

Joginder Singh Vs. State

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Court : Delhi

Decided On : Jul-26-1968

Reported in : 5(1969)DLT1

Judge : I.D. Dua, C.J.,; S.K. Kapur and; T.V.R. Tatachari, JJ.

Acts : Martial (Adjustment of Jurisdiction) Rules, 1952 - Rule 3; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 549

Appeal No. : Criminal Revision Appeal No. 26 of 1968

Appellant : Joginder Singh

Respondent : State

Advocate for Pet/Ap. : Ajmer Singh,; M.G. Chitkara,; Hans Raj,;

Judgement :

I.D. Dua, C.J.

(1) The principal question requiring determination by us is whether non-compliance with the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 framed under section 549 (1), Cr.P. C. (hereafter called the Rules) goes to the root of the inherent jurisdiction of the committing Magistrate and of the Court trying the case pursuant to the commitment order or whether it is a mere irregularity, the effect of which is to be considered on the facts and circumstances

of the each case. The facts giving rise to this reference are contained in the referring order dated 25th June, 1968 and, therefore, need not to be repeated. That order may be read as a part of this order. Section 549, Cr. P. C., and the relevant rules framed there under may now be reproduced :-

'S.549 (1).-Delivery to military authorities of persons liable to be tried by Court martial.-The Central Government may make rules consistent with this Code and the Army Act, the Naval Discipline Act and the Indian Navy (Discipline) Act, 1934, and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air force law, shall be tried by a Court to which this code applies, or by 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 be 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, ship, or detachment, 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 Court martial. (2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of soldiers, 'Sailors or Air man stationed or employed at any such place, use his utmost endeavors to apprehend and secure any person accused of such offence.'

The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952

2. In these rules, unless the context toherwise requires,- (i) 'Commanding Officer'- (a) in relation to a person subject to military law means the Officer Commanding of the unit or detachment to which such person belongs, or is attached, (b) in relation to a person subject to naval law means the Commanding Officer of the ship to which such person for the time being belongs, and (c) in relation to a person subject to Air Force means the officer for the time being in command of the unit for detachment to which such person belongs or is attached; (ii) 'competent military authority' means the Officer Commanding the army, army corps. division, area, independent sub-area or independent brigade in which the accused person is

serving, and except in cases falling under Sec. 69 of the Army Act, 1950 (46 of 1950) in which death has resulted, the Officer Commanding the brigade or sub-area or station in which the accused person is serving.

3. Where a person subject to military, naval or Air Force is brought before 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 inquire with a view to his commitment for trial by the Court of Session 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.

4. Before proceeding under Cl. (a) of rule 3, the Magistrate shall give a Written notice to the Commanding Officer of the accused and until the expiry of a period of- . (i) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say-

(1) Mizo,

(2) Naga Hills,

(3) Garo Hills,

(4) Khasi and Jaintia Hills, and

(5) North Cachar Hills; (ii) seven days in the case of a notice given to any other Commanding Officer in command of a unit or detachment located elsewhere in India, from the date of service of such notice, he shall not (a) convict or acquit the accused under Sec. 243, 245, 247 or 248 of the Code of Criminal Procedure 1898 (Act 5 of 1898), or hear him in his defense under Sec. 244 of the said Code; or (b) frame in writing a charge against the accused under Sec. 254 of the said Code; or . . . (c) make an order committing the accused of trial by the High Court or the Court of Session under sec. 213 of the said Code; or (d) transfer the case for inquiry or trial under Sec. 192 of the said Code.

5. Where within the period of seven days mentioned in rule 4, or at any time thereafter before the Magistrate, has done any act or made any order referred to in that rule, the Commanding Officer of the accused or competent military, .naval or Air. Force authority, as the case may be, gives ntoice to the Migistrate that in the opinion of such authority the accused should be tried by a court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section.

(1) of Sec. 549 of the said Code to the authority specified in the said sub-section.

