ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 04 of 2009

Tuesday this the 25th day of May, 2010

"Hon'ble Mr. Justice Janardan Sahai, Member (J)
Hon'nble Lt. Gen. P.R. Gangadharan, Member (A)"

Capt Vivek Anand Singh (SS-39666P of 16 Garhwal Rifles, C/o 99 APO attached with 32 Infantry Brigade, C/o 56 APO, aged about 33 years, son of Shri Yogendra Pratap Singh, Advocate, permanent resident of A-2 Pratap Bagh (Opposite new Hanuman Temple) Aliganj, Lucknow-226020, District Lucknow. ..... Applicant

By Legal Practitioner Shri P.N. Chaturvedi, Advocate.

Versus

1. Union of India, through the Secretary, Ministry of Defence, New Delhi.
2. General Officer Commanding-in-Chief, South Western Command, C/o 56 APO.
3. General Officer Commanding, 9 Infantry Division, C/o 56 APO.
4. General Court Martial (GCM), president by Col Rakesh Chetal, Commanding Officer, 9 Division Ordinance Unit, C/o 56 APO.
5. Commanding Officer, 16 Garhwal Rifles, C/o 99 APO. .....Respondents

By Legal Practitioner Shri Alok Mathur, Sr. Standing Counsel assisted by Shri R.K. Singh, Central Government Counsel

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1. The applicant Capt. Vivek Anand Singh was charged for offences under section 69 of the Army Act. First for committing a civil offence of selling of fire arm in contravention of section 25 (1) (a) of the Arms Act 1959 and second for being in possession of fire arm and ammunition contrary to Section 25 (1-B) (a) of the Arms Act 1959 in that on 09.04.2007 he was found in possession of a pistol (semi automatic), magazine (pistol) and some ammunition. A General Court Martial was convened against the applicant in which a special plea of jurisdiction was raised by him to the effect that certain special safe guards provided under the Arms Act to the accused were not observed and in view of the decision of the Supreme Court in Union of India Vs. L.D. Balam Singh Mil LJ 2002 SC, the General Court Martial has no jurisdiction. The General Court Martial accepted the special plea of jurisdiction by an order dated 14.10.2009 and adjourned the proceedings sine die. The convening authority then passed an order dated 28.11.2009 taking the view that LD Balam Singh's case which relates to the NDPS Act was not applicable to the case in hand. The Convening Authority also relied upon rules 41 and 42 of the Army Rules and was of the view that the Special plea of

jurisdiction ought to have been raised at that stage. The convening authority directed that another Court Martial be convened. The prayer made in this original application is to set aside the order dated 28.11.2009 passed by the Convening Authority, to remove the provisional ban imposed upon the applicant and issue the posting order commensurate with his rank and service, to pay compensation and to return of all the belongings and personal items which have been illegally confiscated. It is stated by the counsel for the respondents that a copy of the GCM proceedings have already been given to the applicant.

2. Before dealing with the controversy in issue in the present case, it is apt to refer to the above decision of the Apex Court in L.D. Balam Singh's case which was applied by the GCM and distinguished by the Convening Authority and has been heavily relied upon in the petition, in the written submission as also in the oral arguments advanced before us. L D Balam Singh's case was one under the NDPS Act and the question involved in the case was whether the mandatory safe guards regarding search and seizure provided under the NDPS Act are available to the persons tried under the Army Act. Section 42 of the NDPS Act confers power of entry, search, seizure and arrest upon certain officers etc. and provides that if such person has reason to believe that certain incriminating items are kept at a particular place he

may exercise the power in the manner regulated by that section. Section 50 provides the conditions under which search is conducted. The Apex Court held that persons who are subject to the Army Act do not lose their fundamental rights and the Special Safe Guards provided under an enactment would be applicable to persons who are tried under the Army Act. Reliance was placed in the L D Balam Singh's Case upon the previous decision of the Apex Court in State of Punjab Vs. Baldev Singh (1999) 6 SCC 172 in which it was held that it was the obligation of the empowered official to inform the suspect that he has a right to require his search being conducted in the presence of a gazetted officer or a Magistrate and non observance of the provision would make the search illegal because the suspect would not be able to avail the protection inbuilt in section 50.

