UNION OF INDIA AND ORS. A

v.

SHIVENDRA BIKARAM SINGH

APRIL 24, 2003.

[N. SANTOSH HEGDE AND B.P. SINGH, JJ.] B

Military Laws:

Navy Act, 1957—Sections 97, 101, 102, 162 and 163—Court Martial proceedings—Conviction—Objection as to competency of members of Court Martial proceedings to act as impartial judge—Trial Judge Advocate disposing of the objection himself without referring to the members of Court Martial—Justification of—Held: Court Martial proceedings vitiated for not referring the objections since in terms of mandatory provision of Section 102, trial Judge Advocate should not have disposed of the objection himself— Since accused did not challenge the ruling of trial Judge Advocate after an intermediate stage of proceedings it cannot be said that he waived his right to raise the objection—Court Martial proceedings being nullity, evidence recorded before it having no sanctity in law, the finding recorded by High Court that there was no legal evidence to support charges levelled against the accused and he was entitled to benefit of doubt set aside—Whether or not to continue the Court Martial proceedings from the stage of Section 102, is left to the authorities concerned. C D E

Respondent-naval officer was tried by Court Martial for offences under IPC and Navy Act and was found guilty. He was sentenced to rigorous imprisonment for 24 months and dismissal from service with consequential penalties. The Chief of Naval Staff under Section 163 of the Act reduced the sentence to 12 months and upheld the rest of the sentence. He also rejected the respondent's petition under Section 162 of the Act. Respondent then filed writ petition challenging the order of conviction and sentence passed by Court Martial and the orders of Chief of Naval Staff. It was challenged on the ground that the members of the Court Martial had not been appointed in conformity with Section 97 of the Act; that two of the Members of the Court Martial were incompetent to act as impartial Judges; and that the objection raised was disposed of by the Trial Judge Advocate without reference to the members of the Court Martial in violation of Section 102 of the Act. High Court relied on F G H

A the decision of this Court in **Ranjit Thakur* v. *Union of India,* that participation of the objected members in court martial rendered the proceedings *coram non judice*, and allowed the writ petition.

Appellant-Union of India contended that the trial Judge Advocate has power to reject summarily an objection raised by the accused against inclusion
B of any member in the Court Martial even if it related to his competency to act as an impartial Judge, if it did not have any merit; that only those objections, which raised grounds worth considering had to be referred to the Court Martial for its decision; that the High Court erred in relying on the principles laid down in *Ranjit Thakur's* case as that case was under the Army Act which is
C different from Section 102 of the Navy Act; that there was sufficient evidence on record to support the conviction; that the High Court was not justified in law in appreciating the evidence on record and concluding that the respondent was entitled to benefit of doubt; that the respondent having submitted himself to trial and the defect if any, not being of such a nature as to vitiate the trial, the respondent had waived his objection against membership of two of the
D officers in the Court Martial, thus, cannot urge that ground in support of the writ petition.

Respondent contended that the trial Judge Advocate erred in rejecting the objection raised by the respondent since under Section 102 any objection
E relating to a member of the Court Martial on his competency to act as an impartial Judge had to be decided by the members of the Court Martial; that the function of the trial Judge Advocate is only to advise the Court Martial and not to decide such issues; that though the trial Judge Advocate performs functions judicial in nature, his role becomes relevant only after the trial commences after disposal of objections under Section 102 and in the instant
F case that stage was never reached; that the respondent never waived his right to object to the membership of three of the officers in the Court Martial; that the respondent was not expected to challenge every ruling given by the trial Judge Advocate; that the verdict of the Court Martial can be challenged in writ jurisdiction if the High Court is satisfied that there is no legal evidence
G whatsoever to support the charges levelled against the accused; that the High Court was entitled to look for existence of relevant material if not sufficiency of the evidence; and that the finding recorded by the High Court that there was no evidence whatsoever to support the charges levelled against the respondent and, therefore, he was entitled to the benefit of doubt was correct.

H Dismissing the appeal, the Court

HELD: 1.1. The first part of clause (a) of section 102 of the Navy Act, 1957 refers to any objection against a member on the ground, which affects his competency to act as an impartial judge. It enables the prosecutor and the accused to raise an objection of the nature specified. No other objection is to be entertained at this stage. Whether there is any merit in the objection, is not a matter to be considered by the trial Judge Advocate, since he is not vested with the jurisdiction to decide such objections. That power has to be exercised by the court itself in accordance with the procedure laid down in clauses (b) to (e) of section 102. The only authority that is given to the trial Judge Advocate is to reject at that stage all other objections summarily without reference to the members of the court martial which are not on a ground which affects the competency of a member to act as an impartial judge under the second part of clause (a). This is because such other objections may be considered later after the constitution of the court is first finalized after disposal of objections to membership of the court martial on the ground, which affects the competency of any member to act as an impartial judge. Therefore, the scheme of the Act, is to provide for two stages at which the objections to the constitution of the court martial have to be considered. [897-G; 898-D-G]

1.2. The words of the Section 102 clause (a) are "may reject summarily" are indicative of a discretion vested in the trial judge Advocate. That is because if the objection is an objection respecting the constitution of the court, but not on the ground specified in clause (a) of section 102, then he may rather than dismissing the objection reserve it for consideration after the objections under sections 102 are disposed of and the objections under section 103 are taken up for consideration. [899-G, H; 890-A]

1.3. In the instant case, the trial Judge Advocate exceeded his jurisdiction under clause (a) of section 102 of the Act by disposing of the objections without referring to the members of Court Martial and because of his erroneous exercise of jurisdiction the objections relating to the constitution of the Court Martial remained undecided by the competent authority, and yet the members of the Court Martial proceeded with the trial and found the respondent guilty. This was done in breach of a mandatory provision of section 102 of the Act. Non-compliance of the mandatory provision of section 102 is an infirmity which goes to the root of the jurisdiction and, thus the proceedings before the Court Martial are vitiated. Hence the High Court rightly quashed the order of conviction passed by the Court Martial as well as the orders made under sections 162 and 163 of the Navy Act. [900-B-C; 903-G]