6. Where a Magistrate has been .moved by competent military, naval or Air Force .authority, as the case may be, under Cl (b) of rule. 3, and the Commanding Officer of the accused or competent military, naval or Air Force authority, as the case maybe, subsequently gives ntoice to such Magistrate that, in the opinion of such authority, the accused should be tried by a court-martial, such Magistrate, if he has nto before receiving such ntoice done any act or made any order referred to in-rule 4, shall saty proceedings and, if the accused is in his power or under his control, shall in the like manner deliver him, 'with the statement prescribed in sub-section

(1) of Sec. 549 of the said Code to the authority specified in the said sub-section.' These rules were made by the Central Government for trial of persons subject of military, naval or Air Force law by a Court to which the Cr. P. G. Applies or by a Court-martial and they deal with cases of dual jurisdiction of Court-martial and civil Courts, Since the Rules have to be consistent with the Cr. P. C., the Army Act and the toher statutes mentioned in section 549(1), it is desirable to reproduce sections 2, 69, 70, 124, 125, 126 and 127 of. the Army Act as well.

'2. Persons subject to this Act :- (1) The following persons shall be subject to this Act wherever they may be, namely :- (a) officers, junior commissioned officers and warrant officers of the regular Army; (b) persons enrolled under this Act; (c) persons belonging to the Indian Reserve Forces: (d) persons belonging to the Indian Supplementary Reserve Forces when called out for service or when carrying out the annual test; (e) officers of the Territorial Army, when doing duty as such officers and enrolled persons of the said Army when called out or embodied

or attached to any regular forces, subject to such adaptations and modifications as may be made in the application of this Act to such persons under sub-section

(1) of section 9 of the Territorial Army Act, 1948; (f) persons holding commissions in the Army in India Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces ; (g) officers appointed to the Indian Regular Reserve of Officers, when ordered on any duty or service for which they are liable as members of such reserve forces : (i) persons not otherwise subject to military law who, on active service, in camp, on the march or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of or are followers of, or accompany any portion of, the regular Army.

(2) Every person subject to this Act under clauses (a) to (g) of sub-section

(1) shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service.

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,- (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 offence, by the aforesaid law and such less punishment as is in this Act mentioned; and (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 is in this Act mentioned,

70. Civil offences not triable by court-martial.-A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an

offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences- (a) while on active service, or (b) at any place outside India, or (c) at a frontier post specified by the Central Government by notification in this behalf. Explanation :-In this section and in section 69, 'India' does include the State of Jammu and Kashmir:

124. Place of trial :-Any person subject to this Act who commits any offence against it may be tried and punished for such offence in any place whatever.

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.

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, 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.

(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.

127. Successive trials by a criminal court and Court-martial.-

(1) 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.

(2) If a person sentenced by a court-martial 'under this Act or punished under any of the sections 80, 83, 84, or 85 is afterwards tried and convicted by a criminal court for the same offence, or on the same facts, that Court shall, in awarding punishment, have regard to the punishment he may already have undergone for the same offence'.

It appears to us that in section 69, the word 'transportation' has inadvertently been retained because now the sentence of transportation for life has been changed into imprisonment for life by virtue of statutory amendment in 1955. It may here be pointed out that under rule 197 A of the Army Rules, 1954 made by the Central Government under section 191 of the Army Act, the prescribed officer for the purposes of section 125 of that Act is the officer commanding the brigade or station in which the person is serving except in cases falling under section 69 of that Act in which death has resulted. We should keep in mind the provisions contained in Chapters li and lii Cr. P. C. dealing with the constitution and power of criminal Courts and a passing reference may also be made at this stage to those contained in Chapter Xv, Cr. P. C. dealing with the jurisdiction of the criminal Courts in enquiries and trials. Sections 177 deal with place of enquiry or trial; section 190 provides for cognizance of offences by Magistrates; section 207 for procedure in enquiries preparatory to commitment; section 207A for procedure to be adopted by Magistrates in proceedings instituted on police report and section 213 provides for orders of commitment by the committing Magistrate. These provisions show that jurisdiction is conferred on Magistrates by the Code of Criminal Procedure for enquiring into or trying cases governed by the said code and the rules which have to be consistent with the Cr. P. C. cannot override these provisions.

