(11) In this case, as the enquiry officer has given only this finding that fraud has not been proved but if the bus had not been checked, the conductor would have taken the money, cannot be suggestive of the fact that he had committed any misappropriation. On such an inchoate finding, the livelihood of the petitioner should not have been snatched.

(12) For the reasons given above, this writ petition is allowed. Award of the Labour Court Annexure P8 is quashed. Petitioner is ordered to be reinstated into service. Petitioner was removed form service in the year 1980. It is not believable that all these 23 years he has not engaged himself in any job and has not fed his family. I think award of 50 per cent of the back wages will do. He will have the benefit of continuity of service and also the benefit of the increments towards the arrears of back wages and also towards fixation of pay.

R.N.R.

Before V.M. Jain, & Satish Kumar Mittal, JJ

INDERPAL SINGH—*Petitioner*

versus

UNION OF INDIA & ANOTHER—*Respondents*

Crl.W.P. No. 465 of 1997

17th January, 2003

Army Act, 1950—Ss. 63 & 164(2)—Army Rules, 1954—Rl. 18(3)—Charges of indiscipline & negligence in handling fire arm—Summary Court Martial awarding dismissal from service—Vice Chief of Army Staff converting dismissal orders into discharge from service from the date of dismissal order became effective—Petition u/s 164(2) filed against the orders of Summary Court Martial is maintainable—Competent authority can reduce the sentence of dismissal to the discharge from service being a lesser punishment—No infirmity or illegality in the order passed by the Vice Chief of Army Staff—Provisions of Rule 18(3) impose a restriction that the discharge cannot be made with retrospective effect—Order to that extent liable to be set aside—Petition partly allowed.

Held, that one person was injured due to the discharge of bullet from the rifle of the petitioner. The petitioner also pleaded guilty before the authorities. The Summary Court Martial proceedings were initiated against him and he was dismissed from service. Though the Court Martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, yet the Court Martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a Court Martial has been properly convened and there is no challange to its composition and the proceedings are in accordance with the procedure prescribed, the High Court cannot interfere into the punishment awarded to the delinquent.

(Para 12)

Further held, that the allegations against the petitioner are the act of his omission prejudicial to good order and military indiscipline in so negligently handling his service rifle as to cause it to be discharged and thereby injuring his co-fellow. Therefore, by no stretch of imagination, the allegation levelled against the petitioner in the charge sheet can be held to constitute a civil offence defined and punishable under the Code. Therefore, the question of trying the petitioner under Section 69 of the act does not arise and he was rightly tried under Section 63 of the Act. If that is so, the bar imposed by sub-section (2) of section 120 of the Act is not applicable. Therefore, there is no force in the contention that the Summary Court Martial proceedings conducted in the present case were wholly without jurisdiction.

(Para 14)

Further held, that though the punishment of discharge does not find mention in the list of punishments which can be awarded in the Summary Court Martial proceedings as provided under Section 71 of the Act, but the said punishment can be awarded by the Central Government or the competent authority while disposing of the post confirmation petition under section 164(2) of the Act as under this Section 'any order' can be passed by the authority which he thinks fit.

(Para 16)

Further held, that against the findings and sentence awarded by a Summary Court Martial, a petition under Section 164(2) of the Act by an aggrieved person is maintainable and the same can be considered and decided by the prescribed authority by passing such order which he thinks fit. While passing such order, the sentence awarded by the Summary Court Martial can be reduced and mitigated to any other sentence. The competent authority under Section 164(2) of the Act can reduce the sentence of dismissal to the discharge from service being a lesser punishment. Thus, there, is no infirmity or illegality in the impugned order dated 2nd March, 1995 passed by the Vice-Chief of Army Staff.

(Para 20)

Further held, that Sub-Rule (3) of Rule 18 of the 1954 Rules clearly imposes a restriction that in no case the discharge can be made with retrospective effect. We are of the opinion that whether the discharge is made in the ordinary course or has been made as a matter of punishment, in no case, the same can be made with retrospective effect. Merely because the petitioner was punished by the Court Martial, it cannot be said that the aforesaid rules are not applicable on him and the punishment of discharge can be given to him with retrospective effect. Therefore, to this extent, the impunged order dated 2nd March, 1995 *vide* which the petitioner was ordered to be deemed to have been discharged from service from the date his dismissal order became effective, is set aside and the order of discharge of the petitioner will be effective from the date it was passed by the Vice Chief of Army Staff.