A 1.4. Section 130 of the Army Act as well as Section 102 of the Navy Act relate to the objection to the inclusion of any officer as member of the Court Martial. It may be that the procedure prescribed is not identical, though similar, but if the provision is mandatory in nature and there is non-compliance with that provision, the consequences will be the same. [902-F, G]

B

Ranjit Thakur v. *Union of India and Ors.*, AIR (1987) SC 2386; *Lt. Col. Prithi Pal Singh Bedi* v. *Union of India and Ors.*, AIR (1982) SC 1413; *Union of India and Ors.* v. *Major A. Hussain,* [1998] 1 SCC 537 and *Union of India and Ors.* v. *Himmat Singh Chahar,* [1999] 4 SCC 521, relied on.

C 2. It is not expected of an accused to challenge every ruling in the course of a trial, as that would unnecessarily protract the trial, something, which is not encouraged by the courts. The respondent raised that objection in his petition under section 162 of the Act and thereafter raised the same objection in the instant writ petition from which this appeal arises. Therefore, it cannot D be said that he waived his right to raise this objection merely because he did not challenge the ruling of the trial Judge Advocate immediately after it was given at an intermediate stage of the proceedings. [903-A, B]

3. If the very constitution of the Court Martial was not in accordance with law, then any proceedings taken before such an improper Court Martial E was a nullity as far as the trial is concerned. As a consequence, the evidence recorded before such a Court Martial had no sanctity in law and, therefore, did not deserve any further consideration. Therefore, the finding recorded by the High Court that there was no legal evidence whatsoever to support the charges levelled against the respondent and that he was entitled to benefit of F doubt is set aside. [903-E, F]

4. It is left to the authorities concerned to consider whether or not to continue the Court Martial proceedings from the stage of section 102 of the Act. Reference to the facts of the case and the merit of the charges against the respondent is avoided. However, nothing said in this judgment shall be G construed as expression of opinion on the merit of the charges, which shall be considered in the light of the evidence, which may be produced by the prosecution before the Court Martial or the reconstituted Court Martial, as the case may be, if the competent authority so decides. Further, the respondent will be at the liberty to raise the submission, on which no opinion is expressed, H that the re-trial of the respondent, even if ordered, will be barred by limitation in view of the provision of section 79 of the Act in appropriate proceedings

before the appropriate forum if occasion arises. [903-H; 904-D-F] A

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 821 of 2001.

From the Judgment and Order dated 2.5.2001 of the Mumbai High Court at Goa in W.P. No. 3 of 2001. B

Anup G. Chaudhary, R.C. Verma, R.N. Poddar and B.V. Balaram Das for the Appellants.

A.B. Sharya, D.S. Chauhan and Rajesh Narula for the Respondents. C

The Judgment of the Court was delivered by

B.P. SINGH, J. In this appeal by special leave the Union of India has impugned the judgment and order of the High Court of Bombay at Goa dated May 2, 2001 in Criminal Writ Petition No. 3 of 2001 whereby the High Court D allowing the writ petition filed under Article 226 of the Constitution of India quashed the order of the Court Martial dated 4th September, 2000 which found the respondent guilty of the offences under sections 497, 452 and 325 of the Indian Penal Code read with Section 77(2) of the Navy Act, 1957 (hereinafter referred to as 'the Act') and the order of the Chief of the Naval Staff dated 8th January, 2001 passed under Section 162 of the Act as also the E order of the Chief of the Naval Staff dated January 31, 2001 passed under Section 163 of the Act. After going through the evidence on record it also recorded a finding that there was no legal evidence to support the order of conviction and, therefore, gave to the respondent the benefit of doubt.

The facts of the case so far as they are relevant for the disposal of this F appeal are :-

The respondent was an officer of the Indian Navy and at the relevant time was serving as a Lieutenant posted in Goa. He was tried by a Court Martial for offences under sections 497, 506, 452 and 325 of the Indian Penal G Code read with Section 77(2) of the Act. The Court Marital found the respondent guilty of the offences under sections 497, 452 and 325 of the Indian Penal Code read with Section 77(2) of the Act and ordered the respondent to be kept in rigorous imprisonment for a term of 24 calendar months as a Class-I prisoner; to be dismissed with disgrace from the Naval service and to suffer H consequential penalties involved. The Chief of the Naval Staff in exercise of

A his power under Section 163 of the Act modified the sentence awarded to the respondent and ordered that the respondent be kept in rigorous imprisonment as a Class-I prisoner for a period of 12 calendar months and that he be dismissed from Naval service and shall suffer the consequential penalties involved. The respondent submitted a petition on December 4, 2000 under Section 162 of the Act with a request to set aside the findings and sentence B awarded to him by the Court Martial, but the same was rejected by the Chief of the Naval Staff by his order dated January 31, 2001.

The order of conviction and sentence passed by the Court Martial as well as the orders of the Chief of the Naval Staff in exercise of powers under C sections 162 and 163 of the Act were challenged before the High Court by the respondent by filing a writ petition under Article 226 of the Constitution of India. The challenge to the aforesaid orders was on several grounds. It was submitted before the High Court that the members of the Court Martial had not been appointed in conformity with Section 97 of the Act. Three of the Members of the Court Martial were incompetent to act as impartial Judges and D the objection raised by the respondent in this regard was disposed of by the Trial Judge Advocate, without reference to the members of the Court Martial, in gross violation of the mandatory provisions contained in Section 102 of the Act. As a result grave prejudice was caused to the respondent and there was serious miscarriage of justice by such officers continuing as members of E the Court Martial to try him. The order of Court Martial was also challenged on the ground of its failure to record reasons for the conclusions reached by it. It was also submitted that the offences for which the respondent was tried were ordinarily offences which could have been tried by an ordinary criminal court and, therefore, trial by Court Martial was not justified.

