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ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 68 of 2010

Tuesday this the 05th day of October, 2010

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

Ex Lt Col Ranjodh Singh (SL-4092P)
Formerly Senior Records Officer, the JAT Regiment, Bareilly (Uttar Pradesh)
(Presently lodged in Bareilly Jail)
(Through Miss Poonam Singh-daughter)

.........Applicant

By Legal Practitioner Shri Lalit Kumar, Advocate.

Versus

1. Union of India
   through Secretary Ministry of Defence
   South Block, New Delhi.

2. The Chief of the Army Staff
   South Block
   Integrated Headquarters of Ministry of Defence (Army), New Delhi.

3. The General Officer Commanding-in-Chief, HQ Central Command, Lucknow (U.P.)

4. The General Officer Commanding
   HQ Uttar Bharat Area
   Bareilly (U.P.)

5. The Commandant
   The Kumaon Regimental Centre
   Ranikhet
   Distt : Almora (Uttarakhand)

......Respondents

By Legal Practitioner Shri Alok Mathur, Ld. Sr. Standing Counsel

Shri R.N. Singh, Ld. Sr. Standing Counsel

Connected with

O.A. No. 100 of 2010

Ex Lt Col Ranjodh Singh (SL-4092P)
Ex Senior Records Officer,
JAT Regimental Centre,
Bareilly (UP)

.........Applicant

By Legal Practitioner Shri Lalit Kumar, Advocate.

Versus

1. Union of India
through Secretary Ministry of Defence
New Delhi.

2. The Chief of the Army Staff
Integrated HQ of MOD (Army),
DHQ PO, New Delhi- 110011

3. General Officer Commanding-in-Chief,
HQ Central Command,
Lucknow (U.P.)

4. General Officer Commanding
HQ Uttar Bharat Area
Bareilly (U.P.)

5. PCDA (Officers)
Golibar Maidan
Pune-1 (Maharashtra)

......Respondents

By Legal Practitioner Shri Alok Mathur, Ld. Sr. Standing Counsel
Shri R.N. Singh, Ld. Sr. Standing Counsel

ORDER

"Hon'ble Mr. Justice Janardan Sahai"

1 These are two connected cases. The appellant Ranjodh Singh was tried by a General Court Martial (in short GCM) for three separate charges. The first charge Under Section 69 Army Act read with Section 120 B.IPC was that he had entered into criminal conspiracy with Havildar Satyaveer Singh for attempting to take illegal gratification from one

Manaram Choudhary. The second charge was under Section 69 of the Army Act read with Section 7 of the Prevention of Corruption Act, 1988 for attempting to obtain illegal gratification of Rs. One lakh for himself from Manaram Choudhary. The third charge was under Section 69 of the Army Act read with Section 7 of the Prevention of Corruption Act, 1988 for obtaining for himself illegal gratification of Rs. Fifteen thousand from Havildar Virendra Kumar. The Appellant was convicted by the GCM and was awarded sentence of five years RI and cashiering. The pre-confirmation petition filed by the appellant was rejected. The post-confirmation petition filed by the appellant was also rejected. The appellant then filed a writ petition No. 1111 of 2009 in the High Court of Uttaranchal, the records of which have been transferred to the Tribunal in view of the provisions of Section 34 of the Armed Forces Tribunal Act, 2007. This Transferred Application has since been converted into an appeal.

2 It appears that one of the grounds taken by the appellant in the writ petition was that the GCM was not legally constituted, in that out of five members constituting the Court, two of them were holding the rank of Major whereas the substantive rank of the appellant was that of Lt. Col. and, therefore, the constitution of the GCM was against the provisions of Rule 40 of the Army Rules which provides that no member shall be of a rank lower than that of the accused. In the Writ Petition reliance was placed by the appellant upon the Gazette Notification dated 23-29 September, 2006 by which he was promoted to the rank of Lt. Col. During the pendency of this case, the impugned Gazette Notification dated 12-19 September, 2009 was published by which the entry in the earlier gazette relating to the promotion

of the appellant was annulled. The appellant has filed Original Application No. 100 of 2010 challenging the cancellation of his promotion. The validity of the order cancelling the promotion of the appellant relates to the substantive rank of the appellant which is also one of the questions involved in the Appeal and, therefore, we have heard the two cases together.

3 We have heard Shri Lalit Kumar, Ld. Counsel for the appellant and S/Shri Alok Mathur and R.N. Singh, Ld. Sr. Standing Counsel on behalf of the respondents.

4 In OA 100 of 2010, which we shall first deal with the appellant claims that he was promoted to the substantive rank of Lt. Col. by gazette notification dated 23-29.09.2006 and he was also being paid salary of the rank of a Lt. Col. In support of these facts, the appellant has filed a copy of the gazette notification dated 23-29.09.2006 and the salary statement for the month of December, 2008 in which his rank is shown as Lt. Col. During the course of the proceedings before the Tribunal, the appellant has also filed as additional evidence, a copy of the salary bill for the month of August, 2006, in which too he is being shown as Lt.Col. By this salary bill the arrears of salary from 17.04.2006 were also paid to him. According to the applicant, there was no infirmity in his promotion and in any case he was entitled to an opportunity of hearing before cancellation of his promotion. In the counter affidavit filed in the OA the respondents have alleged that the promotion of the appellant was not in accordance with the Army Order 8 of 2005 as the appellant was under suspension with effect from 19.02.2006 and also under a Discipline and Vigilance Ban from 25.05.2006. The learned counsel for the respondents would submit that the promotion itself was

against the rules and no opportunity of hearing was required to be given before its cancellation. It is however not in dispute that no opportunity of hearing was afforded to the appellant, a fact which is also borne out from the original record relating to the cancellation of the promotion of the appellant produced before us.

5 In order to appreciate the rival submissions made by the learned counsel for the parties, we may refer to the Army Order 8/2005. Para 3 of the Appendix of this Army Order contains the eligibility conditions on which the substantive promotion to the rank of Lt. Col. is to be granted. Out of the clauses (a) to (h) of para 3 which lay down different conditions required to be fulfilled the only condition which appears to be relevant for this case is the condition mentioned in clause (e) of para 3. Para 3 reads as follows:

> *"3. A Major will be eligible to be promoted to the substantive rank of Lt. Col. Provided he/she fulfils the following conditions :*
>
> *a. His/her Gazzette Notification of substantive Major has been published.*
>
> *b. He/she completed prescribed length of reckonable commissioned service for promotion to the rank of substantive Lt. Col.*
>
> *c. He/she has passed promotion examinations Part 'B' and Part 'D' in accordance with the provisions of SAI 1/S/85, as amended.*
>
> *d. His/her overall assessment in UACs is B (minus) or higher and/or he/she has been recommended for promotion in ACRs and has not been granted below average in his/her ACRs."*
>
> *e. He/she is not under a disciplinary ban and there is no disciplinary case pending against the officer.*

f. *Any punishment awarded to the officer has been taken into account.*

g. *The officer is not on an Adverse or Review Report*

h. *The Officer has rendered full pay service*

6 It is no doubt true that the appellant was placed under suspension from 19.02.2006 but nothing has been brought to our notice to indicate that the DV Ban referred to in clause (e) of para 3 of the Army Order becomes applicable from the date of suspension or that a disciplinary case would be deemed to be pending from that date. In Union of India Vs. K V Janakiraman AIR 1991 SC it has been held that a disciplinary case begins from the date of issuance of the charge sheet. It is not in dispute that the DV Ban was imposed upon the appellant from 25.05.2006 whereas he was due for promotion earlier after completing 13 years of service which was on 17.04.2006. Learned counsel for the appellant has placed before us a decision of the Delhi High Court in Nb Ris Balwan Singh V. Union of India 2002 FLJ 210 that the right of an Army Officer to be considered for promotion is a fundamental right and cannot be ignored by the Army authorities. From the original file relating to the cancellation of the gazette notification, which has been placed before us, we find a letter dated 23.05.08 of Jaswant Singh, Jt. Director, to MS 8C, which states that the DV Ban was imposed upon the appellant on 25th May, 2006

and not on 25th May, 2005 and that the officer was due for promotion and was promoted correctly. No doubt, the same officer, in a letter subsequently sent, has recommended cancellation of the promotion on the ground that the officer was under suspension but as already observed no Army Order or provision has been placed before us that the DV Ban or the disciplinary case would be deemed to have begun from the date of suspension. In the circumstances, it appears to us that even if there was doubt about the status of the promotion of the petitioner the petitioner ought to have been given an opportunity of hearing.