(Para 24)

R. S. Randhawa, Advocate *for the Petitioner.*

R. S. Rai, Senior Central Government Standing Counsel, for Union of India.

JUDGEMENT

Satish Kumar Mittal, J

(1) Inderpal Singh—petitioner has filed the present petition under Articles 226/227 of the Constitution of India for quashing the Summary Court Martial proceedings dated 13th July, 1992 (Annexure P-2) held against him in which he was awarded the sentence of

dismissal from service and further for quashing the order dated 2nd March, 1995 (Annexure P-4), passed by the Vice Chief of Army Staff, whereby the sentence of dismissal awarded by the Court Martial was commuted to dicharge which, under the provisions of the Army Act, 1950 (hereinafter referred to as the Act') and the Army Rules, 1954 (hereinafter referred as the Rules') could not legally be done and the same being illegal and without jurisdiction; with a further prayer that he be reinstated into service with all consequential benefits, Initially, this petition was numbered as CWP No. 7793 of 1995, but subsequently it was treated as Criminal Writ Petition,—*vide* dated 21st March, 1997 and numbered as Crl. W.P. No. 465 of 1997.

(2) The brief facts of the case are that the petitioner was enrolled in the Army as a Sepoy in April, 1980. On 11th June, 1992, when the petitioner alongwith other members of his Unit had gone on exercise and while he was resting under the shade of a tree, his rifle got accidentally discharged. The discharge of the rifle happened to injure Sepoy Iqbal Singh of his Unit. There was no allegation of any ill-will against the petitioner. For this omission, the petitioner was tried by the Summary Court Martial for an offence committed under Section 63 of the Act and he was charge-sheeted under the said Section for committing an omission prejudicial to good order and military discipline in which he, at Field, on 11th June, 1992 at about 1200 hrs., so negligently handled his rifle as to cause it to be discharged and thereby injuring Sepoy Iqbal Singh of the same Regiment. The Summary Court Martial proceedings were conducted by the officiating Commanding Officer on 13th July, 1992, in which the petitioner pleaded guilty and he was awarded the punishment of dismissal from service. Before pleading guilty, the petitioner was duly explained the nature of the charge levelled against him. By knowing the contents and allegations of charge against him, he pleaded guilty.

(3) The petitioner pleaded in the petition that copy of the Court Martial proceedings was not supplied to him by the Army Authorities in spite of his repeated requests. Therefore, he had to apporach this Court by filing C.W.P. No. 3546 of 1993. Thereupon, he was supplied the copy of the Summary Court Martial proceedings on 27th August, 1993. The petitioner then filed a statutory post-confirmation petition under the provisions of Section 164(2) of the Act on 18th October, 1993, but the said petition filed by him was not decided by the

concerned authority in spite of his repeated reminders. He had to again approach this Court by way of filing C.W.P. No. 6152 of 1994, which was disposed of on 13th May, 1994 with the direction to respondent No. 2 to consider and decide the post-confirmation petition of the petitioner within a period of two months. When the post-confirmation petition of the petitioner was not decided in the aforesaid stipulated time, the petitioner filed C.O.C.P. No. 1282 of 1994. Thereafter, respondent No. 2 passed the order dated 2nd March, 1995,—*vide* which the post-confirmation petition of the petitioner was decided and the sentence of dismissal from service was remitted. However, it was further directed that the petitioner shall be deemed to have been discharged from service from the date his dismissal became effective. This order dated 2nd March, 1995 (Annexure P-4) was received by the petitioner on 14th March, 1995 at his permanent residence in village Nangal Path, P.O. Mehroli, District Ambala (Haryana). Since the said order was conveyed to the petitioner at his residential address in a village in Ambala District, the petitioner filed the present writ petition in this Court challenging the said order by alleging that part of the cause of action has arisen under the territorial jurisdiction of this Court.