(2) The scheme of the Army Act has been described by the Supreme Court in *Major E. G. Borsay v. State of Bombay* to be self-evident. It applies to offences committed by army personnel described in section 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 sively both by a Court-martial and by a criminal Court. It does not satisfactory machinery for resolving the conflict of jurisdiction. It further enables,

subject to certain conditions, an accused to be tried successively bar the jurisdiction of criminal Courts in respect of acts or omissions punishable under the Act, if they are also 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 because they provide in express terms not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of the same offence, but also provide for successive trials of an accused in respect of such an offence. Section 125 and 126 quite clearly apply to offences which are triable both by an ordinary criminal Court having jurisdiction to try the said offences and by a Court-martial. If in such a situation the designated officer in section 125 does not choose to exercise his discretion to decide before which Court the proceedings are to be instituted, then, to quote from the judgment of the Supreme Court in the above case, 'as he has not exercised his discretion, there is no occasion for the criminal Court to invoke the provisions of section 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.

(3) It is, however, urged by Shri Ajmer Singh, the learned counsel for the accused-petitioner, that the Rules have the effect of depriving the Magistrate of his inherent jurisdiction to commit the accused for trial by the Court of Session. Now, if, as the Supreme Court suggests, the Army Act does not take away the jurisdiction of the Magistrate, then quite clearly, the Rules-made by the Central Government under section 549 (1)- Cr. P. C., which have to be consistent with the said Act and the Code, cannot be so construed as to deprive the Magistrates of their inherent jurisdiction conferred on them by the Code, for to do so would seem to render them inconsistent with the Code. These Rules must not be in excess of the statutory power authorising them or repugnant to the statutes with which they have

expressly been directed to be consistent. It is true that Rule 3 does embody a direction in imperative form to the Magistrates concerned not to proceed to try or to enquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, a person subject to military law brought before such Magistrates and charged with an offence for which he is liable to be tried by a Court-martial, 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. But this direction seems only to regulate the manner in which the Magistrate is to proceed with the enquiry or the trial, as the case may be, and it does not seem to be intended to deprive the Magistrate of his inherent jurisdiction in the matter of holding the enquiry or the trial. This delegated legislation has to be construed so as not to outstep the limits of the delegated power nor to operate in the sphere which is out-of-bounds for the rule-making authority to function. The fact that after complying with the procedure prescribed in Rules 4 and 5, the Magistrate may, in consultation with the State and the Central Government, proceed to deal with the accused person in accordance with law, as contemplated in Rule 7, also indicates that the Magistrate is not deprived of his inherent jurisdiction and that the Rules merely direct or control the manner in which he has to proceed in the matter of the enquiry or trial. At this stage, it may appropriately be observed that all laws and legislative directions are, from their very nature, intended to be obeyed and the difficulty arises only when the Court is faced with the task of determining the effect of the past violation of a given provision of law for the purpose of judicially determining whether such violation has the effect of automatically invalidating or nullifying all subsequent acts or whether its effect is dependent on the seriousness of the nature of the consequences which follow there from. The Court has, in that event, to look for guidance into all legitimate circumstances and relevant rules of interpretation. Each case stands pretty much on its own facts to be determined on an interpretation of the particular language used in the background of the exact circumstances under which the problem is raised, whether in proceedings to enforce compliance or to redress non-compliance or in proceedings requiring a determination of the effect of non-compliance on legal consequences. Various methods dealing with the problem, are employed, but one oft-repeated formula is