F On the other hand the Union of India contended that the Court Martial had been properly constituted and it had scrupulously observed provisions of the Act and recorded a finding of guilt against the respondent. It was not required to record reasons for its conclusions and its findings were, therefore, not vitiated for this reason. The objection raised by the respondent against the inclusion of three officers as members of the Court Martial was duly G considered by the trial Judge Advocate who rejected the objection as regards two of the officers, while the objection against the third officer was considered by the members of the Court Martial and was ultimately rejected. The trial Judge Advocate exercised his power to reject such an objection in accordance with the provisions of Section 102 of the Act. No irregularity was committed H by him. The proceedings before the Court Martial were conducted scrupulously

in accordance with law and no illegality had been committed which either resulted in serious prejudice to the respondent or in miscarriage of justice. The writ court, therefore, had no jurisdiction to interfere with the impugned orders. It was also the case of the Union of India that the offences for which the respondent was tried while serving as a naval officer were triable by the Court Martial. The respondent had, therefore, not made out a case for interference with the order of the Court Martial as well as the orders passed under Sections 162 and 163 of the Act having regard to the parameters of judicial interference in matters of this nature.

The High Court first considered the scope of its writ jurisdiction in such matters and the parameters of judicial interference. It considered the judgments of this Court in Union of India and others vs. Himmat Singh Chahar : (1999) 4 SCC 521 ; Lt. Col. Prithi Pal Singh Bedi vs. Union of India and others : AIR 1982 SC 1413 and Union of India and others vs. Major A. Hussain : (1998) 1 SCC 537 and held that though the Court Martial proceedings are subject to judicial review by the High Court in exercise of its writ jurisdiction, the Court Martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. In exercise of its jurisdiction the High Court will not minutely examine the record of the Court Martial as if it was sitting in appeal. If the Court Martial has been properly convened, and there is no challenge to its composition, and the proceedings are in accordance with the procedure prescribed, the High Court, or for that matter any Court, must stay its hand. Proceedings of a Court Martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure since these proceedings remain to a significant degree, a specialized part of overall mechanism by which military discipline is preserved. The Court Martial discharges judicial function and the procedure prescribed provide for a fair trial to the accused. Therefore, unless it is shown that prejudice has been caused or mandatory provisions have been violated, the High Court should not allow the challenge to validity of the conviction and sentence of the accused when evidence is sufficient.

Bearing the above principles in mind the High Court proceeded to consider the other submissions advanced before it. It rejected the submission that non-recording of reasons in support of the conclusion reached by the Court Martial vitiated the order. Relying upon the judgment of this Court in *S.N. Mukherjee* v. *Union of India,* AIR (1990) SC 1984 it was held that the Court Martial is not required to record reasons for the conclusion reached by it while recording a conviction. It also rejected the contention urged on behalf

A of the respondent that the Court Martial was not duly constituted inasmuch as the majority of members of the Court Martial did not belong to the executive branch of the Naval service as required by Section 97 (10) of the Act. It accepted the submission urged on behalf of the Union that all the officers who were members of the Court Martial were Executive Officers which was supported by a Notification issued in this regard. The submission, that B the constitution of the Court Martial was not constituted in conformity with the mandate of sub-section (16) of Section 97 of the Act since it had to be constituted by the peers of the respondent, namely the Lieutenants, and not by the Commanders, especially when the President was Acting Captain, was also rejected. It was held that on a plain reading of sub-sections (17) of C Section 97, the mere fact that the members of the Court Martial were higher in rank to the petitioner, did not render the constitution of the Court Martial infirm.

The crucial question raised before the High Court was with regard to the manner in which, and the person by whom, objection raised by the D respondent with regard to the competency of two members of the Court Martial to act as impartial judges was rejected. It is not in dispute that the respondent objected to three members of the Court Martial on the ground of their competency to act as impartial judges. The members objected to were Captain Rajiv Girotra, President, and a Member Cdr. Suresh Mehta. The objection of the respondent was rejected by the trial Judge Advocate without E referring the objection to the members of the Court Martial for decision. The objection as against the third member, namely Cdr. Narayan was referred to all the members of the Court Martial excluding Cdr. Narayan, but the objection was ultimately rejected. The High Court held that on a plain reading of Section 102 of the Act the trial Judge Advocate had no jurisdiction to dispose of an F objection summarily which related to the competency of a member of the Court Martial to act as an impartial member. In the interest of fairness the Act envisages that the objection with regard to any member of the Court Martial must be dealt with at the threshold. The objection to any member of the Court regarding his competency to act as an impartial judge, must be referred to the members of the Court and disposed of in accordance with the procedure laid G down in that section. At that stage any other objection, which did not relate to the capacity of the member to act as an impartial Judge had to be rejected by the trial Judge Advocate. Other objections, if any, were to be dealt with under section 103 of the Act. The language of section 102 of the Act clearly postulates that when an objection is taken against any member on the ground H of his incompetency to act as an impartial judge, the trial Judge Advocate