(4) The petitioner has challenged the Summary Court Martial proceedings held against him on 13th July, 1992 (Annexure P-2) and the order dated 2nd March, 1995 (Annexure P-4) passed by respondent No. 2,—*vide* which his dismissal order was converted into discharge, on various grounds, by alleging that these are wholly illegal and without jurisdiction.

(5) Pursuant to notice issued by this Court, respondents have filed the written statement, contesting the petition on merits as well as on preliminary objections that this Court has no territorial jurisdiction to entertain this petition, as neither the alleged incident had taken place nor the impugned orders were passed in the territorial jurisdiction of this Court. Merely becuase the order passed by respondent No. 2 disposing of the post-confirmation petition of the petitioner, was conveyed to the petitioner in the territorial jurisdiction of this Court, it does not entitle the petitioner to invoke the extraordinary jurisdiction of this Court.

(6) After hearing both the sides at the motion stage, the writ petition was admitted on 10th May, 1996 to be heard by a Division Bench. Now the case has been placed before this Bench for regular hearing.

(7) We have heard the learned counsel for both the parties and have perused the record of the case.

(8) Mr. R. S. Rai, Senior Central Government Standing Counsel, for Union of India, while relying upon a decision of this Court, in C.W.P. No. 6557 of 2002, decided on 20, Nobember, 2002, titled as **S. B. Tarlok** *versus* **Union of India and others,** has raised a preliminary objection that this Court has no territorial jurisdiction to entertain the present petition filed by the petitioner as neither the alleged incident had taken place nor the Summary Court Martial proceedings were held in the territorial jurisdiction of this Court. He further submitted that even the order dated 2nd March, 1995. (Annexure P-4) passed by respondent No. 2 was not passed in the territorial jurisdication of this Court. He submitted that merely because the said order was communicated to the petitioner at his permanent address in the village situated in the territorial jurisdiction of this Court, does not confer any right on the petitioner to get the controversy in question determined from this Court. In the case of **S. B. Tarlok** *(supra),* it has been held by this Court that merely becuase the impugned order has been communicated in the territorial jurisdiction of this Court, it will not confer jurisdiction on this Court to entertain the controversy between the parties, when the cause of action does not arise in the territorial jurisdiction of this Court.

(9) On the other hand, learned counsel for the petitioner submitted that the respondents cannot raise this objection regarding territorial jurisdiction, at this stage, when the matter has been listed for final hearing. He submitted that once the matter was admitted for regular hearing way back in the year 1996, now the writ petition filed by the petitioner cannot be dismissed on the ground of want of jurisdiction. He further submitted that in similar circumstances the Hon'ble Supreme Court, in ***Dinesh Chandra Gahtori*** versus ***Chief of Army Staff and another, (1)*** while setting aside the judgment of the Allahabad High Court,—*vide* which the writ petition was dismissed at the motion stage on the ground of territorial jurisdiction, has held as under :—

> "The writ petition was filed in 1992. The impugned order was passed in 1999. This is a fact that the High Court

(1) (2001) 9 SCC 525

should have taken into consideration. More importantly, it should have taken into consideration the fact that the Chief of Army Staff may be sued anywhere in the country. Placing reliance only on the cause of action, as the High Court did, was not justified.

The appeal is allowed. The order under appeal is set aside. The writ petition (CWP No. 39209 of 1992) is restored to the file of the High Court to be heard and disposed of on merits expeditiously."

(10) We have considered the submissions made by the learned counsel for the parties. In our view, it will not be appropriate to dismiss the writ petition filed by the petitioner at this stage on the point of territorial jurisdication. The decision given by the Hon'ble Supreme Court, in **Dinesh Chandra Gahtori's** case *(supra)*, is fully applicable to the facts and circumstances of the present case and the said decision has been distinguished by this Court in **S. B. Tarlok's** case (supra), while holding that since the matter remained pending for seven long years, therefore, in the peculiar facts and circumstances of the case, the Apex Court took the said view. But the said decision was not followed in **S. B. Tarlok's** case *(supra)*, as in the case, the preliminary objection was raised at the preliminary stage. Therefore, we find no force in the preliminary objection raised by the learned counsel for the respondents regarding maintainability of the present petition.

