptions. According to Mr. Purshottam, therefore, there are three categories of offences dealt with by Chap. VI of the Army Act, Sections 34 to 68 dealing with purely military offences, Section 69 dealing with offences over which there is concurrent jurisdiction of the military Court as well, as of the ordinary criminal Court, and Section 70 dealing with offences over which the military Court would have no jurisdiction subject to certain exceptions. In developing his arguments, Mr. Purshottam relied on the provisions of Section 52 of the Act which deals with offences in respect of property. Section 52(b) refers to dishonest misappropriation or conversion by a military officer to his own use of property belonging to the Government, and Section 52(f) refers to a person, subject to the Army Act, who commits an offence by doing any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person. It is Mr. Purshottam's contention that the offence of criminal

conspiracy and criminal misconduct with which his client is charged would be covered by Sections 52(b) and (f) of the Army Act and he submits that since Section 52 would fall within the sections in respect of which military Courts alone have jurisdiction, the Court of the Special Judge was not competent to try accused No. 1. In our opinion, this contention is not well founded. Accused No. 1 is charged in this case with having entered into a criminal conspiracy with five others, two of whom are public servants and three are not public servants. It is no doubt true that the offences falling under Section 5(1)(c) and (d) of the Prevention of Corruption Act might fall under Section 52(b) of the Army Act. But, in our opinion, the argument that the offence of criminal conspiracy with which accused No. 1 is charged would fall within the ambit of the provisions of Section 52(f) of the Army Act cannot be accepted. Section 52 of the Army Act deals with offences in respect of Government property or property belonging to any military, naval or air force mess, band or institution or to any person subject to military, naval or air force law. The several clauses in that section deal with different kinds of offences which are liable to be committed in respect of such property. In our opinion, the language of Section 52(f) must be construed ejusdem generic and would not include the offence of criminal conspiracy, much less criminal conspiracy entered into with persons not governed by the provisions of the Act.

16. In this view of the matter, it is really not necessary to consider Mr. Purshottam's argument that Sections 34 to 68 of the Army Act deal, with the offences which are triable by court-martial alone and they would exclude the jurisdiction of the ordinary criminal Courts, However, we are inclined to hold that the jurisdiction of the ordinary criminal Court would not be ousted in respect of such of the offences which are covered by Sections 34 to 68 of the Army Act but which would also fall within any of the provisions of the Indian Penal Code or any other penal law. Taking the case of theft or misappropriation of Government property in a Military Depot, though such an offence would fall within the provisions of Section 52(a) and (b) of the Army Act, we see no reason why the jurisdiction of the ordinary criminal Court should be excluded provided the other provisions of the Army Act are complied with. Our attention has not been drawn to any provision of the Army Act which would exclude the jurisdiction of the ordinary criminal Court in such a case. On the other hand, in Chap. X of the Act which

deals with courts-martial there is one section which contemplates a trial by a criminal Court after a trial by a court-martial. Under Section 127(1) of the Act, a person convicted or acquitted by a court-martial may, with the previous sanction of the Central Government, be tried again by a criminal Court for the same offence, or on the same facts. If a person were convicted or acquitted by a court-martial for the offence of theft or criminal misappropriation of Government property which is covered by Section 52(a) and (b) of the Act, Section 127 specifically provides that he may be tried again by a criminal. Court for the same offence or on the same facts, provided the sanction of the Central Government is obtained. To accept Mr. Purshottam's argument that offences covered by Section 52(a) and (b) would be triable by a military Court alone would make the provisions of Section 127 superfluous, so far as offences under Sections 34 to 68 of the Army Act are concerned, even though some of those offences or facts constituting them may fall within the provisions of the Indian Penal Code or the Prevention of Corruption Act or any other penal law and thus be civil offences triable by a criminal Court. The Legislature did not define a civil offence as excluding offences which might fall within the ambit of Sections 34 to 68 of the Army Act. We are, therefore, inclined to hold that, even assuming Mr. Purshottam's argument that the charge of criminal conspiracy alleged against Mr. Barsay would fall under Section 52(f) of the Army Act and thus be within the jurisdiction of the court-martial is correct, the jurisdiction of the Court of the Special Judge would not be excluded.