must stay his hand and is obliged to refer the same to the members of the Court Martial for deciding the same in the manner provided for by section 102 of the Act. This provision is in the nature of an opportunity being offered to the concerned member against whom such a ground is urged to recuse himself, in view of the allegations made. The trial Judge Advocate had no jurisdiction to summarily reject such an objection without referring the same to the members. It would amount to rewriting the said provision if it was to be held that the trial Judge Advocate must in the first instance examine the objection himself, as to whether the ground about the competency to act as impartial judge is made out or not. The summary rejection of the objection with regard to Captain Rajiv Girotra and Cdr. Suresh Mehta was, therefore, not in accordance with the procedure prescribed by law, and there was a clear breach of the mandatory provision relating to procedure of Court Martial, which undoubtedly caused gross miscarriage of justice to the respondent. Accordingly it held that the constitution of the Court Martial itself become susceptible to serious challenge on account of incompetency of Captain Rajiv Girotra (President) and Cdr. Suresh, Member to act as impartial judges. Since the Court Martial was not duly constituted in accordance with law, all subsequent steps taken by such a Court Martial were nullity and non-est in the eye of law. It further held that even the objection with regard to Cdr. Narayan, which was referred to the members of the Court Martial and was rejected, was not disposed of in accordance with law. The reason was that Captain Rajiv Girotra and Cdr. Suresh Mehta continued to participate as members of the Court Martial and participated in the proceeding when the objection against Cdr. Narayan was referred to the Court Martial. Having regard to the procedure prescribed by section 102 of the Act, the continued participation of Captain Rajiv Girotra and Cdr. Suresh Mehta, without consideration of objection against them in accordance with law, vitiated the proceeding of the Court Marital even in regard to the consideration of the objection against Cdr. Narayan.

The High Court, therefore, held that the writ petition must succeed on the sole ground of non-compliance of mandatory provisions of law while considering the objection regarding incompetency of Captain Rajiv Girotra and Cdr. Suresh Mehta to act as impartial judges, relying on the observations of this Court in *Ranjit Thakur* v. *Union of India and Ors.*, AIR (1987) SC 2386 wherein it was held that participation of the objected members in the Court Martial rendered the proceedings coram non judice.

The High Court observed that in view of its above finding it was

A unnecessary to examine the other contentions but since the parties had addressed the Court at length on all points, it proceeded to deal with other submissions as well.

It rejected the submission urged on behalf of the respondent that the Court Martial had no jurisdiction to try the respondent for the offences with B which he was charged. It held that the respondent being a person subject to Naval Law, even though the offences of which he was charged were civil offences, he could be tried and punished under the provisions of the Navy Act regardless of where the offences were committed. Reference to section 78(2) of the Act was also of no assistance to the respondent because the C offence under section 497 of the Indian Penal Code was quite distinct from an offence of rape under section 376 of the Indian Penal Code, and section 78(2) of the Act was confined in its application to the offences of murder, culpable homicide not amounting to murder and rape.

The High Court was then persuaded to consider the evidence on record D for finding out whether there was any legal evidence to convict the respondent of the offences with which he was charged. Considering the offence under section 497 of the Indian Penal Code the High Court found that the prosecution had miserably failed to establish the factum of marriage and its legality and, therefore, the first ingredient of the offence was not established. Similarly having scrutinized the evidence on record for the limited purpose whether E there was any legal evidence to sustain the conviction, the High Court held that having regard to the totality of circumstances it would be wholly unsafe to record the finding of guilt against the respondent for the offences under sections 452 and 355 of the Indian Penal Code. The High Court observed that it had not re-appreciated the evidence as such, or made any attempt to find F out sufficiency or adequacy of evidence, but on wading through the evidence it found that there was no legal evidence to support the charges and, therefore, the respondent should be given the benefit of doubt. With these findings, the High Court allowed the writ petition and quashed the impugned orders.

G Shri Anup G. Chaudhary, senior counsel appearing on behalf of the Union of India submitted that on a fair reading of section 102 of the Act it must be held that the trial Judge Advocate has power to reject summarily an objection raised by the accused against inclusion of any member in the Court Martial even if it was related to his competency to act as an impartial judge. He emphasized the fact that under section 114 of the Act the trial Judge H Advocate exercises powers which are judicial in nature and, therefore, section

102 must be understood in the background of the nature of judicial functions performed by the trial Judge Advocate. It was, therefore, open to the trial Judge Advocate to consider the objection and if he was of the opinion that the ground challenging the competency of the concerned officer to act as an impartial judge did not have merit, he could reject the same summarily. Only those objections, which raised grounds worth considering had to be referred to the Court Martial for its decision. He, therefore, submitted that the High Court had wrongly relied on the observations made by this Court in *Ranjit Thakur's* case (supra). According to him the principles laid down therein were wholly inapplicable to the case in hand, because in that case this Court had considered the provisions of the Army Act, particularly Section 130 thereof which is quite different from Section 102 of the Act. He, therefore, supported the ruling of the trial Judge Advocate rejecting the objection of the respondent to two members of the Court Martial on the ground of their not being competent to act as impartial Judges. In the alternative it is submitted that in any case there was sufficient evidence on record to support the conviction, and the High Court was, therefore, not justified in law in appreciating the evidence on record and reaching the conclusion that the respondent was entitled to benefit of doubt. It is further contended that the respondent having submitted himself to trial and the defect if any, not being of such a nature as to vitiate the trial, it must be held that the respondent had waived his objection against membership of two of the officers in the Court Martial. According to him. If the respondent was aggrieved by the ruling of the trial Judge Advocate, he could have challenged his ruling by filing a writ petition. He having not done so, it amount to a waiver and, therefore, he could not be permitted to urge that ground in support of the writ petition.

Shri Arun B. Saharya, senior advocate appearing on behalf of the respondent submitted that the trial Judge Advocate was clearly in error in rejecting the objection raised by the respondent under section 102 of the Act having regard to the clear language of the section. Any objection relating to a member of the Court Martial on a ground which affected his competency to act as an impartial judge had to be decided by the members of the Court Martial and not by the trial Judge Advocate. He took us to the scheme of the Act in support of his submission. He further submitted that though the trial Judge Advocate performs functions which are judicial in nature, his role becomes relevant only after the trial commences, as is evident from section 114 of the Act, and the trial does not commence till such time as the objection under section 102 are disposed of and the President and every Member of the Court Martial is administered the oath or affirmation as mandated by

A section 104 of the Act and the plea of the accused on the charges is recorded under section 105. That stage was never reached in this case because the objections were not disposed of in accordance with the procedure laid down under section 102 of the Act. Moreover the provisions of the Act further clarify that the function of the trial Judge Advocate is only to advice the B Court Martial and not to decide such issues.