that statutory requirements which are of the essence of the thing required by a statute must be strictly obeyed while those things which are not of the essence, are to be substantially complied with. Now, to what extent a given statutory requirement is of the essence going to the root of jurisdiction and what part of it pertains to non-essential form, is a question which has to be determined on full appreciation of all the relevant circumstances of each case. The soundest judicial technique of understanding the meaning of a statute seems to be provided by the doctrine of interpreting a statute according to its purpose or spirit when properly employed. The object and purpose of the Rules would appear to be to see that the members of the Armed Forces are not taken away from military duty without the concurrence of the Army Authorities so that the defense of the country does not suffer. It is the larger public interest which is kept in view and the Army Authorities are given the right and the duty to determine the forum for the trial of the members of the Armed Forces. It is not meant to confer a right on the accused person different from other accused persons. The defense of the country, however, is truly not to be made to suffer because of ignorance of the Magistrates, or of the accused or the prosecution or even of the Army Authorities who may be unaware of the technicalities, of the statutory rules. But this purpose can quite effectively be served if the Army Authorities are made fully aware of a criminal case against a member of the Armed Forces and they are afforded or have had an adequate and full opportunity to exercise the discretion of having the accused tried by a Court-martial. In order to achieve this object, it does not seem to be an essential jurisdictional condition precedent to require literal and meticulous compliance with the form and the manner of notice prescribed in Rules 3 and 4 of the Rules, failure to do which would automatically by itself, without more, nullify the proceeding rendering the trial, the sentence and the resultant punishment as if tainted with absence of inherent jurisdiction. Having had full knowledge of the charge and the opportunity to come to a decision on the question of the forum of trial, if the Army Authorities voluntarily deliver the accused to the civil authorities for trial, the statutory purpose and object may well ordinarily be held to have been accomplished. In this connection, it may be borne in mind that the Rules are not required to be pieced on the table of the parliament as is not infrequently done in case of important rule effecting valuable rights and jurisdiction : on the other hand,

the Central Government may, at its sweet will, go on changing them from time to time to suit the changing conditions. It is, therefore, not easy to infer too readily legislative intent to leave the question of inherent jurisdiction of the Magistrates to the rule-making authority in the present case. The statutory object and purpose can satisfactorily be served if the Magistrate take steps to see that the Army Authorities have the information about the charge leveled against a person belonging to the Armed Forces so that they may have the opportunity of determining the question of handing over or not handing over accused to the civil authorities. The form in which the information goes to the Army Authorities, may not always necessarily affect the Magistrate's inherent jurisdiction. Emphasis has, however, been laid on rules, 7, 8 and 9 of the Rules which, in case of conflict of opinion between the Magistrates and the Army Authorities, require the Central Government to determine as to before which Court the accused is to be tried and it is argued that these rules are intended to take away the inherent jurisdiction of the Magistrates' Courts. In a case where the appropriate Army Authorities have intimated their decision to have the accused tried by a Court-martial, it may be that the trial or inquiry by the Magistrate, without securing a favorable determination from the Central Government would be liable in a given case to be quashed as illegal by the higher authorities, but this may not necessarily mean that the Magistrate has acted without jurisdiction, rendering the proceedings non-est. The power to proceed further may, in a way, be hampered but the inherent jurisdiction may seem still to vest in the Magistrate. We have in this connection to bear in mind the observations of the Supreme Court in Barsay's case. In any event, the consequence of violation of rules 3 and 4 which concerns us in the case at bar, would clearly appear to be different from that of violation of rules 7, 8, and 9 of the Rules and we would not like to express any considered opinion on the effect of such violation. We are not unmindful of the use of the words 'previous sanction' in section 127 of the Army Act, which provides for successive trials for the same offence. In a case covered by this section also, other considerations may have to be taken into account, which have not at all been fully canvassed on this occasion. We would accordingly refrain from expressing a considered opinion on such cases as well.

(4) Reference has been made to section 69 of the Army Act which contemplates lesser penalty in some cases when tried by Courts-martial but this factor too does not seem to us to affect or touch the inherent jurisdiction of the Magistrate, for this section merely confers some benefit in certain circumstances on the accused who is tried by a Courtmartial. This point was indeed suggested from the Bench and was also not properly developed at the bar.

(5) Shri Ajmer Singh has placed reliance on some decided cases in support of his submission. The latest decision cited is *Awadh Behari Singh v. The State*, in which it has been observed as under :-

'THE mandatory provisions both in sec. 549 of the Code of criminal Procedure as also the Rules framed there under not having been complied with, it must be held that the procedural defect is not merely an irregularity but is also illegality, which has affected the jurisdiction of the Magistrate in the trial Court'.