7 Shri Mathur, would however, submit that neither the gazette notification by itself nor the payment of salary nor the two together would result in promotion of the officer unless permission is given by the Commanding Officer to him to wear the badges of the higher rank and a Part II Order is published. In support of this contention, reliance has been placed by the respondents upon the same Army Order No.8/2005. Para-3 of this Army Order, which deals with this aspect of the matter is as follows :

"On grant of permission to wear the badges of rank, the officer would be deemed to have been granted the substantive rank, ni despite the fact that the notification notifying his/her substantive rank has not yet been published in the Gazette. The benefit of pay and allowances of the rank, however, will accrue to the officer on publication of the Gazette."

8 We shall now examine the scope of the Army Order in the light of the statutory provision of section 142(2) of the Army Act, which reads as under:

> *"142……. (2) An Army, Navy or Air Force List of Gazette purporting to be published by authority shall be evidence of the status and rank of the officers junior commissioned officers or warrant officers therein mentioned and of any appointment held by them and of the corps, battalion or arm or branch of the services to which they belong."*

9 The provision is quite clear in laying down that the gazette notification is the evidence of the rank and status of the officer. In case we accept the interpretation of the learned counsel for the respondents that it is after completion of all the formalities of publication of the gazette notification, the grant by the Commanding Officer of the permission to wear the badges of the higher rank and publication of the Part II Order that the officer would be considered to have been promoted, Section 142 (2) of the Army Act which provides that the gazette notification is the evidence of the rank and status of the officer would be redundant. If the permission to grant badges of rank and publication of the Part II Order were necessary steps in the promotion process to make the promotion complete, Section 142 (2) would have been worded differently so as to provide that the gazette notification together with the permission of the Commanding Officer to wear the badges of rank and the Part II Order would be evidence of the rank and status of the officer. This interpretation is fortified by clause (a) of para 3 of the Army Order 8/2005 itself which requires publication of the

gazette notification of the substantive rank of Major and not of the Part II order or of grant of permission to wear badges of rank as of Major as fulfillment of the eligibility condition that the officer due for promotion is of the rank of Major. It cannot be denied that the Army Order would have to yield to a legislative provision in case of an inconsistency. Moreover, it is to be noted that the gazette notification is issued under the orders of the President of India whereas the Army Order refers to permission to wear the badges of rank, which is given by the Commanding Officer. The publication of the Part II Order, appears to be no more than a clerical act. To save the Army Order it is necessary to read it as its language suggests that it applies when an officer's promotion becomes due and no gazette notification has been published. The Commanding Officer then may allow the officer to wear the badges of higher rank if the conditions mentioned in the Army Order are satisfied. The Army Order itself provides that salary of the higher rank would be payable only after the Gazette Notification. We are thus of the view that the gazette notification which has been filed in this petition is the evidence of the rank and status of the petitioner. The petitioner was also being paid salary of the rank of Lt. Col and on these facts it cannot be denied that he was defacto and dejure a Lt. Col. That apart, for the purpose of considering whether the petitioner was entitled to be afforded opportunity of hearing, what has to be seen is whether the order impugned has civil consequences. It has been held by the Supreme Court in State of Orissa Vs. Dr. Binapani Dei AIR 1967 SC 1269 that if an administrative order entails civil consequences, the person affected would be entitled to a hearing. With this decision, the doctrine of natural justice which hitherto

was confined in its application to quasi judicial orders was released free to extend its reach to administrative orders having 'civil consequences', a term which covers under its wide umbrella infractions not merely of personal or property rights but of civil liabilities, material deprivations, reputation and everything that affects a citizen in his civil life. Within a few years of Dr. Binapani Dei, the Supreme Court again broke new ground in A K Kraipak Vs. Union of India AIR 1970 SC 150 virtually obliterating for the purposes of application of the doctrine of natural justice, the distinction between administrative and quasi judicial orders and contributing to the development of the test of fairness for examining the validity of these orders. Now it cannot be disputed that the cancellation of promotion affects the salary and status of the applicant and it appears to us quite plain that such an order entails civil consequences. The applicant therefore was entitled to an opportunity of hearing as a part of the fairness rule. In Union of India Vs. Narendra Singh 2008 (2) SCC 750 a case relating to a reversion consequent to cancellation of promotion, the Supreme Court observed in para 34 as follows :

> *"34. True it is that before such an action is taken and a person is actually reverted, he must be given an opportunity to show cause why the proposed action should not be taken. He may be able to satisfy the authorities that there was no such mistake. But even otherwise, principles of natural justice and fair play require giving of such opportunity to him."*

10 The rule that an order entailing civil consequences must be passed after opportunity of hearing is subject to two exceptions namely

one : where giving of opportunity would be a futile exercise the illegality in the order in question being patent from indisputable facts. In such cases the person affected could never have been prejudiced by not being given an opportunity of hearing. There is a second class of cases where the order challenged is passed after giving opportunity but where some facet of the opportunity rule has not been observed, as for example not giving a copy of the enquiry report in a disciplinary enquiry. In such cases it has been held that actual prejudice has to be shown. The cases of Aligarh Muslim University Vs. Mansoor Ali Khan AIR 2000 SC 2783, Raj Kumar Soni and another Vs. State of U.P. 2007 (3) AWC 2657 and Mata Prasad Verma Vs. U.P.S.R.T.C. 2005 (2) UPLBEC 1145, cited by the respondents are cases which come under the first exception whereas Union of India Vs Bishambhar Das Bagla 2009 (4) AWC 3726 (SC) comes under the second exception. The decision in Ran Vijai Singh Chauhan Vs. Joint Director, Education 2001 (1) AWC 744 is based on a different principle that the High Court will not interfere in its jurisdiction under Article 226 with an illegal order if the effect of setting it aside would be to restore another equally illegal order.

11 In the facts of this case we are of the view that the cancellation of the entry relating to promotion of the petitioner without affording him opportunity of hearing was vitiated and, therefore, this Original Application deserves to be allowed.

12 We shall now advert to the Appeal and examine the other contentions, which have been advanced by Sri Lalit Kumar to challenge the GCM proceedings. He would submit that the appellant was not given proper

opportunity of defending himself and that the court martial was not legally constituted and that he was not allowed to lead defence evidence and, therefore, the trial was not fair. We shall consider each of the submissions in the order they have been advanced.

13 Learned counsel for the appellant has placed before us several facets of the point that the appellant was not provided proper opportunity to defend himself in the GCM. One of the facets of the submission is that the appellant was neither given a suitable defending officer of his choice nor provided opportunity to engage a civil counsel. Rule 95 (2) Army Rules provides that if the accused desires, the Convening Authority Officer shall use his best endeavours to ensure that the accused shall be to represented by a suitable officer." The Convening Authority had required of the appellant to suggest the name of a defending officer of his choice and in response the appellant had given the name of one Lt. Col. Sanjay Sitanshu who had also conveyed his willingness to represent him. The Convening Authority, however, by its signal dated 10.06.2008 informed the unit to which the appellant was attached that the services of Lt.Col.Sanjay Sitanshu as defending officer would not be available to the appellant, as the said officer was under orders of posting and the appellant may be asked to suggest the name of any other defending officer and to communicate it by 11th June, 2008 and that in the meanwhile services of Lt. Col. Iqbal Aslam as a defending officer were being made available to him and the appellant was requested to express his willingness to accept him. According to the appellant the convening authority had not used its best endeavours to make available the services of Lt. Col. Sathanshu and that a single days time

granted in the signal of the convening authority dated 10.06.2008 to name another defending officer was too short and that Lt. Col. Iqbal Aslam who was detailed as the defending officer by the convening authority on its own was not a suitable defending officer. We may here observe that grant of one day's time to the appellant to communicate the name of another defending officer was too short and unreasonable considering the appellant would have had to obtain consent of the officer.