On the question of waiver he submitted that it implies a conscious giving up of a right. In the facts of this case it is apparent that the respondent never waived his right to object to the membership of three of the officers in the Court Martial. He initially urged this submission before the High Court C when he first filed the writ petition, which was dismissed as pre-mature since he had not availed of the remedies under sections 162 and 163 of the Act. Thereafter, he also urged this objection in his petition filed under section 162 of the Act and finally the point was specifically urged before the High Court in the instant writ petition out of which the present appeal arises. He submitted that the respondent was not expected to challenge every ruling given by the D trial Judge Advocate, and it was only appropriate that he permitted the trial to continue and then challenged the verdict of the Court Martial on the ground of glaring illegalities and breach of mandatory provisions of law which not only caused prejudice to the respondent, but also resulted in serious miscarriage of justice. He further urged before us that even though it is not E permissible to the High Court to exercise its writ jurisdiction to appreciate the evidence on record in the same manner as the High Court may do in a criminal appeal before it exercising appellate jurisdiction, the verdict of the Court Martial can certainly be challenged in writ jurisdiction if the High Court is satisfied that there is no legal evidence whatsoever to support the charges levelled against the accused. He emphasized that in doing so the High Court F was not expected to scrutinize the evidence with a view to finding out whether there was sufficient evidence to record the conviction, but only to find out if there was any legally admissible evidence at all, which could support the finding recorded by the Court Martial. Therefore, not the sufficiency, but the existence of relevant material, was what the High Court G was entitled to look for in a case of this nature, and that is precisely what the High Court has done in this case. He, therefore, supported the finding recorded by the High Court that there was no evidence whatsoever to support the charges levelled against the respondent and, therefore, he was entitled to the benefit of doubt.

H In reply Shri Anup G. Chaudhary submitted that even if this Court

comes to the conclusion that there had been violation of mandatory provisions of section 102 of the Act and that the violation resulted in prejudice to the respondent and serious miscarriage of justice, this Court should direct the trial to commence from the stage of section 101 of the Act. This was, of course, subject to his contention that, in the facts and circumstances of this case, the finding recorded by the Court Martial should be affirmed.

A

B

It would be beneficial to notice a few provisions of the Navy Act, 1957, which would disclose the scheme of the Act and the procedure to be followed in a Court Martial proceedings.

Section 93 provides that an offence triable under the Act may be tried and punished by court-martial. Section 97 provides that court-marital shall be constituted and convened, subject to the provisions of the sub-sections to Section 97, by the President, the Chief of the Naval Staff, or any officer empowered in this behalf by commission from the Chief of the Naval Staff. Sub-section (6) thereof provides that a court-martial shall consist of not less than five and not more than nine officers. Sub-sections (7) to (22) lay down the qualifications of the officers entitled to sit as a member of the court-martial and other details relating to the constitution of a court-martial. Section 99 lays down that every court-martial shall be attended by a person referred to as the trial Judge Advocate who shall be either a Judge Advocate in the department of the Judge Advocate General of the Navy or any fit person appointed by the convening officer. Sub-section (2) provides that the trial Judge Advocate shall administer oath to every witness at the trial and shall perform such other duties as are provided in the Act and as may be prescribed. Sections 101 to 103 are of considerable significance in this case and they are, therefore, reproduced for sake of convenience :-

C

D

E

F

> "101. Commencement of proceedings. - (1) As soon as the Court has been assembled the accused shall be brought before it and the prosecutor, the person or persons, if any defending the accused and the audience admitted.
>
> (2) Except where the accused defends himself, he may be defended by such person or persons as may be prescribed.
>
> (3) The trial Judge Advocate shall read out the warrant for assembling the court and the names of officers who are exempted from attending under sub-section (20) of section 97 together with the reasons for such exemption.

G

H

(4) The trial Judge Advocate shall read out the names of the officers composing the court and shall ask the prosecutor whether he objects to any of them.

(5) If the prosecutor shall have made no objection or after any objection made by the prosecutor has been disposed of, the trial Judge Advocate shall ask the accused if he objects to any member of the court.

102.Objections to members. - The following provisions shall apply to the disposal of objections raised by the prosecutor as well as the accused :-

(a) any member may be objected to on a ground which affects his competency to act as an impartial judge; and the trial Judge Advocate may reject summarily without reference to the members of the court any objection not made on such grounds;

(b) objections to members shall be decided separately, those to the officer lowest in rank being taken first : provided that if the objection is to the president, such objection shall be decided first and all the other members whether objected to or not shall vote as to the disposal of the objection;

(c) on an objection being allowed by one-half or more of the Officers entitled to decide the objection, the member objected to shall at once retire and his place shall be filled up before an objection against another member is taken up;

(d) should the president be objected to and the objection be allowed, the court shall adjourn until a new president has been appointed by the convening authority or by the officer empowered in this behalf by the convening authority; and

(e) should a member be objected to on the ground of being summoned as a witness, and should it be found that the objection has been made in good faith and that the officer is to give evidence as to facts and not merely as to character, the objection shall be allowed.

103. Further objections. - (1) The trial Judge Advocate shall then ask the accused whether he has any further objection to make respecting the constitution of the court; and should the accused raise any such objection, it shall then be decided by the court, which decision shall be final and the constitution of the court-martial shall not be afterwards impeached and it shall be deemed in all respects to have been duly

constituted.