On the facts in that case, it was held that section 549, Cr. P. C. had also not been complied with. In that case, one Awadh Behari Singh, a member of the Indian Army, being a Company Commander of the rank of a Naik, was arrested in a military compartment while traveling. It was alleged that on search of his bedding, a packet containing about 11 seers of contraband opium was found for which he had no license. On being produced before the Magistrate, he was granted bail in April, 1962. On 3rd May, 1962, on seeing a report of Major Maurice, C. O. the learned Magistrate directed the sureties to produce the accused on 7th May, 1962, when he was taken into custody and ordered to be handed up over to the military authorities on 4th September, 1962. On 4th July, 1962, however, investigation was completed and charge-sheet submitted to the Magistrate in regard to the offence under section 9(a) of the Opium Act. On 3rd August, 1962, the case was transferred to a learned Magistrate and he was convicted on 23rd August, 1962. On appeal against the order of conviction, the accused attacked the conviction on the basis of section 549. The learned Sessions Judge kept the appeal pending in his Court and in the mean while directed the Magistrate to take additional evidence for proving certain documents. Two letters. Exhibit 5 and a reply thereto. Exhibit 12, were brought on the record. Exhibit 12 (marked confidential) from the

commanding Officer to the Deputy Commissioner of Excise is in the following words:-

'IN continuation of this office letter No. 2902 Ac dated 18 April, 1962 in reply to your letter No. 149 Ed (con) dated 31 March, 1962. No. 2640609 Naik Awadha Behari Singh of this unit may please be tried under Civil Law.'

The High Court did not consider this document to be an application by which the Army Authority had moved the Magistrate observing inter alia, that no petition before a Magistrate could be a confidential document. Curiously enough, however, though the conviction of the accused was set aside as without jurisdiction, the order of the Magistrate forfeiting the contraband opium was maintained. With all due respect, we are unable on the basis of this authority to hold that the inherent jurisdiction of the Magistrate depends on meticulous compliance with rules 3 and 4 of the Rules in all their literalness in regard to the form etc. of the notice and motion by the military authorities. The decisions *In re Captain Hugh May*, in *Emperor v. Jerry D' Sena*, and in *Amarendra Chandra Chakravorty v. Garrison Engineer*, do not seem to us to add more cogency to the petitioner's submission.

(6) We have read the dissenting judgment of our learned brother S. K. Kapur J. and because of the high regard, esteem and respect we entertain for his opinion, we have again thought over and further considered the point raised, but to our genuine regret, we are unable to persuade ourselves to hold that non-compliance with the form and the manner of or service of notice strictly in accordance with the rules 3 and 4, would nullify the proceedings by attracting that taint of absence of inherent jurisdiction.

(7) As a result of the foregoing discussion, the violation of rules 3 and 4 of the Rules does not seem to us by itself to deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and the effect of such violation has to be determined on evaluation of all the facts and circumstances of each case. This revision will now be finally disposed of by the Single Bench.

S.K. Kapur, J.

(8) I regret, I am unable to agree with the judgment of my Lord, the Chief Justice. I am not unmindful of the fact that what I say is bound to be eclipsed by the very lucid reasons given in the decision of my Lord, the Chief Justice, a product of great wisdom and experience, but still I will endeavor to give my own reasons which impel me to come to a different conclusion.

(9) Joginder Singh petitioner was committed by Magistrate 1st Class, Nahan to the Court of Session to stand his trial under section 376, Indian, Penal Code. By judgment dated February, 19th, 1968, the learned Assistant Sessions Judge, Nahan, held the petitioner guilty and sentenced him to three years' rigorous imprisonment. The conviction and sentence of the petitioner was upheld in appeal by the learned Sessions Judge. The petitioner filed a criminal revision and there, for the first time, raised the question that non-compliance with the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, framed by the Central Government under section 549 (1), Criminal Procedure Code, vitiated his trial and conviction. The matter came before my Lord, the Chief Justice and his Lordship referred 'the question 'whether non-compliance with the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 framed under section 549 (1), Criminal Procedure Code, goes to the root of the inherent jurisdiction of the committing Magistrate and of the trial Court or it is a mere irregularity, the effect of which is to be considered on the facts and circumstances of each case'. For a decision by a Full Bench.. My Lord, the Chief Justice felt the necessity of making this reference in view of the decision of the Calcutta High Court in *Awadh Behari Singh v. The State*', wherein it has been held that compliance with the said Rules was obligatory and non-compliance there with constituted an illegality affecting the jurisdiction of the trial Court. The facts and the provisions of law relevant to the controversy have been set out in the judgment of my Lord, the Chief Justice, and it is, therefore, not necessary to repeat the same. I may, however say that when the matter was proceeding before the committing Magistrate or the Court Of Session, the parties do not appear to have been conscious of a notification dated 28th November, 1962, issued by the Central Government in exercise of powers conferred by section 9 of the Army Act, 1950, which reads-