14 Sri Alok Mathur, learned counsel for the respondents, would submit that the contention of the appellant is baseless and that there are several documents on the record of the GCM proceedings to rebut the contention. After the signal dated 10.06.2008, referred to above, the Convening Authority wrote to the appellant a letter dated 11.06.2008 intimating him that owing to the exigencies of Military service, the services of Lt. Col. Sanjay Sathanshu were not available and the appellant may give his consent regarding Lt.Col.Iqbal Aslam before 13.06.2008. This letter is Ext.6 on the record of the GCM proceedings. A letter dated 15.06.2008 (Ext.7) from 509 Base Workshop was also filed in the GCM proceedings intimating that Lt.Col.Sanjay Sathanshu is not available, as he was being posted in an operational area and is required to join his new posting by 28.06.2008. Sri Alok Mathur has painstakingly taken us through the proceedings of the GCM from the date they commenced, namely, 17th June, 2008, and some of the subsequent dates which were fixed thereafter, namely, 20.06.2008, 02.07.2008, 03.07.2008 and 01.08.2008. The proceedings of these dates are replete with offers made by the Court to the appellant that he may name another defending officer of his choice or engage a civil counsel and take adjournment for that purpose. The

contention of the learned counsel for the respondent that the GCM had on almost each of these dates repeatedly offered the appellant to take an adjournment and on 02.07.2008 had also offered that the appellant may apply for recall of the witnesses in accordance with the prescribed procedure is well founded and is borne out from the record of the GCM Proceedings but to appreciate the issue whether the convening officer had used his best endeavours to provide a suitable defending officer of the appellant's choice and whether Lt. Col. Iqbal Aslam provided by him was a suitable defending officer and whether the adjournment offered by the court were in consonance with the Rules, it is necessary for us to analyze the trail of events from 10.06.2008 onwards. In the signal dated 10.06.2008 of the convening authority and its letter dated 11.06.2008 to the appellant and in the letter dated 15.06.2008 of 509 Base Workshop, the reason for not providing Lt. Col. Sathanshu as a defending officer of the appellant was stated to be military exigency on account of his new posting in an operational area. On 17.06.2008 the date of commencement of the GCM, the appellant pointed out to the court that this ground was not tenable. His contention before the court was that the posting of an officer is not a military exigency and, therefore, the respondents have illegally turned down his request. It was also pointed out that no request had been made by the Army authorities from 14 Corps the new unit of Lt.Col.Sanjay Sathanshu,. We find from the record of the proceedings of the GCM that after 17.06.2008, the GCM had fixed 20.06.2008, 01.07.2008, 02.07.2008 and 03.07.2008 etc. but it was not until July, 3, 2008 that the court had asked the prosecutor to make a request through the Convening Authority to the new unit of Lt.Col.Sanjay

Sathanshu. The record of the proceedings dated 01.08.2008 indicates that a signal had been received from the new unit that Lt. Col. Sanjay Sathanshu had been detailed as a defending officer of one Nk. Sanjeev Sharma in another GCM and he would not be available for the appellant till his assignment was over. What appears from these facts is that the reason given out by the respondents that Lt.Col.Sanjay Sathanshu could not be spared on account of Military exigencies was a lame excuse and is belied by the fact that his services were made available in another GCM. It thus appears that the best endeavours which the convening authority is required to make under Rule 95 of the Army Rules for providing a suitable defending officer were not made by the convening authority. Moreover, it also appears to us that the court delayed making the enquiry about the availability of Lt. Col. Sathanshu from his new unit and instead of making the request on 17.06.2008 the first date of the proceedings when objection was taken by the appellant 'the court' decided at that stage (vide GCM proceedings dated 17.06.2008 and 20.06.2008) to treat the matter as closed and it was only on 03.07.2008 after six PW's had already been examined that the court had second thoughts and asked the prosecutor to write to the convening authority to find out from his new unit whether Lt. Col. Sathanshu could be made available. But by the time the request was conveyed it must have been too late as the officer had been detailed in another Court Martial.

15. The contention of Sri Alok Mathur, learned Sr.Standing Counsel, is that the only right which the rule gives is that the accused can make a request for being provided a suitable defending officer and he has no right to choose his own defending officer and even if he does express a

choice, the Army authorities are not bound by it. No doubt, the statute envisages providing a 'suitable defending officer' but the word 'suitable' would in the context mean suitable for the purpose of the job with which the defending officer is entrusted and not any defending officer. It is on the record of the GCM proceedings that Lt.Col.Iqbal Aslam was not qualified. On the other hand the convening authority had appointed a practicing lawyer for the prosecution. We also find that the convening authority itself had given the appellant the liberty to choose a defending officer. Once having given this liberty, the respondents cannot be heard to say that the choice is altogether irrelevant and that the convening authority was not required to use its best endeavours to make available the officer of the appellant's choice.

16. At this stage, we may also consider whether the defending officer Lt.Col.Iqbal Aslam,whose services were provided to the appellant was a suitable defending officer. Sri Mathur would contend that there is no provision for providing a qualified defending officer and that the appellant had agreed to avail the services of Lt.Col.Iqbal Aslam and he placed before us the proceedings of the GCM dated 02.07.2008 which records the statement of Lt.Col.Iqbal Aslam that henceforth he would exercise the right of audience on behalf of the appellant and the appellant, it is also recorded, had confirmed this fact. We also have it from the records of the proceedings of that date that Lt.Col.Iqbal Aslam pointed out to the court that the appellant was legally not competent to cross-examine the witnesses and, for that reason the witnesses could not be cross examined and, therefore, he may be provided a defending officer of his choice. In case Lt.Col.Iqbal Aslam

was competent to cross-examine the witnesses, we do not find any reason as to why after having made this statement, he neither did make any request to the court that he was ready to cross-examine the witnesses nor did he make a request for recall of the witnesses for the purposes of cross examination. He rather requested the court that the appellant may be provided with the services of a defending officer of his choice. It is noteworthy that most of the material witnesses were not cross examined. From these facts it appears that Lt. Col. Iqbal Aslam was not a suitable defending officer particularly in view of the fact that appellant was being tried for offences under Section 69 Army Act read with Sec. 120 BIPC or section 7 Prevention of Corruption Act and the evidence also consisted of trap witnesses to cross examine whom some skill and technical knowledge of law and procedure is required. The prosecution was represented by a practicing lawyer. The match was quite unequal.

17. We also find from the records of the GCM proceedings dated 20.06.2008 that the appellant had made violent request for providing Lt.Col.Sanjay Sathanshu as his defending officer and had even tried to run away from the court and was brought back by the guards. Whether this act of frenzy was a result of the desperation of the appellant in watching his defence being frustrated as the Authorities had turned down his request for a defending officer of his choice without even ascertaining his availability from the appropriate quarters or was the out come of some other reason it is difficult for us to perceive at this distant point of time, far removed from the scene where the court martial was being conducted but what we can

clearly see is that this was certainly not the serene atmosphere in which a trial is expected to go on.

18. While dealing with the question as to whether the appellant was granted sufficient opportunity to name a defending officer of his choice, we shall consider also the related issue whether the appellant was given sufficient opportunity to engage a civil lawyer. On the first date of the GCM proceedings i.e. 17.06.2008 when the trial commenced, the prosecution was found to be represented by Mrs. Ish Singh a practising lawyer. Learned counsel for the appellant placed before us the provisions of Rule 97(2) of the Army Rules which reads as under :

> *"97 (2)...... If the convening officer so directs, counsel may appear on behalf of the the prosecutor, but in that case, unless the notice referred to in sub-rule (1) has been given by the accused, notice of the direction for counsel to appear shall be given to the accused at such time (not in any case less than seven days) before the trial, as would, in the opinion of the court, have enabled the accused to obtain counsel to assist him at the trial."*

But in this case no notice was at all given. We also find that on the very first day of the commencement of the GCM i.e. 17.06.2008 the appellant brought to the notice of the Court that his request for return of Savings Certificates in connection with arranging a civil counsel has been turned down by the Army authorities.