(2) If the accused should have no further objection to make to the constitution of the court or if any objection is disallowed, the members and the trial Judge Advocate shall then make an oath or affirmation in the form set out in section 104.

These provisions lay down the manner in which the proceedings commence before the Court Martial and the objections, which are to be considered even before the trial begins. These provisions, therefore, apply at the pre-trial stage. After the provisions of sections 101 to 103 are complied with, the President and every member of the Court Martial is required to be administered an oath or affirmation in the form and manner prescribed by section 104 of the Act. Thereafter under section 105 when the court is ready to commence the trial, the trial Judge Advocate is required to read out the charges and ask the accused whether he pleads guilty or not guilty. If he pleads guilty and the court accepts the plea, it shall be recorded as a finding of the court and the court shall proceed to take steps to pass sentence unless there are other charges to be tried in which event the sentence shall be deferred until after the findings on such charges are given. If the accused pleads not guilty or refuses to, or does not, plead or if he claims to be tried, the court shall proceed to try the accused. Section 113 provides that when the case for the defence and the prosecutor's reply, if any, are concluded, the trial Judge Advocate shall proceed to sum up in open court the evidence for the prosecution and the defence and lay down the law by which the court is to be guided. Section 114 lays down the duties of the trial Judge Advocate at such trial. It is the duty of a trial Judge Advocate to decide at the trial all questions of law arising in the course of the trial, and specially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of the questions asked by or on behalf of the parties; and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties. Under section 115 it is the duty of the court to decide which view of the facts is true and then arrive at the finding, which under such view ought to be arrived at. Under section 116 after the trial Judge Advocate has finished his summing up, the court is to be cleared to consider the finding. The trial Judge Advocate shall not sit with the court when the court is considering the finding and no person shall speak to or hold any communication with the court while the court is considering the finding. Thereafter under section 117 the court is required to reassemble and the President shall inform the trial Judge Advocate in open

court what is the finding of the court as ascertained in accordance with section 124.

It will thus appear that the steps taken before the stage is reached under section 104 of the Act for administering oath or affirmation to the President and the Members of the Court Martial, are taken at the pre-trial stage. Though the proceedings commence before the Court Martial for compliance of the requirements of sections 101, 102 and 103 of the Act, the trial commences only after the President and the members of the Court Martial are administered oath as required by section 104 of the Act and the accused is produced before the Court Martial. Sub-section (3) of Section 101 directs the trial Judge Advocate to read out the warrant for assembling the court and the names of officers who are exempted from attending together with the reasons for such exemption. After the warrant is read out, the trial judge is required to read out the names of the officers composing the court. It shall then ask the prosecutor whether he objects to any of them. If any objection is made by the prosecutor the same has to be disposed of. However, if the prosecutor has no objection, the trial Judge Advocate shall ask the accused if he objects to any member of the court.

It would thus appear that before the trial commences, objections to membership of the Court have to be considered with a view to ensure fairness of trial and to avoid charge of bias against any of the members of the Court Martial. Section 102 lays down the provisions, which shall apply to the disposal of objections raised by the prosecutor as well as the accused. Clause (a) provides that any member may be objected on a ground, which affects his competency to act as an impartial judge, and the trial Judge Advocate may reject summarily without reference to the members of the court any objection not made on such ground. Clauses (b) to (e) lay down the procedure to be followed by the members of the Court Martial while considering such objections.

Section 103 refers to further objections. Clause (a) of section 103 begins with the words "the trial judge advocate shall then ask the accused whether he has any further objections to make respecting the constitution of the court". If the accused raises any such objection, that is required to be decided by the court, which decision shall be final and the constitution of the court martial shall not be afterwards impeached, and it shall be deemed in all respects to have been duly constituted. In case the accused has no further objection to make or the objection made is disallowed, the members and the

trial Judge Advocate shall then make an oath or affirmation in the form set out in section 104. From the scheme of these sections it is quite apparent that before the trial commences, all objections to the constitution of the Court Martial must be considered and decided. Section 102 is confined to an objection on the ground, which affects the competency of the President or a member of the Court Martial to act as an impartial Judge. As would be clear from a reading of this section as a whole it does not provide for the consideration of any other objection at that stage. The section that follows i.e. section 103 refers to any further objection respecting the constitution of the Court Martial. It is, therefore, open to the accused to raise further objections on other grounds respecting the constitution of the Court Martial, and for this purpose he may urge the ground of breach of any or the provisions of the sub-sections of section 97 of the Act, or any other objection which he has respecting the constitution of the Court Martial. These objections have to be decided under section 103 by the Court Martial, which must mean all the members of the Court Martial, who are entitled to sit as a Court after the disposal of objections, if any, under section 102 of the Act.

We then come back to section 102 of the Act, particularly clause (a) thereof. The real controversy in the instant case is the nature of authority exercised by the trial Judge Advocate to reject summarily, without reference to the members of the Court Martial any objection not made on a ground, which affects the competency of a member to act as an impartial judge. While the respondent contends that all objections made on a ground which affects the competency of a member to act as an impartial judge have to be decided in accordance with the procedure laid down in clauses (b) to (e) of section 102, according to the appellant it is open to the trial Judge Advocate to reject summarily even an objection to a member on the ground which affects his competency to act as an impartial judge. It is contended that even if the ground urged, though it affects the competency of a member to act as an impartial judge, the trial Judge Advocate may reject the same if he finds no merit in it.