17. That takes us to the second part of Mr. Purshottam's argument that the provisions of Section 69 read with Section 125 and Section 126 of the Army Act have not been complied with so far as accused No. 1 is concerned and, therefore, his trial is without jurisdiction. Under Section 69 of the Army Act, subject to the provisions of Section 70, any person subject to the Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against the Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable in the manner provided in Clauses (a) and (b) of that section. According to Mr. Purghottam, under this section any Military Officer who is subject to the Act who commits any civil offence will be deemed to be guilty of an offence under the Army Act and then, according to Mr. Purshottam, he shall be liable to be tried by a court-martial. Therefore, says

Mr. Purshottam, as soon as a civil offence is committed by a person subject to the Army Act, he becomes subject to two jurisdictions, one of the ordinary criminal Court and the other of the court-martial. In such a case, the provisions of Section 125 have to be looked to for the purpose of deciding how this conflict between the two jurisdictions has to be resolved. Under Section 125, 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 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. Under this section, therefore, as soon as an ordinary criminal Court and a court-martial have concurrent jurisdiction in respect of an offence, it is for the military officer to decide before which Court the proceedings shall be instituted, and, if the decision of the officer is that the proceedings should be instituted before the court-martial, he would direct that the accused person should be detained in military custody. Under Section 126(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, require 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; and under Sub-section (2) of this section, in every such case the said officer shall 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. At one stage of his arguments, Mr. Purshottam submitted that Section 126 should be read apart from the provisions of Sections 69 and 125, and his contention was that even assuming that the provisions of Sections 69 and 125 of the Army Act were not applicable, the provisions of Section 126 would make it obligatory on a criminal Court to give a written notice to the officer referred to in Section 125 to deliver over the offender. We are not prepared to accept this argument. Section 126 in terms refers to the officer-referred to in Section 125 and also under certain circumstances it contemplates the officer

postponing the proceedings pending a reference to the Central Government, which must necessarily mean proceedings before a court-martial. In our opinion, Section 69 and Sections 125 and 126 of the Army Act must be read together and they deal with the case when both the ordinary criminal Court and the court-martial have jurisdiction in respect of an offence.

18. Mr. Amin on behalf of the State in the first instance attempted to counter this argument by relying on the provisions of the Criminal Law Amendment Act, 1952. According to Mr. Amin, this Act amended the Indian Penal Code and the Code of Criminal Procedure and provided for a more speedy trial of certain offences, the offences being enumerated in Section 6 of the Act, and for the trial of those offences the State Government has the power to appoint Special Judges, and Section 7(i) of that Act provides that notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only. Mr. Amin contended that, by virtue of this non obstante clause, the jurisdiction of the court-martial was excluded in respect of the offences with which accused No. 1 was charged and the Special Judge alone was competent to try those offences. Mr. Purshottam contended, on the other hand, that the provisions of Section 7 of the Criminal Law Amendment Act could not abrogate the provisions of the earlier special Act, which is the Army Act in this case, on the principle of *generaliaspecialibus non derogant*. It is true that a general law does not abrogate an earlier special one by mere implication. Where there are general words in a later Act which are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, the earlier and special legislation cannot be held to have been indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so. See *Seward v. 'Vera Cruz'* (1884) 10 App. Cas. 59; *Barker v. Edger* [1898] A.C. 748; and *Maxwell on Interpretation of Statutes*, 10th edn., 176. In our opinion, however, it is not necessary to have recourse to the principle and cases relied upon by Mr. Purshottam, because though under Section 7 of the Criminal Law Amendment Act offences falling within the purview of Section 6(1) will be triable by Special Judges only, that, in our opinion, would not affect the jurisdiction of the Court-martial because the offence with which the

Court-martial will be dealing would not be an offence under the Prevention of Corruption Act but an offence under Section 69 of the Army Act. As soon as a civil offence is committed by a military officer governed by the Army Act, under Section 69 by legal fiction he is deemed to be guilty of an offence under the Army Act; and in that case, provided the conditions of Section 69 are satisfied, the Court-martial will be trying him for an offence under Section 69 and not for any offence under the Prevention of Corruption Act, and as an offence under Section 69 is not an offence falling within the purview of Section 6 of the Criminal Law Amendment Act, a Special Judge would have obviously no jurisdiction to try such an offence. The argument of Mr. Amiri, therefore, that it is the Special Judge alone who has jurisdiction to try the offence committed by accused No. 1 and that the provisions of the Army Act would not apply to such a case cannot be accepted.

19. But that does not solve the difficulty of Mr. Purshottam. Under Section 69 of the Army Act certain conditions have to be satisfied before a civil offence committed by a military officer, is liable to be tried by a Court-martial. In the first instance, the military officer must commit a civil offence. As soon as he commits a civil offence, he is to be deemed to be guilty of an offence against the Army Act. But he must be charged with the offence under Section 69, before he shall be liable to be tried by a Court-martial Unless, therefore, a person subject to the Army Act is charged with the offence under Section 69 he is not liable to be tried by a Court-martial, and there is nothing in this case to indicate that accused No. 1 was charged with the offence under Section 69 of the Army Act, which would make him liable to be tried by a Court-martial.