As regards the opportunity said to have been provided to the appellant when the question of making available Lt. Col. Sathanshu was

raised before the GCM on 20.06.2008, , the GCM ruled vide its decision of the same date that the appellant could take two days adjournment for the purpose of giving the name of any other defending officer or engaging a civil counsel. Rule 97 (2) however provides a minimum notice of seven days to the accused to enable him to engage a counsel. We also find that although in the later part of the proceedings of that date, the GCM advised the appellant to take an adjournment but it is obvious in view of the ruling given by the GCM that the adjournment being referred to was of two days which is much less than that provided under Rule 97 of the Army Rules.

19. We shall now examine whether Rule 97(2) is mandatory. Sri Alok Mathur would submit that the provision is directory because its non observance is not coupled by a penalty. The rule however employs negative words "in no case less than 7 days" in reference to the period of notice. In our opinion such a provision would be mandatory. In Crawford's Statutory Construction the point has been dealt with as follows : *"Prohibitive or negative words can rarely if ever be directory. And this is so even though the statute provides no penalty for disobedience"*. The determination whether a statute is mandatory or directory would also depend upon the nature of the right the statute intends to protect. We shall therefore refer to the position of Rule 97 in the scheme of the Army Rules. It appears that this Rule is a part of the mechanism of the statute to provide a fair hearing to the accused. Rule 33 of the Army Rules provides that at the time of service of the charge sheet the accused will be explained his rights as to preparing his defence and he shall be asked to state whether he wishes the convening

authority to assign an officer to defend him at the trial if a suitable officer should be available.

Rule 34 of the Army Rules which bears the heading 'Warning of accused for trial' also contains provisions whereunder the accused is required to be informed of the charges for which he is to be tried and for procuring the attendance of defence witnesses and about the names and ranks of the members who are to form the court.

20. Rule 33 and 34 ensure that opportunity is given to the accused to prepare his defence before the trial. Rules 95,96 and 97 of the Army Rules are a continuation of the scheme and are intended to protect the accused from suffering for want of legal assistance in the trial. All these rules are meant to ensure that the accused has a fair trial and effective hearing. Rule 33(7) and Rule 34 have been held to be mandatory, the former by a Division Bench of the Allahabad High Court in Chief of Army Staff Vs. Ex. Sep Dvr M Z Khan Mil LJ 2006 (All) 152 following Ram Pravesh Rai Vs. Union of India 1988 UPLBEC 783 and Rule 34 by the Apex Court in Union of India Vs. Anil Kumar Pandey Mil LJ 2009 SC 117. The Supreme Court has held that if the interval of not less than 96 hours between service of charge sheet and commencement of trial is not given, the trial would be vitiated. It is noteworthy that in Anil Kumar's case the accused had pleaded guilty and despite that plea the Apex Court held that negative words having been used in Rule 34 the Rule was mandatory and its non compliance would be fatal irrespective of any prejudice caused to the accused. The distinction between the effect of a mandatory provision and a directory provision has been drawn by the Privy Counsel in Punjab Coop. Bank Vs. CIT AIR 1940 PC 230. Their Lordships have laid down that whereas a mandatory

provision is to be complied with strictly in letter and spirit, a directory provision would be complied with sufficiently if there is substantial compliance. The non observance of a directory provision is not fatal unless prejudice is proved but breach of a mandatory provision would be fatal. Rule 97 employs negative words and is one of the provisions which in the scheme of the Rules is enacted to ensure fair opportunity to the accused in the trial. It is therefore mandatory. Learned counsel for the respondents relied upon the decision of the Delhi High Court in Satyapal Sud Ex Brigadier Vs. Union of India 2003 (3) SLJ 450 in which the contention that the trial was vitiated for non compliance of Rule 97 was repelled. However it does not appear that any contention was advanced there that the rule was mandatory nor has the Delhi High Court given any decision upon the point whether the Rule is Mandatory. The decision therefore is not of much help to us on the point we are called upon to decide.

21. We shall now refer to the rulings cited by the Respondents counsel on the point that the conviction by a Court Martial cannot be set aside on the ground that a defending officer or counsel was not provided namely Bhuneshwar Singh V. Union of India (1993) 4 SCC 327, Union of India V. Ex. Flt. Lt. G.S. Bajwa 2003 (9) SCC 630 and Union of India V. Maj. A Hussain 1998(1) SCC 537. These cases were decided on their own facts. In none of these cases was the prosecution represented by a practising Advocate and there was thus no breach of the Mandatory provisions of Rule 97 (2). In Bhuneshwar Singh's case the accused was provided with a list of available Defending Officers to chose from and the accused had agreed to have one of them as his Defending Officer, and had expressed no objection to his

name; the Defending Officer provided had cross examined the witnesses. No prejudice had thus been caused to the accused. In Maj. A Hussain the accused was allowed services of a civilian counsel and a special advance of Rs. 10,000/- was given to him; cross examination of the material witnesses had been deferred ; it was found that the accused had not been hampered by paucity of funds and that the Respondents had offered the choice of three officers two of whom were qualified. The case of Flt. Lt. G.S. Bajwa is on a different issue. The High Court had quashed the conviction made by the Court Martial on the ground that under Article 21 the accused was entitled to be provided the services of an Advocate which was not done. No breach of any provision of the Air Force Act or Army Act or Rules was found. The Supreme Court set aside the High Court's decision on the ground that the Air Force Rules could not be held to be ultra vires Art. 21 in view of the provisions of Article 33 of the Constitution.

22. We shall now deal with the contention of the learned counsel for the appellant that the GCM was not properly constituted. From the convening order dated 10.06.08 it is clear that a Court of five members with five waiting members was constituted. Out of the five members constituting the court, two were of the rank of Major while the appellant was a Lt. Colonel and in this situation Rule 40 (2) of the Army Rules is attracted. The rule reads as follows:

> *"40. ..... (2) The members of a court-martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening officer, officers of such rank are not (having due regard to the exigencies of the public*

service) available. Such opinion shall be recorded in the convening order."

23. On this point, the contention of Sri Mathur is that the gazette notification dated 23-29-9-2006 was never produced before the GCM and the presumption envisaged under section 142 of the Army Act that the gazette is evidence of the rank and status of an officer was not attracted. In para 44 and 45 of the petition however it has been asserted by the petitioner that at the stage of raising the special plea of general jurisdiction of the Court under Army Rule 51 the appellant had placed the gazette notification before the court and had also relied upon section 142 of the Army Act. Although in para 20 of the Counter Affidavit which is a reply to paragraphs 44 and 45 there is no denial of the averment but the fact has been denied in para 18 of the counter affidavit. As the pleadings have to be read as a whole it cannot be said as the appellant's counsel would contend that there is an admission of the Respondents on that point.. The matter, therefore, cannot be decided merely on the basis of the pleadings of the parties and it is necessary for us now to refer to the GCM proceedings. It is noteworthy that no where in the proceedings of the GCM has it been recorded that the gazette was produced before the court. The proceedings of the GCM are open to inspection by the parties and we find that the court had permitted the parties to inspect the proceedings. Moreover, the appellant had towards the end of the case given an exhaustive written statement referring to the various illegalities committed in the proceedings but we do not find anything in the written statement to indicate that he had produced before the Court Martial the gazette notification. In the circumstances, we are of the view that the

appellant has not been able to establish that the gazette notification was produced before the Court Martial. But that is not the end of the matter. The gazette notification undoubtedly has been produced in the writ petition, which has been transferred to the Tribunal and which has since been converted into an appeal and the gazette notification is also a part of the Original Application No.100 of 2010, which has been heard with this case. An appeal is a continuation of the proceedings and the gazette notification can therefore be taken notice of in the appeal but for the moment we will leave this question here to revert to it later in this order.