3. We shall now consider whether the view taken by the Convening Authority that L.D. Balam Singh's case is not applicable is correct. Ld. Counsel for the applicant has submitted that under section 36 of the Arms Act a duty is cast upon a person who is aware of the commission of an offence to inform the police or the Magistrate. From this provision, it is sought to be contended that the Army Authorities do not have any jurisdiction to deal with the case but the matter has to be reported to the Police or the Magistrate. The language of section 36 indicates that it casts a

duty upon a person aware of the commission of an offence under the Act to inform the police or Magistrate. It is not meant to be a safeguard to the accused. No inference can be drawn from this provision that the Army authorities do not have the power to investigate or try an offence under the Arms Act. An offence under the Arms Act is a civil offence and is deemed an offence under the Army Act under Section 69 and can be investigated and tried under the Army Act.

4. Heavy reliance was placed by the applicant's counsel upon section 37 of the Arms Act which, deals with the subject of arrest and searches. Section 37 (a) of the Arms Act provides that arrests and searches would be carried out in accordance with the provisions of the Code of Criminal Procedure. Clause (b) of Section 37 provides that a person who is arrested and the arms seized under the Act would be delivered to the Officer – in – Charge of the Police Station, in a case where arrest and seizure has not been made by the Magistrate or the Police Officer. In view of section 37 a search and seizure under the Arms Act is regulated by the Code of Criminal Procedure.

5. For appreciation of what are the safe guards in the matter provided under the Code of Criminal Procedure the learned counsel for the applicant referred to us the provisions of the Code of Criminal Procedure relating to search and seizure. The relevant

provisions relating to search and seizure under the Cr.P.C. are Section 47 which relates to search of the place entered by person sought to be arrested by an officer making arrest under a warrant, Section 51, which provides for search of an arrested person by the officer making the arrest. Articles seized under this provision have to be placed under safe custody and a receipt has to be given to the person from whom the seizure has been made. Section 52 deals with the power to seize offensive weapons found on ~~are~~ about the person arrested. One of the safeguards in the matter of search and seizure under the Cr.P.C. is judicial intervention in that in ordinary circumstances the search is conducted under a warrant issued by a Magistrate. Sections 93, 94, 102 and 103 etc. deal with this subject. Section 93 provides the circumstances in which a search warrant may be issued. The circumstance envisaged in clause (a) is that the court has reason to believe that the person to whom a summons or order under section 91 or a requisition under Sub-section (1) of section 92 is issued would not produce the documents or thing as required ~~or~~ under clause (b) ~~if~~ it is not known in whose possession such documents or thing may be. Section 103 ~~gives the power to~~ the Magistrate to direct that search be made in his presence. It is clear from the provisions relating to the issuance of search warrant that the Magistrate may direct its issuance only in certain circumstances. The subject of search

warrants is therefore well regulated by law. Section 165 of the Code of Criminal Procedure deals with the power of a Police Officer to search without warrant. Under this provision a police officer may search if he has reasonable grounds for believing that any thing necessary for the purposes of any investigation into an offence may be found and it can not be obtained without undue delay. In such a case he may record the grounds of his belief and make a search.

6. The contention of the Ld. Counsel for the applicant was that there is no such power of search under the Army Act or the Rules. Shri Alok Mathur, Sr. Standing Counsel who appeared for the respondents, submitted that there are certain provisions under the Army Act and the Rules and Regulations whereunder the power of search has been conferred. He relied upon the provisions of Section 101 of the Army Act which empowers the Army Authorities to take into military custody a person subject to the Act, who is charged with an offence. This power clearly relates to arrest and in view of its plain language cannot be treated as conferring a power of search or seizure. Rule 177 of the Army Rules relied upon by the Senior Standing Counsel provides for a Court of Enquiry. The provision is as follows :

> *"177. Court of Inquiry. (1) A court of inquiry is an assembly of officers or junior commissioned officers*

or of officers and junior commissioned officers, warrant officers or non-commissioned officers, directed to collect evidence, and if so required to report with regard to any matter which may be referred to them.

(2) The court may consist of a Presiding Officer, who will either be an officer or a junior commissioned officer, and of one or more members. The Presiding Officer and members of court may belong to any Regt or Corps of the service according to the nature of the investigation.

(3) A count of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.