20. In this connection, it is necessary to refer to some of the rules framed under the Army Act under the rule making power of the Central Government under Section 191(2)(d) of the Army Act. Before, however, I refer to these rules, reference may be usefully made to Section 101 of the Army Act, under which any person subject to the Act who is charged with an offence may be taken into military custody. Such person may be ordered to be taken into military custody by any superior officer. Under Section 102 it shall be the duty of every commanding officer to take care that a person under his command when charged with an offence is not detained in custody for more than forty-eight hours after the

committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having regard to the public service. So that it would appear that in the case of a person subject to the Army Act who is charged with an offence and taken into military custody, the charge has to be immediately investigated and he cannot be detained in custody for more than 48 hours after the committal of such person into custody is reported to the commanding officer, without the charge being investigated. Under Section 108 there are four kinds of Courts-martial and they are (a) general courts-martial, (b) district courts-martial, (c) summary general Courts-martial, and (d) summary courts-martial. Chapter V of the Army Rules, 1954, deals with investigation of, charges and trial by Court-martial, and Rule 22 refers to the hearing of charge in the presence of the accused, Under Sub-rule (2) of Rule 22, the commanding officer shall dismiss a charge brought before him if, in his opinion, the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion, he is satisfied that the charge ought not to be proceeded with. Under Rule 25, where an officer is charged with an offence under the Army Act, the investigation shall, if he requires it, be held and the evidence, if he; so requires, be taken in his presence in writing. There are rules for the framing of charges and under Rule 28 a charge-sheet must contain the whole issue or issues to be tried by a Court-martial at one time. Under Rule 28(2) a charge means an accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence, and under Rule 28(3) a charge-sheet may contain one charge or several charges. Rule 30 deals with the contents of a charge. Under Rule 31, the charge-sheet shall be signed by the commanding officer of the accused and shall contain the place and date of such signature. Rule 37 of Section 2, in Chap. V of the Army Rules, deals with the convening of General and District Courts-martial. Under Rule 41, on the Court assembling, the order convening the Court shall be laid before it together with the charge-sheet and the summary of evidence or a true copy thereof. Rule 106 and subsequent rules of Section 3 deal with the procedure before Summary Courts-martial, and Rule 151 and other rules of Section 5 deal with the convening and procedure of Summary General Courts-Martial. It is, therefore, clear that the Army Act provides for the investigation of a charge against a military officer governed by the Army Act and

also provides for the framing of a charge. The liability to be tried by a Court-martial, therefore, arises only after a preliminary investigation and the framing of a charge. We are, therefore, of the opinion that under Section 69 of the Army Act, though a person subject to the Act may be deemed to be guilty of an offence against the Act, he shall only be liable to be tried by a Court-martial if charged therewith under Section 69. The jurisdiction of the Court-martial would, in our opinion, only arise if the offender is charged with an offence of which he is deemed to be guilty under Section 69. In this case it is not contended on behalf of accused No. 1 that there has been any charge investigated or framed under Section 69 of the Army Act against him. If that be so, neither Section 125 nor Section 126 of the Army Act would have any application.

21. But Mr. Purshottam relied further on rules framed under Section 549(1) of the Code of Criminal Procedure. That section empowers the Central Government to make rules consistent with the Code and the Army Act and the other Acts mentioned therein, providing for the trial of persons subject to military, naval or air force law by a Court, to which the Code of Criminal Procedure applies or by a Court-martial; and it also provides that 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 the Code of Criminal, Procedure 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 regiment, corps, etc. to which he belongs, for the purpose of being tried by Court-martial It has to be noted that for the applicability of this section it is necessary that both the ordinary criminal Court as well as the Court-martial should have jurisdiction. Rule 3 of the Rules framed under Section 549(1) of the Criminal Procedure Code runs as follows:

Where a person subject to military, naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial, such Magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or Air Force authority, or

(b) he is moved thereto by such authority.