(11) On merits, firstly the learned counsel for the petitioner submitted that the allegations averred in the charge-sheet (Annexure P-1) did not reveal any culpable neglect. The nature of the offence and the particulars of the charge would clearly show that it was a case of rifle getting discharged by accident. Under the provisions of the Act also, the accident or accidental omission/commission are complete defence. Therefore, he submitted that the allegations contained in the particulars of charge do not reveal any offence and as such no conviction of the petitioner on this charge could have been recorded and no sentence was open to be awarded. Therefore, the sentence of dismissal from service awarded to the petitioner in Summary Court Martial proceedings is wholly without jurisdiction.

(12) We have considered this submission made by the learned counsel for the petitioner. In our view, there is no force in the contention

raised by the learned counsel and the same is liable to be rejected. It is admitted fact that one person was injured due to the discharge of bullet from the rifle of the petitioner. The petitioner also pleaded guilty before the authorities. The Summary Court Martial proceedings were initiated against him and he was dismissed from service. Though the Court Martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, yet the Court Martial is not subject to the superintendence of the High Court under 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 cannot interfere into the punishment awarded to the delinquent. It is also well settled that proceedings of a Court Martial are not to be compared with the proceedings in a criminal Court under the Code of Criminal Procedure. In the present petition, the petitioner did not allege any irregularity in conducting the Court Martial proceedings. Once he pleaded guility in the Court Martial proceedings, he subsequently cannot raise the objection regarding not following the prescribed procedure by the Court Martial. Therefore, it cannot be held that the allegation contained in the particulars of charge do not reveal any offence. The allegations contained in the charge-sheet clearly constitute the offence provided under Section 63 of the Act, which says any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as in this Act is mentioned. The petitioner has injured his co-fellow by his act of negligent handling of his Arm, which clearly falls under Section 63 of the Act. Though the alleged omission of the petitioner may not be wilful, but the same is negligent omission as a high degree of care is demanded from a soldier, who is handling fire-arms are who has been trained in proper handling of such fire-arms. Under Section 71 of the Act, dismissal is one of the punishments which can be awarded to guility official convicted by the court-martial.

(13) The learned counsel for the petitioner then submitted that even if it is assumed for the sake of arguments that the allegations *prima facie* constitute an offence, then certainly these allegations do not reveal and constitute any offence under Section 63 of the Act, as it does not fall within the four corners of the said Section. According

to him, Section 63 of the Act punishes an act or omission, which is not specified as an offence under the Act, but nevertheless it is considered to be an act of omission which is prejudicial to good order and military discipline. According to him, before charging a person under Section 63 of the Act, the authorities are required to first see if the act or omission is ruled out to be an offence in any of the other provisions of the Act, only then resort can be made to Section 63 of the Act. He further submitted that a perusal of Section 69 of the Act would show that by fiction of law, this Section makes all the offences under the Indian Penal Code (hereinafter referred to as the Code) to be offences under the Act and as such triable by Court Martial. He then submitted that bare reading of the averments made in the charge-sheet (Annexure P-1) would show that at the most, the alleged act/omission of the petitioner was rash or negligent act which has resulted into an injury, such an act is clearly brought within the four corners of offences created under Sections 337/338 of the Code. Since all the offences under the Code are offences under the Act, by fiction of law, as created by Section 69 of the Act, the allegation made against the petitioner amounted to a civil offence, as punishable under Section 69 of the Act. If that is so, then no summary court-martial for the trial of such offence can be tried unless the provisions of Sub-Section (2) of Section 120 of the Act have been complied with. This Sub-Section provides that the offence punishable under Section 69 of the Act can not be tried by Summary Court Martial without a reference made by the officer who is empowered to convene a district Court Martial. Since in the present case, no such reference was made by the competent authority nor any sanction was obtained, as required under Sub-Section (2) of Section 120 of the Act, therefore, the Summary Court Martial proceeding conducted in the present case is wholly without jurisdiction.