7. The submission of Shri Mathur is that power to collect evidence referred to in Sub Rule (1) of Rule 177 would also include the power of search and seizure. He also submits that the Army Act and the Rules provide for the procedure for investigation and trial of an offence and the power of search and seizure is covered under them. In particular reliance has been placed upon Rule 22 of the Army Rules which falls in the Chapter relating to investigation and trial of offences by Court Martial. We have gone through the provisions of Rule 22. In our opinion, there is nothing

in rule 22 which may seem to confer any power upon the Army Authorities either of search or of seizure. Shri Mathur also relied upon para 516 of the Regulations for the Army, 1987 which reads as follows :

> *"516 Presiding Officer : The officer assembling a court of inquiry, committee, in so that the objects for which they are assembled should not involve any point of discipline. They will follow, as far as may be convenient, the rules for courts of inquiry, but are in no way bound by them.*
>
> *(b) All proceedings of courts of inquiry, committees and boards for which special forms are not provided will be written on IAFD – 931.*

None of the provisions which have been relied upon by the Ld Counsel for the respondents confer any specific power of search or seizure. It is difficult to accept the contention of the Ld. Counsel for the respondents that the power of search and seizure is implied within the powers referred to above. The power of search and seizure though necessary for the purpose of security of the State is a very drastic power and has to be regulated by law.

8. The history of the executive's power of search and seizure reveals that the power is a conferment by law. Statutes

authorizing searches and seizures were enacted as early as the early 1300s in England. Statute 9 Edw III St II Ch 11 (1335) gave inn keepers in port passages right to search for and seize and share in profits from forfeiture of "false money imported." The oppressive general warrants that authorized the King's messengers to search for and seize the books and papers of any person suspected of the publication of offensive papers were declared "universally invalid except as specifically provided for by Act of Parliament." The usage since the Revolution of issuing these warrants, not based on any statutory authority was absolutely illegal..... None of the law officer's of the Crown defended the legality of the warrant in the course of the parliamentary debate" vide Nelson B Hasson: The History and Development of the Fourth Amendment to the US Constitution quoted by us from Criminal Law, search, seizure and the positive law : expectations of privacy outside the Fourth Amendment by Daniel B Yeager published in Vol 84 No.2. The Journal of Criminal Law and Criminology by Northwestern University School of Law, USA.

8. In Entick Vs. Carrington (1765) 2 Wilson, K. B 275 the question was is whether the Secretary of State had power to issue a warrant for directing a search of the plaintiff's house in respect of a libel. The warrant contains the recital "..... These are in His

Majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for John Entick, the author or one concerned in the writing of several weekly very seditions papers ..... which contain gross and scandalous reflections and invectives upon His Majesty's Government and upon both Houses of Parliament and him having found, you are to seize and apprehend and to bring together with his books and papers in safe custody before me to be examined concerning the premises and further dealt with according to law....."

9. In execution of the warrant the plaintiff's house was raided, locked desks and boxes opened and printed charts, pamphlets and like were seized. It was held that the warrant issued by the Secretary of State was not within the Stat 24 Geo 2. Entick's case has been considered in AIR 2005 SC 186. District Registrar and Collector, Hyderabad Vs. Canara Bank and the following passage is extracted therefrom

> *"In a landmark judgment in Entick V. Carrington: (1765)((19 Howells' State Trials 1029) (95 Eng Rep 807) Lord Camden declared the warrant and the behavior as subversive 'of all the comforts of society' and the issuance of a warrant fro the seizure of all of a person's papers and not those only alleged to be criminal in nature was 'contrary to the genius of the law of England. Besides its generasl*

character, the warrant was, according to the Court, bad inasmuch as it was not issued on a showing of probable cause and no record was required to be made of what had been seized."

10. In paras 19 to 22 of the judgment of the Apex Court in District Registrar and Collector, Hyderabad deal with the rule against unreasonable search and seizures provided by the Fourth Amendment in the US Constitution and contained in Article 17 of the International Covenant of Court and Political Rights (to which India is a party), the European Convention on Human Rights, the Canadian Charter of Rights and the New Zealand Bill of Rights.