Under Rule 4, before proceeding under Clause (a) of Rule 3 the Magistrate shall give written notice to the commanding officer of the accused and until the expiry of a period of seven days from the date of the service of such notice he shall not do certain things which are specified in Clauses (a), (b) and (c) of that rule. Rule 2(i) defines a 'Commanding Officer' and Rule 2(ii) defines a 'competent military authority'. Now, this rule again does not support Mr. Purshottam's contention, because before accused No. 1 is liable to be tried by a Court-martial under Rule 3 he must be charged with an offence; and, as I have already stated, it is nobody's case that a charge under Section 69 of the Army Act was either investigated into or framed against accused No. 1. Secondly, in our opinion, this rule will also not apply to the Court of the Special Judge set up under the Criminal Law Amendment Act, because both Section 549 and Rules 3 and 4 refer to what is to be done by a Magistrate. Mr. Purshottam in this connection relied upon Section 3(32) of the General Clauses Act, 1897, which states that a Magistrate shall include every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force; and Mr. Purshottam's contention is that a Special Judge under the Criminal Law Amendment Act, 1952, is a Magistrate for the purposes of the rules framed under Section 549 of the Code of Criminal Procedure. We are not prepared to accept this argument. It is no doubt true that a Special Judge will normally follow the procedure laid down in the Code of Criminal Procedure, but that does not mean that he is a person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure. Under Section 6(2) of the Criminal Law Amendment Act, a person shall not be qualified for appointment as a Special Judge under that Act unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898. Under Section 8(i) a Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant cases by

Magistrates. Under Sub-section (3) of that section, save as provided in Sub-section (2) or Sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall so far as they are not inconsistent with the Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors. It is clear, therefore, that the Court of a Special Judge under the Criminal Law Amendment Act is on a par with the Court of a Sessions Judge trying cases without a jury or without the aid of assessors. It cannot, therefore, be said that the rules framed under Section 549 of the Code of Criminal Procedure would have to be followed by the Court of a Special Judge.

22. In this connection Mr. Purshottam drew our attention to the observations of the Supreme Court in *H.N. Rishbud and Inder Singh v. The State of Delhi* : 1955 CriLJ526 in which their Lordships of the Supreme Court refer to a Special Judge, as one 'who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case.' It does not mean, however, that their Lordships meant to lay down that the Court of a Special Judge under the Criminal Law Amendment Act was the Court of a Magistrate. Then Mr. Purshottam invited our attention to a ruling in *Emperor v. D'Sena* : AIR1945 Bom176 , in which Mr. Justice Wadia and Mr. Justice Sen were considering the effect of Rules 1 and 2 corresponding to the present Rules 3 and 4 framed under Section 549(1) of the Criminal Procedure Code. In that case, the trying Presidency Magistrate discharged the accused on the ground that the Court had no jurisdiction to try the accused, who was subject to military law, as the prosecution had not produced the permission of the military authorities. The Government name in revision against, this order and the contention was that the order of the Presidency Magistrate was erroneous by virtue of Rule 1(a) of the then existing rules framed under Section 549. This Court held that as the Magistrate had refused to try the accused when he found that he was not moved by the military authorities, he was not bound to record reasons for his opinion under Rule 1(a) obviously because the Magistrate was under no obligation to record reasons for not being of the opinion that he should proceed with the trial. It is only when he is of the opinion that he should proceed with that trial that he has to record reasons. That case, therefore, cannot

have any application to the facts of the present case. Then Mr. Purshottam referred us to a decision of this Court in *State v. Arjunan Sagdevan Naikar* (1955) Confirmation Case No. 13 of 1955. That case also cannot have any application, because the accused there was, in the first place, being tried by a Court-martial but subsequently the Court-martial was dissolved and the military authority handed him over to the police for having the accused tried by the ordinary criminal Court, The only question that was canvassed before the Court in that case was that the military authorities having already decided that the accused should be tried by a Court-martial and that Court having been dissolved subsequently, whether they could exercise the power of decision under Section 125 of the Army Act over again and hand over the accused to the police for trial by ordinary criminal Court, and it was held that they could do so. That, decision, therefore, cannot have any application to the facts of the present case.

23. Then strong reliance was placed on a decision of Mr. Justice Govinda Menon, as he then was, in *Mistry, In re* [1944] 2 M.L.J. 44. In that case it was held that the language of Section 549 of the Code and Rule 105 of the Criminal Rules of Practice was clear and mandatory. When a person subject to the military law is brought before a Magistrate charged with an offence for which he is triable under the Army Act, the Magistrate is bound to follow the procedure prescribed by those provisions. This would be so even if the prescribed military authority under Section 69 of the Army Act had come to the decision that the proceeding should be instituted in an ordinary criminal Court. It was further held that:

where the Court fails in its duty to give notice to the Commanding Officer of the accused, the proceedings before the Magistrate relating to the recording of evidence, etc., would be illegal and without jurisdiction; and acquiescence on the part of the accused in an irregular or illegal proceeding would not regularise or legalise the proceedings. A charge so framed would be without jurisdiction and has to be quashed.