'In exercise of the powers conferred by section 9 of the Army Act, 1950 (46 of 1950), the Central Government hereby declares that all persons subject to that Act, who are not on active service under clause (i) of section 3 thereof, shall, wherever they may be serving, be deemed to be on active service within the meaning of that Act for the purpose of the said Act and of any other law for the time being in force'.

This notification assumes importance in view of the fact 'that under section 70 of the Army Act, 1950, a person subject to the said Act who commits an offence inter-alia of rape in relation to a person not subject to military, naval or air force law, shall not be deemed to be guilty of an offence against the said Act and shall not be tried by a Court-martial, unless he commits the said offence while on active service. Under section 69, which is subject to the provisions of Section 70, any person subject to the Army Act who commits any civil offence shall be deemed to be guilty of an offence against the Army Act and shall be liable to be tried by a court-martial. Section 69 prescribes two types of punishments- (i) if the offence is one 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 offence, by the aforesaid law 'and such less punishment as is in this Act mentioned' and (ii) 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 is in this Act mentioned'. Section 71 prescribes the various punishments awardable by courts-martial including-

(1) cashiering, in the case of officers; (2) dismissal from the service; (3) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to the ranks or to a lower rank or grade, in the case of noncommissioned officers; (4) forfeiture of seniority of rank ; (5) forfeiture of service for the purpose of increased pay ; (6) severe reprimand, etc.

Under the Indian Penal Code offence under section 376 is punishable with 'imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped

is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.' In a case of this type therefore, the imprisonment awardable under section 376, Indian Penal Code, to the petitioner would be imprisonment for life or imprisonment of either description for a term which may extend to ten years and fine. On the other hand, the perusal of section 69 of the Army Act would show that it is competent on the part of the court-martial to award a lesser punishment than the one prescribed under Indian Penal code at least for certain offences. I say 'at least for certain offences' because out of the two categories of punishments prescribed under section 69 the first clause, uses the words 'and such less punishment.....' and the second 'clause says 'or such less punishment.....' It is not necessary for resolving the present controversy to decide whether there or not any difference has been made by use of the words 'and' and 'or'. The question, as I have said earlier, is whether the provisions of the Army Act and of the said Rules in this behalf are obligatory or directory so that the non-compliance therewith will constitute only an irregularity not affecting the jurisdiction of the trial Court. The expressions 'mandatory' and 'directory' have always reference to the method by which the Legislature seeks to attain its object. There are no set principles for determining the nature of the statute has to be tested by reference to the objects sought to be achieved and the various other factors relevant to the inquiry. For instance, if a power is conferred for the purpose of enforcing a right the donee of the power may be obliged to exercise it for effectuation of that right. One of the tests laid down in *Montreal Street Rail Co. v. Normandin*, as quoted in *Craies on Statute Law 15th Edition P. is-*

'THE question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at..... When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void act done in respect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of

acts done.'

One finds some guiding principles in this behalf in certain decisions but the broad test is that one must try to get at the real intention of the Legislature by gleaning through the entire statute concerned and then find out whether the statute is obligatory with an implied nullification for disobedience or directory. There are cases where statutes couched in negative language have been held not to be absolute. Some provisions in the affirmative language have, on the other hand, been treated as obligatory. The use of negative language, however, is generally indicative of the intention of the Legislature that the statute shall be read as obligatory particularly when consequences for non-compliance there with are provided. Again, if a statute directs a particular thing to be done only in a particular way the requirements of the statute must be observed. As a general rule, however, statutes giving jurisdiction to the Courts are treated as obligatory. Similarly, conditions prescribed in an Act for the purpose of protecting or benefiting the public cannot be dispensed with.