11. In M.P Sharma and Ors Vs. Satish Chandra, District Magistrate, Delhi and others, AIR 1954 SC 300, the power of search and seizure under the Code of Criminal Procedure was challenged on the ground that it infringes the right of a person to hold property. It was held that a search by itself is not a restriction on the right to hold and enjoy property. But a seizure and carrying away of property is a temporary restriction on the right of possession and enjoyment of the property seized. However, the power of search and seizure is a power the State must possess for the security of the state but that power necessarily must be regulated by law. The Supreme court took note of the fact that the searches were under the authority of a Magistrate except in the

case of section 165 and were regulated by law. The Apex Court held that validity of the provisions could not be questioned on the ground of a restriction on fundamental rights as privacy was not one of the fundamental rights recognized by our Constitution unlike the fourth amendment of the US Constitution. In Kharak Singh Vs. State of U.P. AIR 1963 SC 125, the validity of Regulation 236(b) of the U P Police Regulations which provided for the domiciliary visits was challenged. The Supreme Court held that although privacy was not a fundamental right but regulation 236(b) was struck down as violative of Article 21. Much water has flown since the decision of the Apex Court in M.P. Sharma's case (supra). The right of privacy is now recognized as fundamental right by the Supreme Court and has been called out from the provisions of Article 19 and 21 of the Constitution. The law upon the point is now quite well settled. In PUCL Vs. Union of India 1997 1 SCC 301 it was held that right to transmit messages by telephone or conversation on telephone in privacy is a fundamental right. All the important cases upon the right of privacy as a fundamental right have been considered by the Apex Court in District Registrar Controller Vs. Canara Bank AIR 2005 SC 186. In that case the validity of Andhra Pradesh amendment in Section 73 of the Indian Stamp Act was challenged. Section 73 of the Principal Act casts an obligation upon every public officer having custody of registers, books,

records,, papers or proceedings the inspection whereof may tend to secure any duty or to prove or lead to the discovery of any fraud or omission in relation to any delay to permit any person authorized by the Collector to inspect the Registers, papers etc. at all reasonable times. The Andhra amendment permitted the inspection, seizure and impounding of the papers etc. in custody of private persons and of banking companies also. The Supreme Court has referred to in para 48, 49, 50 of its judgment to the provisions of search and seizure under the Cr.P.C. and Income Tax Act and the safeguards which they contain against unreasonable search and seizure and pointed out in para 51 that under these enactments there are several judgments explaining the scope of the provisions while upholding their validity and pointing out their limitations. Paras 54 and 55 of the decision of the Apex Court are quoted below.

> *"54. The A.P. amendment permits inspection being carried out by the Collector by having access to the documents which are in private custody i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents 'tending' to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable*

or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to R. Rajagopal's case wherein the learned Judges have held that the right to personal liberty also means the life free from encroachments unsustainable in law and such right flowing from Article 21 of the constitution.

55. In Smt. Maneka Gandhi v. Union of India & Anr., (1978) 1 SCC 248 – 1 7-Judges Bench decision, P.N. Bhagwati, J. (as His Lordship then was) held that the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status distinguishing as fundamental rights and give additional protection under Article 19 (Emphasis supplied). Any law interfering with personal liberty of a person must satisfy a triple test: (i) it must prescribe a procedure; (ii) the procedure must withstand the test of one or more of the fundamental rights conferred under Article 19 which may be applicable in a given situation; and (iii) it must also be liable to be tested with reference to Article 14. As the test propounded by Article 14 pervades Article 21 as well, the law and procedure authorizing interference with personal

liberty and right of privacy must also be right and just and fair and not arbitrary, fanciful or oppressive. If the procedure prescribed does not satisfy the requirement of Article 14 it would b e no procedure at all within the meaning of Article 21."

11. The Apex Court then went on to hold

"Under the garb of the power conferred by Section 73 the person authorized may go on rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility."

12. The Supreme Court upheld the decision of the High Court striking down the Andhra amendment as it conferred unguided power upon the stamp authorities. From the cases which we have referred to it appears that the power of search and seizure even if conferred must be regulated by law.

13. One of the contentions raised by Shri Alok Mathur is that the power under regulation 516 has been conferred upon high

authorities and it can not be presumed that the power would be misused and therefore the power of search and seizure may be implied therefrom. In our opinion, the contention has no merit. Firstly in our opinion no such power is implied in Regulation 516. Secondly, the vice lies in the conferment of absolute and unregulated power and the mere fact that the power has been conferred upon high authorities is not sufficient to uphold it. It is said that power corrupts and that absolute power corrupts absolutely. In Kharak Singh Vs State of UP AIR 1961 SC 125, the contention of the State was that domiciliary visits in the context of the Police Regulations merely meant that the presence of the person at his house was to be checked. The case of the respondents was they merely watch from outside. The contention was repelled by the Apex Court and it was held that the validity of the Regulation could not be tested on the basis how the power under it was being exercised. In the District Registrar, Hyderabad Vs Canara Bank case (supra) the power to search was conferred upon the Collector or a person authorized by him. The Supreme Court however struck down the Andhra Amendment after holding that unregulated power could be misused. The military is the strongest armed force of the State. No presumption can be drawn that military authorities would not misuse unregulated powers. Whenever the legislature have intended to confer power of search