24. Sri Alok Mathur would however submit that the appellant had waived the objections relating to the illegality of the composition of the court. It is pointed out that under section 130 of the Army Act, read with rule 44 which deals with challenges, it was the duty of the appellant to have raised at that stage the question regarding ineligibility or disqualification of the two Members of the Court Martial, who were of the rank of Major but when the names of the members were read out and the question as to whether the appellant has any objection was put to him, he answered in the negative. The submission of Sri Lalit Kumar upon this point is that in fact the Court Martial has skipped the procedure of section 130 read with Rule 44 of the Army Rules and in fact the appellant was not given any opportunity to raise the challenge. In support of this contention learned counsel for the appellant relied upon para 3 of the counter affidavit filed in the writ petition in which it has been stated that the procedure of section 130 of the Army Act had been complied with on 10.06.2006. Shri Lalit Kumar also relied upon the objection raised by the appellant in this regard in his

application dated 27.06.2008 to the Chief of Army Staff. The GCM was convened by an order dated 10.06.2008 of the convening authority for 17.06.2008 and it is difficult for us to believe that the members had met on 10.06.2008 itself. There is no averment in the petition that the members of the court had assembled on 10.6.08. Moreover, there is no reason for us to disbelieve the record of the GCM proceedings dated 17.06.2008 which indicates that the procedure under section 130 was followed on that date. It is not the appellant's case that the proceedings of the GCM have been forged. In the absence of such averment, it is difficult for us to accept the contention of the learned counsel for the appellant that the procedure under section 130 was not followed. It rather appears as the Respondent's counsel contends that the date 10.06.2008 in para 3 of the Counter Affidavit is an inadvertent mistake for the date 17.06.2008.

25. We may at this stage take up the issue whether the objection relating to the ineligibility of a Member on the ground that he is of lower rank than the accused is to be taken up at the stage of Rule 44, or Rule 51 or as the appellant's counsel contends that the objection relating to legality of the composition of the court is a question of jurisdiction and it can be taken at any stage of the proceedings. In order to appreciate this contention, we may refer to the provisions of the Army Rules. Rule 39 of the Army Rules deals with the ineligibility and disqualification of officers for court martial. Sub-rule (1) and (2) of that Rule may be quoted as under:

> *"39. Ineligibility and disqualification of officers for court-martial.-(1) An officer is not eligible for serving on a court-martial if he is not subject to the Act.*

(2) An officer is disqualified for serving on a general or district court-martial if he –

(a) is an officer who convened the court; or

(b) is the prosecutor or a witness for the prosecution; or

(c) investigated the charges before trial, or tool down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

(d) is the commanding officer of the accused, or of the corps to which the accused belongs; or

(e) has a personal interest in the case.

(3) The provost-marshal or assistant provost-marshal is disqualified from serving on a general court-martial or district court-martial."

Sub-Rule (2) of Rule 40 reads as under:

"40. Composition of General Court-martial.-

(1)……

(2) The members of a court-martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening officer, officers of such rank are not (having due regard to the exigencies of the public service) available. Such opinion shall be recorded in the convening order."

26. Then follows Rule 41, sub rule (1) whereof read with clause (d) provides that the court is to satisfy itself that in the case of general court martial, the officers are of the required rank. Rule 41 reads as under:

> *"41. Inquiry by court as to legal constitution. – (1) On the court-assembling, the order convening the court shall be laid before it together with the charge-sheet and the summary of evidence or a true copy thereof, and also the ranks, names and corps of the officers appointed to serve on the court; and the court shall satisfy itself that it is legally constituted; that is to say-*
>
> *(a) that, so far as the court can ascertain, the court has been convened in accordance with the provisions of the Act and these rules;*
>
> *(b) that the court consists of a number of officers, not less than the minimum required by law and, save as mentioned in rule 38, not less than the number detailed;*
>
> *(c) that each of the officers so assembled is eligible and not disqualified for serving on that court-martial; and*
>
> *(d) that in the case of general court-martial, the officers are of the required rank.*
>
> *(2) The court shall, further, if it is a general or district court-martial to which a judge-advocate has been appointed, ascertain that the judge-advocate is duly appointed and is not disqualified for sitting on that court-martial.*
>
> *(3) The court, if not satisfied with regard to the compliance with the aforesaid provisions, shall report its opinion to the convening authority, and may adjourn for that purpose."*

Rule 42 which follows reads as under :

42. Inquiry by court as to amenability of accused and validity of charge. (1) if the court is satisfied that the requirements of rule 41 have been complied with, it shall further satisfy itself in respect of each charge about to be brought before it ;

(a) that it appears to be laid against a person subject to the Act, and subject to the jurisdiction of the court, and

(b) that each charge discloses an offence under the Act and is framed in accordance with these rules, and is so explicit as to enable the accused readily to understand what he has to answer.

(2) The court, if not satisfied on the above matters, shall report its opinion to the convening authority and may adjourn for that purpose."

Rule 49 reads as follows :

> *"49. Objection by accused to charge. The accused, when required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules. The court after hearing any submission which may be made by the prosecutor or by or on behalf of the accused, shall consider the objection in closed court and shall either disallowed it and proceed with the trial, or allow it and adjourn to report to the convening authority or, if is in doubt, it may adjourn to consult the convening authority."*

An analysis of these rules would indicate that they provide a process of filtration of the proceedings at different stages and if the court finds any illegality it is required to report to the convening authority and to adjourn. Thus Rules 39 and 40 (2) specify the grounds of ineligibility and disqualification of members of the court. Rule 41 which follows provides a

filtration process as it requires the court to satisfy itself that the members are not ineligible or disqualified. Rule 44 reads as follows :

> *" 44. Proceedings for challenges of members of court : The order convening the court and the names of the presiding officer and the members of the court shall then be read over to the accused and he shall be asked, as required by section 130, whether he has any objection to being tried by any officer sitting on the court. Any such objection shall be disposed of in accordance with the provisions of the aforesaid.*
>
> *Provided that :*
>
> *(a) The accused shall state the names of all the officers constituting the court in respect of whom he has objection, before any objection is disposed of;*
>
> *(b) The accused may call any person to give evidence in support of his objection and such person may be questioned by the accused and by the court;*
>
> *(c) If more than one officer is objected to, the objection to each officer shall be disposed of separately, and the objection in respect of the officers of the lowest in rank shall be disposed of first, and on an objection to an officer, the remaining, officers of the court shall, in the absence of the challenged officer, vote on the disposal of such objection, notwithstanding that objections have been made to any of those officers;*
>
> *(d) When an objection in respect of an officer is allowed, that officer shall forthwith retire, and take no further part in the proceedings;*
>
> *(e) When an officer go retires or is not available to serve owing to any cause, which the court may deem to be sufficient, and there are any officers in waiting detailed as such, the*

presiding officer shall appoint one of such officers to fill the vacancy. If there is no officer in waiting available, the court shall proceed as required by rule 38,

(f) The eligibility absence of disqualification and freedom from objection of an officer filing a vacancy shall be ascertained by the court, as in the case of other officers appointed to serve on the court."

Rule 44 is another step in the filtration process. It provides opportunity to the accused to object to being tried by any officer sitting on the court. The objection contemplated appears to be against ineligible or disqualified officers to be a member of the court referred to in the earlier Rules 39 and 40. Similarly Rule 42 requires the court to be satisfied about the validity of the charges. The next step in the filtration process in this regard is Rule 49 under which the accused can raise objection to the charges. In view of the Scheme of the Army Rules and the language of Rule 44 we are of the opinion that the objections which are contemplated under Rule 44 would be objections pertaining to ineligibility and disqualification of a member referred to in Rule 39 and Rule 40 (2) in respect of which the court has satisfied itself under Rule 41(1) clauses (c) and (d). Rule 51 comes in at a later stage after the arraignment of the accused and before he has pleaded to the charge and would cover objections not already covered under rules 44 and 49. Rule 44 and 49 themselves provide for a decision of the objections at that stage and it could not have been intended that objections already decided under these Rules can again be raised at the stage of Rule 51. Objection under Rule 44 are however directed against individual members sitting on the court to try the appellant. Objections

under Rule 49 are confined to the ground that the charge does not disclose an offence under the Act or is not in accordance with the Rules. Such objections which do not relate to a member individually as for instance an objection that the GCM is composed exclusively of the Corps or Department to which the accused belongs vide Rule 40 (1) or that the GCM has not been convened in accordance with the provisions of the Act or Rules vide Rule 41 (a) or that the offence ought to be tried by ordinary criminal court can be raised at the stage of Rule 51. In short objections relating to the jurisdiction of the Court other than those which can be raised under Rules 44, 49 and 53 would fall within the scope of Rule 51.