We are inclined to accept the contention put forth by the respondent. Clause (a) of section 102 is in two parts. The first part refers to any objection against a member on the ground, which affects his competency to act as an impartial judge. The second part deals with the authority of the trial Judge Advocate to reject summarily without reference to the members of the court "any objection not made on such grounds". It was not disputed before us that if there was a valid ground urged affecting the competency of a member

A to act as an impartial judge, the same has to be decided in accordance with the procedure laid down under clauses (b), (c), (d) and (e) of section 102. The first part of clause (a) enables the prosecutor and the accused to raise an objection of the nature specified. The second part of clause (a) only empowers the trial Judge Advocate to reject summarily any objection not made on such grounds. To us it appears that the clear intention of the legislature was that B at the stage of section 102 only the objections relating to membership of the court martial on a ground affecting the competency of any member to act as a court martial are required to be considered. Every other objection regarding constitution of the court martial on other grounds has to be considered later, and that is what is provided by section 103 of the Act. All grounds other than C the ground which affects the competency of a member to act as an impartial judge, is required to be decided by the court, and no discretion is left with the trial Judge Advocate. Reading the two provisions together the scheme of the Act appears to be that in the first instance the court has to consider whether any of its member is disentitled to sit as a member of the court martial on the ground that he is not competent to act as an impartial judge. No other D objection is to be entertained at this stage. Therefore, when an objection to any member is raised on a ground other than the ground, which affects his competency to act as an impartial judge, the trial Judge Advocate is authorized to reject the same summarily without reference to the members of the court martial. But if any member is objected to on the ground, which affects his E competency to act as an impartial judge, the trial Judge Advocate has no discretion in the matter and he must place the matter before the court, which must consider the objection in accordance with the procedure laid down in clauses (b) to (e) of section 102. Whether there is any merit in the objection, is not a matter to be considered by the trial Judge Advocate, since he is not vested with the jurisdiction to decide such objections. That power has to be F exercised by the court itself. The only authority that is given to the trial Judge Advocate under clause (a) of section 102 is to reject at that stage all other objections without reference to the members of the court martial which are not on a ground which affects the competency of a member to act as an impartial judge. This is because such other objections may be considered later after G the constitution of the court is first finalized after disposal of objections to membership of the court martial on the ground, which affects the competency of any member to act as an impartial judge. The scheme of the Act, therefore, is to provide for two stages at which the objections to the constitution of the court martial have to be considered. Section 102 clarifies that at that stage only those objections have to be considered which proceed on a ground, H which affects the competency of any member to act as an impartial judge. All

other objections to the constitution of the court have to be considered after the objections on the grounds specified in clause (a) of section 102 of the Act are disposed of. Those other objections have to be disposed of in the manner laid down under section 103 of the Act.

The High Court has taken the same view as we have taken of the provisions of sections 102 and 103 of the Act. The trial Judge Advocate, in the instant case, rejected summarily the objection taken by the respondent to the membership of two of the officers, while the objection against the third officer was rejected by the court itself. Having perused the minutes of the trial Judge Advocate it cannot be said that the ground on which the objection was taken was not one, which affected the concerned member to act as an impartial judge. The objection as against the President of the Court, namely Captain Rajiv Girotra was that he was a course-mate of Cdr. Baijal, with whose wife the respondent was alleged to have had adulterous connections. Similar objection was taken to the membership of Cdr. Suresh Mehta that he was the course-mate of the complainant. It would thus appear that the respondent objected to their membership on a ground, which affected their competency to act as an impartial judge. The question whether the objection was sustainable or not, was a question which had to be decided by the members of the court martial in accordance with the provisions of clauses (b) to (e) of section 102. Instead of following the procedure laid down by the aforesaid sub-sections, the trial Judge Advocate usurped the jurisdiction of the court and rejected summarily the objection of the respondent after going through the material on record, holding that the objections were not sustainable. In doing so he clearly over stepped the limitations of his jurisdiction and decided a matter which the court alone, and not he, was empowered to decide. The question whether the ground is substantiated by material brought on record is a question, which relates to the merit of the objection. The respondent may be able to substantiate the ground urged by him or he may fail to do so. In that event his objection may be rejected by the members of the court martial but that is not to say that the ground on which objection was taken did not affect the competency of a member to act as an impartial judge. The jurisdiction of the trial Judge Advocate under clause (a) of section 102 is limited to the extent of finding out whether the objection is on the ground specified in the first part of clause (a). If it was such a ground, then regardless of its merit, the objection had to be decided by the court martial in accordance with the procedure laid down in that section. If it was not such a ground as specified in the first part of section 102, it was then his discretion to summarily reject the same. The words of the section are "may reject summarily" which is

A indicative of a discretion vested in him. That is because if the objection is an objection respecting the constitution of the court, but not on the ground specified in clause (a) of section 102, then he may rather than dismissing the objection reserve it for consideration after the objections under sections 102 are disposed of and the objections under sections 103 are taken up for consideration.

B

We are, therefore, in agreement with the High Court that the trial Judge Advocate exceeded his jurisdiction under clause (a) of section 102 of the Act and because of his erroneous exercise of jurisdiction the objections relating to the constitution of the Court Martial remained undecided by the competent C authority, and yet the members of the Court Martial proceeded with the trial and found the respondent guilty. This was done in breach of a mandatory provision of section 102 of the Act. Non-compliance of the mandatory provision of section 102 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings. It was so held by the court in Ranjit Thakur's case (supra) where the Court considering a similar provision, though D under the Army Act, observed :-

> "The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the Court-Martial and the severity of the consequences that visit the person subject to that jurisdiction. The E procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the Statute. The oft quoted words of Frankfurther, J. in *Vitarelli* v. *Seaton,* 359 US 535 are again worth F recalling :
>
> > ".....If dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed..... This judicially evolved rule of administrative law is now firmly G established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."
>
> ....
>
> What emerges, therefore, is that in the present case there is a non-compliance with the mandate of S.130 with the attention H consequence that the proceedings of the Summary Court-Martial

are rendered infirm in law." A

This Court referred to similar observations made in *Lt. Col. Prithi Pal Singh Bedi* v. *Union of India,* AIR (1982) SC 1413 where this Court observed:-

> ".....Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection..... B
>
> .....This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection.
>
> .....The provision conferring a right on the accused to object to a member of the Court Martial sitting as a member and participating in C the trial ensures that a charge of bias can be made and investigated against individual members composing the Court - Martial. This is pre-eminently a rational provision which goes a long way to ensure a fair trial."