and seizure upon the army authorities it has done so by specific provision. Under the Armed Forces Special Powers Act 1954, section 4 (d) provides for search in a disturbed area. Similar power of search and seizure have been conferred upon the Magistrate or upon the Police Officer under the Code of Criminal Procedure. Those provisions we have already referred to above. The power of search and seizure has also been conferred under other enactments like Customs Act and Income Tax Act etc. It is also to be noted that where ever such power of search and seizure are conferred, they are regulated by law. If the contention of Shri Alok Mathur that the power of search and seizure is impliedly conferred under para 516 of the Regulations for the Army is accepted, it would have to be accepted that the power is totally unregulated by law. This is a position which no civilized society can accept. In our opinion, the power of search and seizure has to be conferred and regulated by law. No such implied power can be read in the provisions referred to above. Moreover such power has to be regulated by law. For the reasons given, we are of the view that the Military authorities do not have the power of search and seizure under the Army Act, rules or Regulations while investigating a case.

14. We shall now examine the question whether the safeguards relating to search and seizure which are provided

under the Arms Act can be dispensed with. Shri Alok Mathur Senior Standing Counsel relying upon the provisions of section 69 of the Army Act contended that under that provision certain civil offences have been deemed to be offences under the Army Act the procedure for investigation and trial has to be regulated entirely by the provisions of the Army Act, Rules and Regulations. It is submitted that all that has been borrowed from the other criminal statutes is the fact that offences under those statutes are treated as offences under the Army Act. In support of his contentions reliance was placed by the Ld. Counsel upon Sewa Ram Nagiyal Vs. Union of India 1983 Cr. L.J. 1788. In our opinion, this contention also does not have any force. In L D Balam Singh's case (supra) the Supreme Court has held that the safeguards provided under the special statutes would be available to the persons subject to the Army Act also. Although the correctness of the decision of L D Balam Singh's case (supra) was questioned by Shri Mathur on the strength of a Constitution Bench decision on another point i.e. about the effect an illegal search or seizure would have upon the trial, he has not cited a single authority taking a different view upon the point that the safeguards under a special enactment would not ensure to the benefit of the Army Personnel.

15. In the pleadings and in the written submissions the petitioner has relied upon the decision in Union of India Vs. L D

Balam Singh (supra) in support of his case that the safeguards under the Arms Act have not been followed. In para 4.14 of the Original Application a reference has been made to the decision in L D Balam Singh's case and in the ground 5.2 and 5.3 also, reliance has been placed upon it. In para 5.3 of the Original Application which pertains to the grounds it is stated that in particular, the entire investigation had been done by Military Intelligence personnel or under their aegis by other officers whereas such investigations which included search and seizure of the alleged weapon could be done only by the Magistrate or Police Officer or by any other Officer empowered in this behalf by the Central Government. The statutory procedure and safeguards provided by the above provisions were not provided to the accused applicant and thus the investigation by the Military Intelligence personnel and by others was without jurisdiction null and void.

16. The entire tenor of the Original Application is based upon L D Balam Singh's case. In fact, it was this aspect that the safeguards under the special enactment (Arms Act) which the applicant had pressed before the GCM in his special plea relating to general jurisdiction of the Court Martial. From Annexure A 7 to the Second Compilation of the OA, it is clear that the applicant had relied upon before the GCM several other provisions of the Arms

Act in relation to the safeguards, namely section 22 etc. The GCM had allowed the plea under Army Rule 51 specifically with regard to the fact that all mandatory safeguards under the Arms Act which should have been followed were not followed. Reliance was placed upon L D Balam Singh's case. However, the GCM has not recorded any finding regarding non observance of any particular safeguard as a fact. The Convening Authority has taken the view that L D Balam Singh's case is not applicable to cases under the Arms Act. We have therefore considered the legal position on the issue and in our opinion the safeguards under the Arms Act are applicable to the army personnel and that the army authorities do not have the power of search and seizure under the Army Act, Rules and Regulations.