27. We are, therefore, not inclined to accept the submission of the learned counsel for the appellant that under the Army Rules objection that a member is below the rank of the accused cannot be raised at the stage of Rule 44. It rather appears to us that the appropriate stage when such objection ought to be raised is Rule 44.

28. It is submitted by Sri Alok Mathur that the appellant had not taken the objection, regarding the eligibility of the two members of the rank of Major at the appropriate stage of the proceedings and has thus waived the objection. Sri Mathur pointed out that such objection was not raised by the appellant at the stage of Rule 56(1). Rule 56(i) provides that the accused will be questioned whether he seeks an adjournment for non compliance of the procedure or he has not had sufficient opportunity to prepare his defence and it is pointed out that the appellant had answered this question in the negative. In our opinion the objection that a member is not of the requisite rank does not fall within the scope of Rules 56(i). It is also pointed out by

Mr. Mathur that the court had allowed the appellant to take the special plea relating to the general jurisdiction of the court at the fag end of the trial but even at that stage no such plea was taken. At a still later stage when the appellant was found to be wearing the badges of the rank of Lt. Colonel and objection was raised by the Court and he was told to wear badges of the rank of his entitlement, the appellant never produced evidence of his promotion. This plea that the appellant had waived the objection is further sought to be supported by the letters which the appellant had written to the Commanding Officer or to the Convening Authority or to the GOC in C Central Command which have been placed on record by the Respondents Ext. 11(a) to 11(j) in which the appellant has signed as a Major. The learned counsel for the respondents has also placed before us the admission of the appellant in para 38 of the writ petition in which he has stated that at the time when the charge sheet was served upon him he had noticed that the court was constituted of two members, who were of the rank of Major whereas the rank of the petitioner was Lt.Col. In para 39 of the petition he has stated that he had given this information to the officer who had served the charge sheet upon him. On the basis of this material, learned counsel for the respondents submitted that the appellant had full knowledge about the alleged illegality in the Constitution of the Court but he has waived his right. Sri Lalit Kumar would refute the contention and drew our attention to the proceedings of the GCM dated 20.06.2008 which record that in reply to the request for adjournment for 20 days made by the prosecution to procure its witnesses the appellant stated that the court is unconstitutional and illegally constituted and has no power to try him. The plea it is submitted by Shri Lalit Kumar

was again raised later on when the court allowed the appellant to raise even at a belated stage the special plea relating to the general jurisdiction of the court and the Judge Advocate in his advice at that stage has noticed this plea at point No. (i) in the following words "since the accused got his substantive rank of Lt. Colonel the convening order had become bad in law." There is however nothing on record to indicate that the appellant had produced any evidence upon the point that he has been promoted to the substantive rank of Lt.Col.

29. In order to appreciate the objection raised by the learned counsel for the respondents, it is necessary to refer to the ingredients of the plea of 'waiver'. Firstly waiver must be specifically pleaded. In para 3 of the counter affidavit there are averments that appellant did not raise the objection and that at the stage of Rule 44 when he was asked whether he objects to be tried by any member had answered 'No'. But there is in our opinion one reason why the plea of waiver raised by Sri Mathur has in this case no legs to stand. It is settled law that waiver is an intentional relinquishment of a known right. If a party is not fully aware of its rights there would be no waiver. An authority upon this point is M/s Motilal Padampat Sugar Mills Co. Ltd. Vs. The State of U.P. & Others AIR 1979 SC 621 Para 6 of that decision is quoted blow :

> *"Secondly, it is difficult to see how, on the facts, the pleas of waiver could be said to have been made out by the State Government. Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be "an intentional act with knowledge" per Lord Chelmsford, L.C. in earl of Darnley v. London Chatham and Dover Rly. Co. (1867) 2 HL 43 at p. 57.*

There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in Halsbury's Laws of England (4th ed) Vol. 16 in para 1472 at p. 994 that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and Isaacs, J. Delivering the judgment of the High Court of Australia in Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 has also emphasised that waiver "must be with knowledge, an essential supported by many authorities." Now in the present case there is nothing to show that at the date when the appellant addressed the letter dated 25th June, 1970, it had full knowledge of its right to exemption under the assurance given by the 4th respondent and that it intentionally abandoned such right. It is difficult to speculate what was the reason why the appellant addressed the letter dated 25th June, 1970 stating that it would avail of the concessional rates of sales tax granted under the letter dated 20th Jan, 1970. It is possible that the appellant might have thought that since no notification exempting the appellant from sales tax had been issued by the State Government under Sec 4A, the appellant was legally not entitled to exemption and that is why the appellant might have chosen to accept whatever concession was being granted by the State Government. The claim of the appellant to exemption could be sustained only on the doctrine of promissory estoppel and this doctrine could not be said to be so well defined in its scope and ambit and so free from uncertainty in its application that we should be compelled to hold that the appellant must have had knowledge of its right to exemption on the basis of promissory estoppel at the time when it addressed the letter dated 25th June, 1970. In fact in the petition as originally filed, the right to claim total exemption from sales tax was not based on the pleas of promissory

estoppel which was introduced only by way of amendment. Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that every one is presumed to know the law, but that is not a correct statement : there is no such maxim known to the law. Over a hundred and thirty years ago, Maule J., pointed out in Martindale V. Falkner, (1846) 2 CB 706 "There is no presumption in this country that every person knows the law : it would be contrary to common sense and reason if it were so". Scrutton, L.J., also oce said : "It is impossible to know all the statutory law, and not very possible to know all the common law." But is was Lord Atkin who, as in so many other spheres, put the point in its proper context when he said in Evans v. Bartlam, 1937 AC 473"..... the fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application." It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dtd. 25th June, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government"

One exception to the applicability of the doctrine of waiver is that it does not apply to jurisdictional matters. A Constitution Bench of the Apex Court in Supdt. Of Taxes, Dhubri and others V. Assam Jute Supply Co. Ltd. AIR 1975 SC 2065 had occasion to consider the question of applicability of the doctrine Beg J in para 68 of the reports observed as follows :

"Furthermore, the waiver, even where both sides have agreed to waive the operation of a statutory provision, can not

extend to a case in which the effect may be either to oust the jurisdiction conferred by statute or to confer a jurisdiction which, according to the statute, is not there. In other words, if a notice under Section 7(2) of the Act is a condition precedent to the exercise of jurisdiction to make the best judgment assessment, I do not think that the doctrine of waiver will confer jurisdiction so as to enable parties to avoid the effect of violating a mandatory provision on a jurisdictional matter even by agreement. If, on the other hand, want of notice under Section 7 (2) of the Act is not a condition precedent to the exercise of jurisdiction to make a best judgment assessment – and, that seems to me to be the crux of the matter on this question – it does not appear to me to be necessary to resort at all to a doctrine of a dubious or deemed waiver. In that case, waiver or no waiver, the power to assess would subsist, And, as that power has to be exercised quasi-judicially, the taxing authorities could issue a notice to show cause why they should not assess on such materials as they have, even if their power to issue a notice asking for a return under Section 7 (2) may have been lost by lapse of time. The power to issue a suitable notice to show cause according to rules of natural justice when a quasi-judicial function has to be exercised, can be, as we have repeatedly held, implied and read into the nature of the function to be performed even if it is not expressly mentioned."