It has to be noted that the matter had come before Mr. Justice Govinda Menon for quashing the proceedings which resulted in the framing of a charge, and it was the Court of a Magistrate in that case that had disregarded the provisions of the

relevant rule framed under Section 549 of the Code of Criminal Procedure. As we have already pointed out, it would not be necessary for the Court of a Special Judge under the Criminal Law Amendment Act to have regard to rules framed under Section 549 of the Criminal Procedure Code because the Court of a Special Judge is not a Court of a Magistrate. It may be also mentioned that the question whether the jurisdiction of a Court-martial arises under Section 69 of the Army Act without the military officer being charged with the offence under Section 69 was not canvassed in that case. Mr. Purshottam also fairly pointed out to us the case of *Blythe v. The King* AIR[1949] Cal. 641, in which it was held that the provisions of Section 549 of the Criminal Procedure Code would have no application to trials before Special Tribunals constituted under the West Bengal Criminal Law Amendment Act. The Calcutta High Court held in that case that Special Tribunals under the West Bengal Criminal Law Amendment Act were not Magistrates, but they were in law Courts of Session; and that was because of the provision in Section 5(2) of the West Bengal Criminal Law Amendment Act, which lays down that for the purposes of the provisions of the Code of Criminal Procedure, the Special Tribunal shall be deemed to be a Court of Session, trying cases without a jury, and that being so, Section 549 would have no application to a person who would be brought before a Special Tribunal and charged with an offence for which he is liable to be tried either by a Court to which the Criminal Procedure Code applies or by a Court-martial. As the provisions of the Criminal Law Amendment Act, 1952, seem to be in pari materia with the provisions of the West Bengal Criminal Law Amendment Act, in our opinion, this case clearly goes against the contention urged by Mr. Purshottam.

24. In our opinion, therefore, the trial of accused No. 1 by the Special Judge was not in any manner incompetent and against, the provisions of the Army Act or the rules framed thereunder as also the rules framed under Section 549 of the Code of Criminal Procedure. We may also mention that this point should have been taken on behalf of accused No. 1 in the trial Court. In this connection Mr. Purshottam referred us to the statement of accused NO. 1 under Section 342 of the Criminal Procedure Code, in which he had challenged the legality of the sanction accorded, to his prosecution on the ground that he came under the Army Act and any trial beyond the Army Act must be sanctioned only by the President. In our opinion,

that objection related to the validity of the sanction accorded to his prosecution and. had no reference to the competence of the Special Judge to try the accused on the ground that the provisions of Section 125 and Section 126 of the Army Act and of the rules framed under Section 549 of the Criminal Procedure Code were not complied with. Assuming' that Mr. Purshottam's contention has any substance, if the point had been raised in the trial Court, the Court would have considered it and acted in. accordance with the rules framed under the Code of Criminal Procedure if it had found it necessary to do so. Mr. Amin on behalf of the State wanted to rely on certain, papers which, he said, would have clarified the attitude of the military authorities in this ease. It is worth noting that in the Madras ease decided by Mr. Justice Govinda Menon affidavits were riled which were considered by the Court. In this case, we were referred to certain parts of the evidence of Brig. Wilson and Col. Sindhi and also of Mr. Jog, in which there is some reference to a Court of Inquiry. Brig. Wilson, in his evidence clearly stated that he did not hold any departmental enquiry against anybody and he did not know whether any Court of Inquiry functioned or gave any findings in. this case. He did 'not make any inquiry in that connection. According' to Col. Sindhi, a Court of Inquiry was convened in respect of this matter but it was adjourned sine die as the same matter was entrusted for investigation to the police and he stated that the decision was taken by the higher military authorities. According to the evidence of Jog-, he gave oral instructions to the army officers not to hold any inquiry regarding this offence as he was investigating the same, and it would appear that the instructions he gave were to Col. Naidu who was the Station Commandant then. This witness could not say whether the army officers held or did not hold any inquiry in the matter. In our opinion, the evidence on the record is not sufficient to hold that there was any investigation into the offence by the military authorities and any charge-sheet was framed against the accused. This case has been argued at great length and it is significant that no affidavit has been filed on behalf of accused No. 1 in support of the argument under the provisions of the Army Act.

25. [The rest of the judgemnet is not material to the report.]