17. One of the grounds given by the convening authority in support of its finding is that recovery of an illegal weapon from the possession of the accused by an independent. Board of officers and its illegal sale are part of an incident and not an investigation. In the counter reply to the OA, it is stated in Para VI that a trap was laid and a decoy customer was set up who met the applicant and the applicant showed the weapon kept in a pouch in his briefcase, price was fixed and the applicant went to the car of the decoy customer and on a signal from him the Board of Officers took over control of the search operation and the weapon and ammunition

were recovered from the brief case of the applicant which he had opened before the Board of Officers. However, it is not quite clear in fact as to whether at all any search or seizure was made or the applicant had himself opened the briefcase. This would depend upon the evidence that may or may not have been adduced in the GCM.

18. Shri Mathur also submitted that even if the safeguards as to search and seizure provided under the Arms Act or the Cr.P.C. were not followed the trial would not be vitiated unless the accused is prejudiced. He relied upon the Constitution Bench of the Apex Court in Puranmal Vs. Director of Insp. 1974 (1) SCC 345 (AIR 1974 SC 348) which has taken the view that even though the search or seizure may be illegal, it would not vitiate the subsequent trial. That was a case under the Income Tax Act and the validity of certain provisions including that of Section 132(1) and (5) of the Income Tax Act was under challenge on the ground that these provisions are violative of the fundamental rights guaranteed by Articles 14, 19(i)(f)(g) and 31 of the Constitution. The Supreme Court upheld the validity of the provisions on the ground that the power to direct search was vested in the Director of Investigation, the authorization to search was required to be in favour of an officer not below the rank of ITO; the power can be exercised when the Director has reason to believe certain facts, and that detailed

rules setting out the procedure had been fraud. However, it was held that even if a search and seizure is illegal, the subsequent proceedings would not be vitiated. Reliance was placed by the Apex Court upon the case of Emperor Vs Allahadad Khan in which the S P and Sub – inspector made a search of the house of a person suspected of being in illicit possession of excisable articles. The search was made without warrant and certain excisable items were found as a result of the search. It was held that even though the search was illegal, the fact regarding recovery was admissible. The principle stated behind the view is that the question of admissibility of evidence found in the search is independent from the question of validity of the search and seizure. In para 24 of the report upon which Shri Mathur relied the Supreme Court observed that Courts in India have consistently refused to exclude relevant evidence merely on the ground that it is obtained by illegal search or seizure. The Apex Court has quoted the observations of Chief Justice Sir Lawrence Jenkins in Babendra Kumar Ghose Vs. Emperor and upon the Privy Council decision in Kuruma Vs. Queen. In Kuruma's case, the search made by two police officers was found to be illegal as they were not authorized, but it was held that the evidence regarding the ammunition being found could not be shut out on the ground that the search was illegal. The Apex Court held that even assuming the search and seizure were in

contravention of section 132 Income Tax Act, the material seized could be used by the Income Tax Authorities. The admissibility of evidence is governed by the Indian Evidence Act which makes the evidence admissible.

19. Ld. Counsel for the respondents also relied upon two other judgments in the case of State of Himachal Pradesh Vs. Prakash Chandra 1996 (1) SCC 28 and Khet Singh Vs. Union of India AIR 2002 SC 1450 and upon Major E G Barsay Vs. State of Bombay AIR 1961 SC 1762. That was a case under the Prevention of Corruption Act. The Proviso to Section 5(A) regulated the manner in which the searches are to be made and was thus a safeguard for the accused. The Apex Court held that even though the search may be illegal on account of non- compliance with the proviso to section 5(a) and the investigation would also be illegal, but the illegality would not affect the trial. Shri Mathur submitted that the decision of the Constitution Bench in Pooran Mal and that in Major Barsey's case are directly on the point and they have not been considered in L D Balam Singh's case and the view taken in these cases would prevail over L D Balam Singh's case as the decision in Pooran Mal is that of a Constitution Bench whereas L D Balam Singh was decided by two Judges. It is, however, conceded by Shri Mathur that if any prejudice is caused to the accused by the illegal search or seizure, the evidence can be excluded. It is not

necessary for us to go any further upon this issue at this stage. It is yet to be determined whether any search was at all made. Even the question of prejudice is one of fact. We are, therefore, not expressing any view upon this point at this stage, as to whether the trial is vitiated.