We shall now analyze the circumstances and material placed by Sri Mathur before us in support of his contention of waiver. The first circumstance is that the appellant did not raise the objection about the ineligibility of the two Members before the Court Martial nor did he place the gazette notification nor the provisions of Section 142 Army Act. The second circumstance is that appellant had signed the letter Ex. 11(a) to 11 (j) as a Major. We have already seen that though not specific the plea that

the Court was not legally constituted had been taken in a half hearted manner. The question however is whether the appellant had full knowledge that he had in the eyes of law become a Lt. Colonel In this connection the case of the Respondents themselves is that mere publication of the gazette notification regarding the promotion and payment of salary of the higher rank is not sufficient and it is only with the permission of the Commanding Officer to wear the badges of the higher rank and publication of the Part II Order that the promotion comes into effect. Reliance has been placed by the Respondents upon the Army Order 8 of 2005 in this regard. We also have it from the letter dated 22.06.2009 of DDG (A) part of Annexure 1 to the Counter Affidvit that a querry was made to him regarding the status of the petitioner in the context of para 2 of the OA 8 of 2005 "before allowing the officer to wear the badges of rank, the C.O. would satisfy himself that the Officer meets the criteria fully" and in answer to the querry it was stated in para 4 of the reply that wearing of badges of higher rank by the appellant on his own during suspension period on the basis of the gazette notification published long after the DV ban was irregular. While dealing with the O.A. No. 100 of 2010 we have reconciled the Army Order with Section 142 Army Act and have determined the true scope of the Army Order and the Part II Order but it cannot be presumed that the appellant had also been able to do so. In the circumstances considering the prevailing view in the Army about the requirement of the permission of the Commanding Officer and publication of the Part II order the appellant may have considered himself promoted only defacto on the strength of the Gazette Notification and payment of salary but not dejure as the permission had yet

to be granted and Part II Order published. This explains the half hearted stand he had taken about his promotion in the GCM Proceedings and though he had objected to the constitution of the GCM but had not come out with a clear stand. We may here observe that in view of the provisions of Rule 76 and Rule 105 of the Army Rules a duty was cast upon the Presiding Officer and the Judge Advocate when the appellant had raised the objection regarding the constitution of the court to have sought clarification from the appellant of the reasons why he was saying so. In the circumstances, no inference of waiver can in our opinion be drawn from the fact that the appellant had not taken a clear objection regarding the constitution of the court at various stages of the GCM proceedings and why he had signed as Major in the letters Exhibit 11(a) to Exhibit 11(j).

30. We shall now deal with the admission said to have been made by the appellant in paras 38 and 39 of the petition. It is settled law that if an admission is relied upon it has to be read as a whole. Paras 38 and 39 contain the plea that the appellant had asserted his objection to the officer who had served the charges that the composition of the court was illegal. Para 44 of the petition is also an assertion of the objection before the court that the petitioner showed the gazette notification in proof that his rank was that of Lt. Colonel. Mr. Mathur wants us to infer from the averments in paras 38, 39 and 44 the fact that the petitioner had full knowledge of his promotion and of the gazette but he had intentionally waived the plea. We are afraid, this is not the manner in which an admission is to be read. If read as a whole these averments indicate an assertion of the objection rather than its waiver.

31. What emerges from the discussion aforesaid is that the appellant though had not produced the gazette notification before the Court Martial, but has not waived the objection regarding the constitution of the court. The gazette has since been filed in the present proceedings. It is also not in dispute that he was getting the salary of Lt.Col. rank. It is well settled that an appeal is a continuation of the trial. From the records of the Court Martial proceedings it is clear that even the plea of invalidity of the constitution of the court on account of ineligibility or disqualification of two members was to be raised at the stage of Rule 44 but the court itself allowed him to take the plea under Rule 51 at a very belated stage when the trial was at its fag end. We have also found that the appellant was not given proper legal assistance and it is likely that he could not reconcile the Army Order 8/2005 and Section 142 of the Army Act to determine the status about his promotion in law. There is another aspect of the matter. In the record relating to the cancellation of the appellant's promotion there is a letter of the OIC Records Jat Regiment dated 18.10.06 in which reference has been made to the Salary Account received from CDA Pune in which the rank of the appellant has been shown as Lt. Col. and a querry was made by the OIC Records in this regard. Thus the Respondents if they did not know could have known if they had been a little careful the facts about the appellant's promotion. In the circumstances, the appellant's right of pressing in this appeal his challenge to the jurisdiction of the court should not be denied. We are, therefore, of the view that the composition of the court was illegal, as two members were disqualified, as they were holding the rank of Major

although there were available as the list of waiting members indicates officers of Lt. Colonel rank.

32. We shall now come to the third contention of the learned counsel for the appellant, namely, that he was not allowed to lead defence evidence. Learned counsel for the appellant placed before us the letter dated 18.12.08 of the appellant to the Commanding Officer in which he gave a list of three officers as his defence witnesses. He has also placed before us the averment in para 44 of the petition that another list was furnished by the appellant on 12.01.2009 to the Commanding Officer containing names of 7 witnesses. It is submitted that these witnesses were not summoned. The other submission of the learned counsel for the appellant is that all the witnesses, who had been examined as defence witnesses in the summary of evidence were required to be examined in the GCM even though specific request had not been made by the appellant. The Learned counsel relied upon the provisions of Rule 134 to 137, of the Army Rules in support of the latter submission. We are not inclined to accept the submission of the learned counsel for the appellant. It appears from a plain reading of Rule 137 that it is for the prosecutor or the accused to give the names of the witnesses he wishes to examine and it is the duty of these authorities to procure their attendance. Moreover, if as a matter of law the witnesses who were examined as defence witness in the summary of evidence ipso facto would be called for evidence the step may not be in the interest of the accused himself who may not want to examine at the trial a particular witness called at the stage of the summary of evidence. As regards the first submission that the persons whose names were given by the appellant to be defence

witnesses learned counsel for the respondents has placed before us the proceedings at page 133 of the GCM proceedings dated 07.01.2009 in which a question was put to him as to whether he wishes to call any defence witness and his answer was in the negative. It is no doubt true that if the request of the accused to call a defence witness is denied, it would certainly be a traversity of justice which would vitiate the trial. It, however, appears that the appellant himself had in view of his statement dated 07.01.2009 before the GCM withdrawn his request for summoning any defence witness. We are not however oblivious of the fact that the appellant was not given a suitable defending officer and was not represented by a lawyer and that the provisions of Rule 97, which we have found to be mandatory, have been breached. We shall therefore examine whether the appellant has been prejudiced. Shri R N Singh has placed before us in detail the prosecution evidence in proof of the charges but it is not necessary to refer to it as we are considering the question whether the trial was fair.

33. The first charge levelled against the applicant is that he entered into a Criminal Conspiracy with Havildar/Clerk Satyaveer Singh for attempting to obtain illegal gratification of Rs. 1,00,000/- (Rupees One Lakh only) from Shri Manaram Choudhary.

It is pointed out that there is material difference in the version given by the two witnesses Havildar Satyaveer Singh and Manaram Chaudhary. Havildar Satyavir Singh, while testifying as PW-8 before the GCM in relation to the alleged bribe of Rs. 1,00,000/- had deposed as follows :-

"Next day Shri Manaram Chaudhary rang me up on my residence telephone number 0159-262084 and asked me to come to Jodhpur to collect the money and eatables. I refused as Jodhpur was very far and I told him to come to Jhunjhuinu to deliver the money and eatables. He told me that he would confirm it to me after 2-3 days. He also told me that the plot of land belonging to the accused which was located at Jodhpur could not be sold and that only half of the amount which the accused had asked for, has been arranged." (Page 51 of the Proceedings Vol-I). On the other hand Manaram Chaudhary (PW-4) in his testimony before the GCM had deposed as Under:-

"After about 4-5 days, Major Ranjodh Singh rang me up on my landline telephone No 0291-2263591. He told me that since my case was a very difficult one, I will have to pay Rupees one lac for getting the job done. He further told me that Havildar (Clerk) Satyaveer Singh was being sent to me and that I should keep Rupees One lac ready. He also intimated me his mobile number as 9358777770. I expressed my inability to arrange for this much of money all of a sudden" (page 27 of the proceedings-Vol-I).