(10) I propose to consider the provisions of the said Act and the Rules in the light of the above principles. Section 549 (1) of the Criminal Procedure Code empowers the Central Government to frame Rules consistent with the Criminal Procedure Code and the Army Act and further 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 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 regiment, corps'. The said section 549 (1), therefore, in clear terms enjoins upon the Magistrate that he 'shall have regard to such rules'. Under Section 125 of the Army Act if '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.' The impact of section 126 of the Army Act is that if a

criminal court is still of the opinion that proceedings should be instituted before it itself 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. Under sub-section (2) of section 126 if such a conflict arises the said officer must either deliver over to offender in compliance with the requisition which means a requisition by a written notice, or must forthwith refer the question as to the court before which the proceedings should be instituted for the determination of the Central Government, whose order upon such reference shall be final. It follows that the effect of sections 125 and 126 of the Army Act, when read together, is that the first option lies with the Army officers and in case of conflict the Magistrate gets jurisdiction only if the Central Government decides that the accused person shall be tried by a civil Court. Again, under section 127 a person convicted or acquitted by court-martial can be tried again by a criminal court for the same offence or on the same facts only 'with the previous sanction of the Central Government.' No doubt, section 125 of the said Act opens with the words 'when a criminal court and a court-martial have each jurisdiction in respect of an offence.....' the conditions under which the Magistrate can acquire jurisdiction are that the Magistrate should disagree with the decision of the army officer that the accused person should be tried by a court-martial and that conflict must be settled in favor of the Magistrate by the Central Government. It is only this reading of the provisions of the Act that will make the said Rules consistent both with the Criminal Procedure Code and the Army Act. The Magistrate cannot, by reason of section 126 of the Army Act, assume jurisdiction to try an accused person unless he has given a written notice to the officer referred to in section 125 and then the Central Government decides that the case should be tried by the Magistrate. If it were to be held that a Magistrate can straightaway proceed to try an accused person without concurrence of the army authorities or giving a written notice or a decision of the Central Government, the effect would be that the Magistrate can assume jurisdiction which can be conferred on him only as a result of the decision of the Central Government or the army authorities that the accused person should be tried by a civil court. The said Rules are also, in my opinion, consistent with the scheme of sections 125 and 126 of the said Act and seek to

give effect to these provisions and the provisions of Criminal Procedure Code.

(11) Rule 3 of the said Rules provides that where a person subject to the Army Act, charged with an offence for which he is liable to be tried by a court-martial, is brought before a Magistrate 'such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session 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'.

In case he is so moved by 'such authority' the Magistrate can certainly try him and that will be in accord with the scheme of sections 125 and 126 of the Army Act for in that case there would be no conflict about the exercise of jurisdiction by either the court-martial or the Magistrate. If, on the other hand, he is not so moved, the Magistrate has to record reasons that he should proceed with the trial. Even where he has recorded such reasons, the provisions of rule 4 come into play and require that before proceeding 'the Magistrate shall give a written notice to the commanding officer' and till the expiry of seven days, 'he shall not (a) convict or acquit the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), or hear him in his defense under section 244 of the said Code; or (b) frame in writing a charge against the accused under section 254 of the said Code, or (c) make an order committing the accused for trial by the High Court or the Court of Session under section 213 of the said Code' Under rule 5 also the first option has been given to the army authorities and they may give notice to the Magistrate that the accused should be tried by a court-martial. In case such notice is given 'the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section.' Such option may be exercised by the army authorities under rule 5 within a period of seven days mentioned in rule 4 'or at any time thereafter before the Magistrate has done any act or made any order referred to in that rule.' By rule 6 the army authorities have been given the option