20. Another contention advanced by the Ld. Counsel for the petitioner was about the scope of rule 51 of the Army Rules in the context of sub rule (3) of rule 51 Army Rule 51 (3) reads as follows :

> *"51 (3) If the court allows the special plea, it shall record its decision, and the reasons for it, and report it to the convening authority and adjourn; such decision, shall not require any confirmation, and the convening authority shall either forthwith convene another court for the trial of the accused, or order the accused to be released."*

21. Ld. Counsel for the applicant submitted that after the GCM had allowed the special plea relating to the jurisdiction, it was incumbent upon the Convening Authority to forthwith convene another court martial for the trial of the accused or in the alternative to direct the accused to be released. The submission is that the convening authority did not forthwith convene another Court Martial. Rather the second option of releasing the accused

was adopted and in the circumstances, the order of the convening authority directing another court martial to be convened is wholly without jurisdiction. Emphasis is laid upon the fact that the order accepting the special plea relating to the general jurisdiction of the court is not subject to confirmation under the provisions of the Army Rules. From the fact as they have emerged from the record of the case it is apparent that the GCM accepted the Special Plea relating to general jurisdiction of the court relying upon L D Balam Singh's case on 14.10.2009 and the order impugned of the Convening Authority directing another court martial to be convened was passed on 28.11.2009. The question is whether in view of this time gap the convening of this Court Martial can be considered as having been done 'forthwith'. Ld. Counsel for the respondents placed reliance upon the case of Kesav Nilkanth Joglekar Vs. Commissioner of Police, AIR 1957 SC page 28. Ld. Judges referred to the decision in Beg Vs. The Justices of Worcester wherein the meaning of the word forthwith in section 50 of 6 Will, IV, was considered. Coleridge J observed as under :

> *"I agree that this word 'forthwith' is not to receive a strict construction like the word 'immediately',, so that whatever follows, must be done immediately after that which has been done before. By referring to section 50, it seems that whatever is to be done under it, ought to*

be done without any unreasonable delay. I think that the word 'forthwith' there used, must be considered as having that meaning."

22. We are also quoting another portion of that judgment relating to the decision in The Queen Vs. The Justice -3 of Berkshire (3),

"The question is substantially one of fact, it is impossible to lay down any bard and fast rule as to what is the meaning of the word 'immediately', in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression within a reasonable time', and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case".

23. The answer to the question as to whether the action of convening another court martial was taken forthwith or not within the meaning of rule 51 (3) would depend upon case to case. Ld. Counsel for the respondents submits that the convening authority need not be an expert in law and looking into the voluminous nature of the proceedings of the General Court Martial it was but natural for the Convening Authority to have taken some time in taking the decision in the matter. Looking into the nature of the

case and the technicality of the question it cannot be said that the decision was not taken by the convening authority within reasonable time. But even assuming that the decision was not taken forthwith, we would still have to consider the consequences in such a case the rule contemplates would follow and their effect. Rule 51 (3) provides that the convening authority should forthwith convene another Court Martial or release the applicant. If there is some delay in convening another Court Martial and the accused has consequently to be released, it does not mean that there a bar to convening another Court Martial. The words 'or order the accused to be released' do not in our opinion mean acquittal or a discharge. The Legislature is conscious about the expressions which it uses; for example, rule 22 of the Army Rules provides that if there is want of evidence, the Commanding Officer may dismiss the charge. The words 'acquittal' discharge dismissal of the charge have well known meanings. The rule making authority has not used these expressions in Rule 51(3). It does not appear that the release of the accused under Rule 51(3) means bar of trial. If it was intended that the subsequent court martial or trial is forbidden, express words to that effect would have been used such as 'acquittal' or 'bar of trial' etc. The grounds on which, the accused can plead that the subsequent trial is barred are given in Rule 53 of the Army Rules which includes plea of previous conviction or acquittal by a

criminal court or Court martial or if he has been dealt with summarily or the charge has been dismissed under Sub Rule(2) of Rule 22 or the offence has been pardoned or condoned. Release under Rule 51 is not a ground in bar of trial. The intention of the rule making authority in conferring the power upon the convening authority to order release of the accused is related to the delay on the part of convening authority in directing another Court Martial. The intention appears to be that the continuance in custody of the accused would be unreasonable as his special plea of jurisdiction has been accepted and delay in convening another Court martial is on the part of the convening authority. It is to be noted that Rule 51(3) is not the only provision in which the accused is to be released on ground of delay. Section 103 of the Army Act as also Rule 27 of the Army Rules contemplate submission of delay reports where a person is in Military custody for a period longer than eight days and such delay reports are to be continued to be given at intervals of eight days until the Court martial is assembled or the accused is released from custody. Sub Rule (2) of Rule 27 provides that on or after the 48th day of the accused being in custody, a copy of every delay report shall be sent to the Deputy Judge Advocate General. Sub Rule 3 provides that detention in military custody beyond two months without a Court martial being assembled shall require the sanction of the Chief of the Army Staff