(14) The above arguments of the learned counsel for the petitioner though appear to be attractive but there is no force in the same. If we carefully peruse the charge-sheet (Annexure P-1), then it is clear that the petitioner was not charged for any civil offence, as defined under the Code, on the other hand, the petitioner was tried for an omission prejudicial to good order and military indiscipline as he could not handle his service rifle carefully, which he was expected to handle such fire-arm for which he was duly trained. Such an act on the part of the petitioner obviously amounts to neglect and omission

though may not be wilful or culpable. Such an act is not a civil offence and the same is only triable under Section 63 of the Act. The contention of the learned counsel for the petitioner that the allegation levelled in the charge-sheet constitute an offence under Sections 336/337/338 of the Code cannot be accepted. The aforesaid Sections provide for punishment to a person for his rash and negligent act which endanger human life or the personal safety of osthers. But, the allegation in the charge-sheet (Annexure P-1) is not rash and negligent act on the part of the petitioner for endangering human life and personal safety. The allegations against the petitioner are the act of his omission prejudicial to good order and military indiscipline in so negligently handling his service rifle as to cause it to be discharged and thereby injuring his co-fellow. Therefore, by no stretch of imagination, the allegation levelled against the petitioner in the charge-sheet can be held to constitute a civil offence defined and punishable under the Code. Therefore, the question of trying the petitioner under Section 69 of the Act does not arise and he was rightly tried under Section 63 of the Act. If that is so, the bar imposed by Sub-Section (2) of Section 120 of the Act is not applicable. Therefore, there is no force in the contention of the learned counsel for the petitioner that the Summary Court Martial proceedings conducted in the present case were wholly without jurisdiction.

(15) The learned counsel for the petitioner further sumitted that,— *vide* order dated 2nd March, 1995 (Annexure P-4), the Vice Chief of Army Staff, while exercising the delegated powers of the Chief of Amry Staff under Section 162 of the Act and while disposing of the post confirmation petition of the petitioner filed under Section 164(2) of the Act, remitted the sentence of dismissal awarded by the Summary Court Matrial, but directed that the petitioner shall be deemed to have been discharged from service from the date his dismissal order became effective. He submitted that the Vice Chief of Army Staff was competent to reduce the sentence while exercising the power under Section 162 of the Act, but while doing so he can reduce the sentence to any other sentence which might have been passed by the Summary Court Matrial under the Act. But the punishment of discharge does not fall under any sentence which can be awarded by the Court Matrial. He referred to Section 71 of the Act which provides for punishment awardable by the Court Matrial. In that Section, the punishment of discharge does not find mention. Thus, the discharge

is not one of the punishments prescribed under the Act which the Court Matrial can pass. According to the learned counsel for the petitioner, discharge means premature retirement and even the sentence of premature retirement or release from service is not prescribed as a sentence awardable by Court Matrial under the provisions of Section 71 of the Act. According to him, after remission of the sentence of dismissal by the Vice Chief of Army Staff, no sentence stands against the petitioner and he is deemed to be in service and the order of discharge having been made is wholly without jurisdiction. Therefore, the petitioner as such must be reinstated with all consequential benefits. He further submitted that even a reading of the provisions of Section 179 of the Act would also lead to the same conclusion, whereby under that provisions also, the competent authority can commute the punishment awarded by a Court Matrial of any offence for any less punishment or punishment as mentioned in that Act. Since discharge being not mentioned as a punishment in the Act, it is not open to be commuted from that of dismissal.

(16) In reply to the aforesaid contention, the learned counsel for the respondents submitted that the order dated 2nd March, 1995 (Annexure P-4) was passed by the Vice-Chief of Army Staff under section 164(2) of the Act against the finding and sentence awarded to the petitioner by the Summary Court Martial while disposing of the post confirmation petition filed by him. The Vice-Chief of Army Staff exercising the powers of Chief of Army Staff had mitigated the sentence of dismissal to discharge purely on humanitarian ground. The mitigation of the award of Summary Court by remitting the sentence of 'dismissal' to 'discharge' does not nullify the offence committed by the petitioner and the cognizance of the offence remains the same. He submitted that under sub-section (2) of Section 164 of the Act, the Central Government or the competent authority while deciding the post confirmation petition filed by the aggrieved person against the proceeding of any Court Martial may confirm such sentence or may pass such order thereon as it or he thinks fit. Therefore, the Vice Chief of Army Staff, while passing the impugned order dated 2nd March, 1995 (Annexure P-4), in his wisdom reduced the sentence of the petitioner from dismissal to discharge, which he was competent to do so under sub-section (2) of Section 164 of the Act. In support of his contention, the learned counsel for the respondents relied upon a