On the question of bias, the Court in Ranjit Thakur's case (supra) D observed thus :-

> "The second limb of the contention is as to the effect of the alleged bias on the part of respondent 4. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent E 4 was likely to be disposed to decide the matter only in a particular way.
>
> It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice is composed of F impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice'. (See *Vassiliades* v. *Vassiliades*, AIR (1945) PC 38."

In *Union of India and Ors* v. *Major A. Hussain*, [1998] 1 SCC 537, while G dealing with the parameters of judicial review and interference with Court-Martial proceedings this Court observed :-

> "23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under H

A Article 227 of the Constitution. If a court-martial has been properly convened *and there is no challenge to its composition and the* proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands."

(emphasis supplied)

B To the same effect are the observations in *Union of India* v. *Himmat Singh Chahar*, [1999] 4 SCC 521. It was said, while considering provisions of the Navy Act, 1957 :-

"4. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval C Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the competent authority in the court-martial proceedings. It is of course true and notwithstanding the finality attached to the orders of the competent authority in the court- martial proceedings the High Court is entitled to exercise its D power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings or that the authority E exercising the jurisdiction had not been vested with jurisdiction under the Act."

Learned counsel for the appellant submitted that except one, the aforesaid decisions were rendered while considering the provisions of Section 130 of the Army Act, which is differently worded. It may be that section 130 of the F Army Act is differently worded, but that will not make any difference to the application of the principles laid down by this Court in the aforesaid decisions. Section 130 of the Army Act as well as section 102 of the Navy Act relate to the objection to the inclusion of any officer as member of the Court Martial. It may be that the procedure prescribed is not identical, though similar, but G if the provision is mandatory in nature and there is non-compliance with that provision, the consequences will be the same. We, therefore, hold that non-compliance with section 102 of the Navy Act has vitiated the proceedings before the Court Martial.

This takes us to the second submission urged on behalf of the appellant H that the respondent has waived his right to raise such objection since he did

not challenge the ruling of the trial Judge Advocate by filing a writ petition before the High Court. We find no merit in this submission because it is not expected of an accused to challenge every ruling in the course of a trial as that would unnecessarily protract the trial, something, which is not encouraged by the courts. He raised that objection in his petition under section 162 of the Act and thereafter raised the same objection in the instant writ petition from which this appeal arises. It cannot, therefore, be said that he waived his right to raise this objection merely because he did not challenge the ruling of the trial Judge Advocate immediately after it was given at an intermediate stage of the proceedings.

We, however, find considerable force in the submission urged on behalf of the appellant that having found that there was a breach of mandatory provision of the Act which vitiated the proceedings before the Court Martial, the High Court was not justified in considering the evidence on record even for the limited purpose of discovering whether there was any legal evidence to sustain the charges. Counsel for the respondent on the other hand submitted that it was within the power of judicial review of the High Court to quash an order of conviction recorded by the Court Martial if it came to the conclusion that the finding of the Court Martial was perverse as there was no legal evidence whatsoever to support the conviction. In our view, in the facts and circumstances of this case this question had become academic once it was found that the proceedings before the Court Martial were vitiated on account of non-compliance with the provisions of section 102 of the Act. If the very constitution of the Court Martial was not in accordance with law, then any proceedings taken before such an improper Court Martial was a nullity as far as the trial is concerned. As a consequence, the evidence recorded before such a Court Martial had no sanctity in law and, therefore, did not deserve any further consideration.

We, therefore, set aside the finding recorded by the High Court that there was no legal evidence whatsoever to support the charges levelled against the respondent and that he was entitled to benefit of doubt. The findings of the High Court on other questions are affirmed. The order of conviction passed by the Court Martial as well as the orders made under sections 162 and 163 of the Navy Act have been rightly quashed by the High Court.

In the facts and circumstances of the case we leave it to the authorities concerned to consider whether or not to continue the Court Martial

A proceedings from the stage of section 102 of the Act. We make no direction in that regard. In case it is decided to continue the proceeding, the objections raised by the respondents shall be placed for consideration and decision by the members of the Court Martial in accordance with the procedure laid down in clauses (b) to (e) of section 102 of the Act. This is on the assumption that all the members of the Court Martial are available to act as such. In the event B of non-availability of any or all the members of Court Martial earlier constituted, it will be open to the competent authority to constitute a fresh Court Martial. In that event the question whether the objections survive or not may have to be reconsidered depending on whether the President or the Members objected to continue to serve on the Court Martial. Thereafter further C proceedings shall be taken in accordance with law. The Court Martial shall not be influenced by any observation made by the High Court in its impugned judgment. We have scrupulously avoided reference to the facts of the case and the merit of the charges against the respondent. However, nothing said in this judgment shall be construed as expression of opinion on the merit of the charges, which shall be considered in the light of the evidence, which may D be produced by the prosecution before the Court Martial or the reconstituted Court Martial, as the case may be, if the competent authority so decides.

Before parting with this judgment we may notice the submission urged on behalf of the respondent that the re-trial of the respondent, even if E ordered, will be barred by limitation in view of the provision of section 79 of the Act. According to learned counsel for the respondent the trial commences when the charges are read out to the accused and his plea is recorded in accordance with section 105 of the Act. We do not wish to express any opinion on this question. However, the respondent will be at liberty to raise this question in appropriate proceedings before the appropriate forum, if F occasion arises.

This appeal is accordingly dismissed but subject to the direction aforesaid.

N.J. Appeal dismissed.