to notify to the Magistrate, even in cases in which the Magistrate has been moved by the army authorities to try the accused person to stay proceedings. On such notice the Magistrate 'shall stay proceedings' if he has not done any act or issued any order referred to in rule 4 before receiving the notice. If under the Rules also a conflict arises between the army authorities and the civil Court as to who shall try the accused person recourse shall have to be taken to section 126 of the Army Act and rule 8 and the Magistrate will get jurisdiction only in case the Central Government decides in favor of the trial by a civil Court. It is apparent, therefore, that even under the Rules the first option is given to the army authorities to place an accused person before a court-martial for trial and in case of exercise of such option the Magistrate will have no jurisdiction in as much as he must either agree to the option by the army authorities or try the accused only after the decision by the Central Government. Under the Rules the Magistrate is enjoined not to proceed with the case and not to make an order committing the accused for trial to the Court of Session until the expiry of seven days from the date of the service of written notice and even after the expiry of seven days the army authorities can exercise option in favor of a trial by a court-martial provided the Magistrate has not made any order or done any act referred to in sub-clauses (a) to (d) of clause (ii) of rule 4. The said notice by the Magistrate is intended to give an opportunity to the army authorities to exercise that option. Under rule 5 the notice to the Magistrate may be given either by the commanding officer of the accused or competent military authority, which have been separately defined in rule 2. If notice is not given one of the two authorities competent to exercise option may not have even knowledge of the fact that the accused person is being tried by the Magistrate. The object of notice, therefore, appears to be to place the matter on record of the army authorities to enable them to take a decision. It is only when the Magistrate is moved by the authority under rule 3(b) that such notice or knowledge is presumed and that must necessarily be so, take a case where the 'competent military authority' within rule 5 alone has notice of the accused person being tried by a Magistrate. That may deprive the commanding officer of an opportunity to give notice under rule 5 to the Magistrate to stay proceedings. If the Magistrate proceeds to frame a charge or make a commitment order without giving notice, the military authorities may still say 'time has not reached for us to exercise the option

as the Magistrate has given notice. By which forum should a person be tried is a matter of substance and not mere form and I am most disinclined to say that a forum can be settled in disregard of law. The entire set up and the procedure before a court-martial is different and the matter has to be judged not only from the point of view of the accused persons but also from that of the prosecution. Moreover, under rule 3 (a) a Magistrate is expected to record reasons which serve an additional purpose of helping the army authorities in taking a decision.

(12) From the above discussion what emerges is this that under the Army Act as well as the Rules the first option lies with the army authorities to decide the forum of trial. The Magistrate gets jurisdiction only after a decision in his favor by the Central Government in case of a conflict between the army authorities and the Magistrate. To my mind, it clearly appears that a Magistrate cannot assume jurisdiction straight away unless the army authorities have had an opportunity of deciding upon the forum. No doubt, the Magistrate can try again the accused person convicted or acquitted by the court martial but that too can be done with the previous sanction of the Central Government. If the Magistrate straightaway assumes jurisdiction and makes any order or does any act mentioned in sub-clauses (a) to (d) of clause (ii) of rule 4, the army authorities will be completely deprived of their right to decide the forum of trial under rule 5. Besides that, the accused person may consider that he has certain advantages in a trial before a court-martial. He has the benefit of being tried by his own kinsmen and the court-martial may award a lesser punishment. Another factor that cannot be lost sight of is that in case of a person on active service, the court-martial may have regard to the exigencies of the situation, such as, his immediate requirement on the war front. Having regard to these requirements, the court-martial, which is best conversant with the needs of the situation, may try him at the spot and award him a lesser punishment so that the services of the person subject to the Army Act may be utilised without detriment to the needs of the army. That must have been intended in the interest of the, national cause.

(13) In view of the above discussion my conclusion is that observance of the rules is obligatory and non-observance thereof will result in a illegality vitiating the trial.

I.D. Dua, C.J., S.K. Kapur and T.V.R. Tatacheri, JJ.

(14) In accordance with the majority judgment, it is held that violation of rules 3 and 4 of the Rules does not by itself deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and that the effect of the violation is to be determined on the facts and circumstances of each case keeping in view the nature of the violation and all other relevant factors. The case may now be finally disposed of by the Single Bench.

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