Division Bench decision of the Delhi High Court in ***R.N. Srivastava*** versus ***Union of India and others, (2)*** in which it was held that the Central Government or the competent authority is competent to modify the order of dismissal to one of discharge from service being a lesser punishment while passing order on the post confirmation petition filed under section 164(2) of the Act. In our view, there is force in the contention raised by the learned counsel for the respondents. Though the punishment of discharge does not find mention in the list of punishments which can be awarded in the Summary Court Martial proceedings as provided under section 71 of the Act, but the said punishment can be awarded by the Central Government or the competnet authority while disposing of the post confirmation petition under Section 164(2) of the Act, as under this section any order can be passed by the authority which he thinks fit. We are in agreement which the law laid down by the Division Bench of the Delhi High Court in R.N. Srivastava's case (supra) that the punishment of discharge from service is a lesser punishment from the punishment of dismissal from service and the same can be awarded by the Central Government or the competent authority while passing the order under section 164(2) of the Act.

(17) Faced with this situation, the learned counsel for the petitioner tried to persuade that no post confirmation petition lies against the order passed by the Summary Court Martial. According to him, the post confirmation petition can only be filed against the order of those Court Martial proceedings which are required to be confirmed by the higher authority; and such petition can be filed against the sentence of such Court Martial, the proceeding of which had been confirmed. He submitted that the sentence awarded by the Summary Court Martial is not required to be confirmed, as is clear from Section 161 of the Act, which provides that the finding and sentence of a Summary Court Martial shall not require to be confirmed, but may be carried out forthwith. He submitted that the order dated 2nd March, 1995 (Annexure P-4) has been passed by the Vice-Chief of Army Staff under Section 162 of the Act, though it has been wrongly averred that the said order was passed by the said authority under section 164(2) of the Act, while disposing of the post confirmation petition filed by the petitioner. Learned counsel for the petitioner submitted that under section 162 of the Act, the Vice-Chief of Army

(2) 1982 (3) SLR 133

Staff or any officer empowered in this behalf by the Chief of Army Staff can certainly reduce the sentence, but he can reduce that sentence to any other sentence which the Court might have passed under the Act. He pointed out that the expression may pass such order theron as it or he thinks fit used in Section 164(2) of the Act, has not been used under section 162 of the Act. Therefore, the competent authority was having no jurisdiction to reduce the sentence of dismissal to discharge from service, as sentence of discharge from service has not been prescribed as one of the sentences which might be awarded under the Act, as defined in Section 71 of the Act. Therefore, the order dated 2nd March, 1995 (Annexure P-4) passed by the Vice-Chief of Army Staff is wholly without jurisdiction.

(18) We are unable to accept the aforesaid contention raised by the learned counsel for the petitioner. Section 164 of the Act provides as under :—

> **"164. Remedy against order, finding or sentence of court-martial.**—(1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the offficer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.
>
> (2) Any person subject to this Act who considers himself aggrieved by a finding or sentence to any court-martial which has been confirmed, may present a petition to the Central Government, the (Chief of the Army Staff) or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government the (Chief of the Army Staff) or other officer, as the case may be, may pass such order thereon as it or he thinks fit."