who may extend the time up to three months and any detention beyond three months requires approval of the Central Government. From the nature of the provision it appears that there should not be unreasonable delay in ordering assembly of a Court martial where the accused is in military custody. If the delay is unreasonable the Chief of the Army Staff or the Central Government can refuse sanction and the accused would have to be released. There is nothing to indicate that if the accused is released on account of delay in the ordering of assembly of Court martial the trial would be barred. Rule 53(1), in our opinion, is in tune with section 103 and Rule 27 of the Army Rules. For these reasons we are of the view that the release envisaged in Rule 51(3) does not take away the jurisdiction of the convening authority to convene another Court Martial.

24. We shall now examine whether the contention of the Ld. Counsel for the petitioner that in this case the second option namely, releasing of the accused had in fact been exercised, has merit. In support of the contention, reliance was placed by Ld Counsel upon para 392(k) and 392(M) of the Regulations. Para 5.17 of the Original Application is as follows:

> *"Because the accused applicant has been released from close arrest which he was so placed in terms of Para 392(k) of the Regulations of 1987. He was later*

placed under open arrest and finally he was granted part of annual leave with effect from 24-11-2009 to 08-12-2009 at his home address. On expiry of the above leave applicant have been directed to report to HQ 32 Infantry Brigade "for Duty" it is a matter common military knowledge that open arrest and duty are not synonyms."

25. Ld. Counsel for the respondents on the other hand submitted that there is no material to indicate that the applicant was released by the convening authority and that even if any leave was granted by the Commanding Officer that would not be release within the meaning of Rule 51(3) of the Army Rules. It is pointed out that leave was granted to the petitioner on his own application for the purpose of his own marriage and that the petitioner can not take advantage of his own request. The release envisaged in Rule 51(3) as is clear from the wordings of the rule is release ordered by the Convening Authority. There is nothing to show that the convening authority had ordered release of the applicant. The mere grant of leave by the Commanding Officer on the request of the applicant for his marriage cannot be ~~taken up~~ accepted as a ground to question the jurisdiction of the convening authority to convene another Court Martial. Moreover even assuming the applicant was

released from custody such release we have already found above would not bar the convening of another trial.

26. Another submission made by the Ld. Counsel for the applicant is that after the order of the convening authority, the proceedings have to begin de novo from the stage of Rule 22. We may point out that what is before us is the validity of the order passed by the convening authority. The operative portion of the order of the convening authority reads as under :

> *"Keeping in view the entire circumstances of the case, I am of the considered opinion that this is a fit case to forthwith convene another Court for the trial of the accused and I direct accordingly."*

27. The convening authority has in fact repeated the words of the rule itself. It is, therefore, not necessary to express any opinion upon the point at this stage.

28. Ld. Counsel for the applicant submitted that the convening authority was under misconception in applying Rule 41 and 42 of the Army Rules which has no application in the case. Under Rule 41 the Court is required to satisfy itself that it is legally constituted. Under Rule 42 the Court is required to be satisfied that the charge is laid against a person subject to the Army Act and that the each charge discloses an offence under the Act. In our view,

to the root of the matter in that the objection was that the safeguards provided under the Arms Act have not been provided to the applicant and that the trial in such a case would be without jurisdiction. Such an objection goes to the root of the matter and could therefore be taken also at later stage.

29. In view of the discussion aforesaid, we are of the view that the order of the convening authority dated 28.11.2009 directing another court does not suffer from any illegality.

30. On the question as to whether any search or seizure was in fact made by the army authorities, we do not express any opinion and leave it open to be raised in the Court Martial.

31. Subject to what we have held above, the Original Application is dismissed. The interim order passed by us staying the Court Martial Proceedings is vacated.

(Lt. Gen. P.R. Gangadharan)
Member (A)

(Justice Janardan Sahai)
Member (J)