34. According to the Learned Counsel there was a motive to implicate the applicant in the false case of bribery, because the applicant had got cancelled the illegal Part II Order which had been published in the year 2000 at the behest of Manaram Choudhary showing the death of his son Sep Pradeep Chaudhary as a battle casualty. It is submitted that if the Presiding officer or Judge Advocate who had the custody of the said SOE during the applicant's trial and were consequently in the knowledge of the fact that there was substantial evidence in favour of the applicant; in discharge of their duty

under AR 76 and 105 respectively, summoned even one defence witness, namely Lt Col Om Prakash (ex CRO) whose evidence was contained to the aforesaid effect, the finding on the first charge would have been different. It is also submitted that the appellant was prejudiced for want of suitable defending officer or lawyer and consequently these witnesses could not be cross examined.

The Second Charge in that he, attempted to obtain illegal gratification, of Rs. 1,00,000/- (One Lakh only) for himself from Shri Manaram Choudhary as a motive for showing favour in a Family Pension Claim pertaining to Smt. Geeta Chaudhary.

35. It is submitted by counsel for the appellant that Conviction of the appellant on the aforesaid charge is based on the testimony of Manaram Chaudhary (PW-4) and corroborative testimony of Smt. Geeta Chaudhary (PW-3), wherein they had deposed to the following effect before the GCM :-

PW-4 Shri Manaram Chaudhary

" After about 4-5 days, Major Ranjodh Singh rang me up on my landline telephone No. 0291-2263591. He told me that since my case was a very difficult one, I will have to pay Rupees one lac for getting the job done. He further told me that Havildar (Clerk) Satyaveer Singh was being sent to me and that I should keep Rs. One lac ready. He also intimated me his mobile number as 9358777770. I expressed my inability to arrange for this much of money all of a sudden" (page 27 of the proceedings-Vol-I).

PW-3. Smt. Geeta Chaudhary

" After 4-5 days phone call came to my house from 'Major Sahab'. My father-in-law picked up the phone. 'Major Sahab' asked for one lac rupees for sanctioning the pension. My father-in-law told him that we do not have so much of money. He further told Major Sahab that he would have to sell his land to give the money.

When my father-in-law was talking on telephone, I was standing nearby and I heard the whole conversation". (Page-24 of the proceedings-Vol-I).

36. It is submitted that as against the aforesaid statement of Manaram Chaudhary given before the GCM, his earlier statement given at the Summary of Evidence was totally different. The relevant parts of the statement which had emerged through his cross examination by the appellant at Summary of Evidence, are extracted herein below :-

Q.6.3. Did I ever ring you up on your land line or Smt Geeta Choudhary and demand any bribe/gratification/kharcha-paani to favour your case?.

Ans. No.

37. It has been pointed out that Smt. Geeta Chaudhary had not been examined as a prosecution witness at the recording of SOE earlier, and she was produced at the GCM under AR 135; only in order to corroborate the 'changed statement' of Manaram Chaudhary. It is also pointed out that the CDR produced by the prosecution does not contain the record of the alleged

call made by the applicant to the said residential telephone of Manaram Chaudhary.

38. The counsel submits that had the Presiding Officer in discharge of his responsibility or the JA in discharge of his duty asked the said Manaram Chaudhary to explain the contradictions between the two statements given by him on two different occasions on the same subject, the said witness would have been caught lying and the applicant would not havebeen found guilty on the second charge also.

The Third Charge is that he, at Bareilly, on 04 Feb 2006, obtained for himself gratification, Rs. 15,000/- (Fifteen thousand only) from Havildar (Retd) Virender Kumar as a motive for showing favour in distribution of shares of death benefits pertaining to Late Sepoy Ajit Singh of 5 JAT.

As regards, the third charge, the submission of the learned counsel is that the appellant had set up a parallel case in the summary of evidence through his defence evidence that the appellant was trying to trap Virendra Kumar for attempting to pay bribe and that Virendra Kumar had been called by him on phone.The appellant has filed the application given by him to the police station Sadar Cantt on 02.02.06 and another such application to the city police on 03.02.06 and in proof of his case he had also examined in the summary of evidence Sri A.K.Dixit, Sub Inspector of Police. The contention of Sri Lalit Kumar is that if the appellant had been given proper legal assistance, he may have been advised to examine these defence witnesses in the trial. It is submitted that evidence of these persons was of vital importance and it was on account of incompetence of the

appellant to examine the witnesses in the GCM and to cross examine the PW's that prejudice have been caused to the appellant in the trial and that the trial has not been fair. It is not for us at this stage to comment as to what effect the defence evidence led in the Summary of Evidence if led in the trial would have had upon the fate of the prosecution case but it does appear that some of the evidence was relevant. It also appears that material witnesses who had proved the three charges were not cross examined and the appellant has been prejudiced The match with the prosecution represented by a practicing lawyer and the appellant by an unqualified defending officer was unequal.

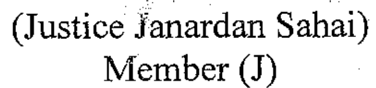
39. Now there are before us two options, either to allow the appellant to adduce defence evidence and recall the prosecution witnesses for cross examination here in the appeal, which is a continuation of the trial, a course permissible under section 17 of the AFT Act or in view of the fact that defence evidence in the summary of evidence is available and evidence of the PWs is also available and also in view of the fact that the gazette notification which had not been produced before the Court Martial but is now available in the records of this case to order a retrial. The submission of the learned counsel for the appellant is that in a case where the court martial has been found to be illegally constituted, the appellant should be acquitted. In support of his contention, he has placed reliance upon the case of Lt. Col. Anmol Singh v. Union of India, (1987) OCA 1 HC, 1991 Cal WA 631. In that case a writ of prohibition was issued against holding of the GCM proceedings on the ground that three of the members constituting the court were below the rank of the accused. The case is no authority for the question

which is involved for our consideration here. The prosecution has examined 21 witnesses and the GCM has convicted the appellant finding the charges proved. With all the evidence available, acquitting the appellant on the ground that the court was illegally constituted or that he could not get proper legal assistance does not appear to be just. To take additional evidence in the Appeal or to recall the prosecution witnesses for cross examination in the Appeal would virtually be a fresh trial in the appeal. In the circumstances, it would be in the interests of justice that the conviction of the appellant be set aside and re-trial be authorized. The question is whether the appellant can be re-tried. The provisions of section 16 of the Armed Forces Tribunal Act are quite clear. The precondition envisaged in the provision in which a re-trial can be ordered is that the appeal is allowed by reason only of evidence received or available to be received by the Tribunal under the Act. The purpose of these two conditions is that if there is sufficient material already on the record and no fresh evidence has been received or available to be received by the Tribunal, the appeal itself can be finally decided on merits ending in an acquittal or conviction and a re-trial is not the proper course. If evidence is received by the Tribunal under Section 17 of the Act a need for re-trial may in certain cases arise as for instance. a document is filed or oral evidence led which may necessitate the witnesses being recalled for cross examination or fresh evidence being led. Retrial is also permissible if evidence though not received by the Tribunal is available to be received. The object of this condition is to ensure that relevant evidence exists and a retrial is not directed where it would be a foregone conclusion that it would be a futile exercise. In this case both

these conditions for authorizing retrial exist. We have found the court to be illegally constituted on the basis of the gazette notification which was not filed before the Court Martial and is new material. We have also found that the applicant was prejudiced in his defence and material prosecution witnesses could not be cross examined and that available evidence could not be led. The prosecution witness can be recalled. Evidence is thus available and it appears retrial would not be a futile exercise.

40. In the result, OA 100 of 2010 is allowed. The entry in the gazette notification dated 12-19 Sept. 2009, annulling the entry regarding the appellant's promotion in the gazette notification dated 23-26 Sept. 2006 is quashed. The Appeal is also allowed. The conviction and sentence awarded by GCM dated 12.2.2009 which was confirmed on 10.04.09 is set aside and we authorize the re-trial of the appellant by court martial subject to the conditions in the proviso to sub-section (2) of section 16 of the Act. In view of the fact that we have set aside the conviction and sentence of the appellant, he would be reinstated in service with consequential benefits admissible in law but it would be open to the respondents to suspend the ~~petitioner~~ appellant in accordance with law.

(Lt. Gen. PR Gangadharan)
Member (A)



(Justice Janardan Sahai)
Member (J)

RPS/-