(19) A careful reading of the aforesaid Section makes it clear that this Section has two independent parts. Sub-section (1) provides for filing a petition which can be filed by the aggrieved person against

any order passed by any Court Martial to the officer or authority empowered to confirm the finding or sentence of such Court Martial. The confirming authority may take into consideration the said petition and take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed by such Court Martial. Sub-section (2) provides for a post confirmation petition which can be filed before the Central Government or the Chief of Army Staff or any prescribed officer superior in command to one who confirmed such finding or sentence challenging the correctness and legality of the said order. Though the proceedings of Summary Court Martial are not required to be confirmed as provided under section 161 of the Act, but as per Section 162 of the Act, the proceeding of every Summary Court Martial is required to be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer without any delay and such officer can reduce the sentence to any other sentence. Thus, the confirmation of the punishment awarded by the Summary Court Martial is inherent under Section 162 itself. In the present case, the Summary Court Martial proceedings were forwarded to the brigade commander who countersigned the same on 5th August, 1992 and confirmed the sentence awarded by the Summary Court Martial. Sub-section (2) of Section 164 of the Act has an independent part which provides that any aggrieved person against the finding of sentence awarded to him by 'any Court Martial' can file a petition before the Central Government or the Chief of Amry Staff or any prescribed officer superior in command. This Sub-section also permit an aggrieved person against the finding and sentence of the Summary Court Martial of file a petition before the superior authority. This interpretation finds support from Rule 201 of the Rules, which provides as under :—

> "**201. Prescribed Officer under section 164(2).**—The Prescribed officer for the purposes of sub-section (2) of Section 164 shall be any officer superior in Command to the commanding officer and in the case of a summary court-martial any officer superior in command to the officer who held the summary court-martial, provided that such superior officer has power not less than a brigade commander."

(20) From this rule, it is clear that in case of a Summary Court Martial, any officer superior in command to the officer, who held the Summary Court Martial, is the prescribed officer before whom a petition under section 164(2) of the Act can be filed. This is one aspect of the matter. Further, the petitioner himself filed the post confirmation petition under section 164(2) of the Act against the sentence awarded to him by the Summary Court Martial. Not only that, when the said petition was not decided, he filed C.W.P. No. 6152 of 1994, which was disposed of on 13th May, 1994 with the direction to respondent No.2 to consider and decide the petition filed by the petitioner under Section 164(2) of the Act within a period of two months. Now, the petition under sub-section (2) of Section 164 of the Act against the sentence awarded by the Summary Court Martial is maintainable and the order dated 2nd March, 1995 (Annexure P-4) passed by the Vice-Chief of Army Staff is wholly without jurisdiction. We are of the considered opinion that against the finding and sentence awarded by a Summary Court Martial, a petition under section 164(2) of the Act by an aggrieved person is maintainable and the same can be considered and decided by the prescribed authority by passing such order which he thinks fit. While passing such order, the sentence awarded by the Summary Court Martial can be reduced and mitigated to any other sentence. We are also of the opinion that the competent authority under section 164(2) of the Act can reduce the sentence of dismissal to the discharge from service being a lesser punishment. Thus, there is no infirmity or illegality in the impugned order dated 2nd March, 1995 (Annexure P-4) passed by the Vice-Chief of Army Staff.

(21) In the last, the learned counsel for the petitioner submitted that even if it is held that the punishment of dismissal from service can be reduced to the order of discharge from service, but the same cannot be awarded to the petitioner with retrospective effect. In the impugned order dated 2nd March, 1995 (Annexure P-4), the punishment of discharge shall be deemed to have been effected from the date the dismissal order became effective. He submitted that the above order was passed on 2nd March, 1995, but the same was given effect from 13th July, 1992. Therefore, the order of discharge which has been made with retrospective effect is wholly illegal and without jurisdiction. In support of his contention, he referred to the provisions of Rule 18(3) of the Rules and submitted that the impugned order of discharge even if otherwise everything is conceded, could have been

made effective from the date of the order, i.e., 2nd March, 1995 and if that happens, the petitioner would be held entitled to earn his pension and pensionary benefits.

(22) The learned counsel for the petitioner had further drawn the attention of the Court towards note (7) provided under the provisions of Rule 13 of the Rules which says that in no case discharge can be made retrospective. In reply to the above contention, the learned counsel for the respondents submitted that the provisions of Rule 13 or 18 are not applicable in case of the petitioner because when the petitioner was punished for dismissal from service by the Summary Court Martial, he ceased to be subject of the Act and these rules are only applicable to the persons who are still serving and subject to the Act. He further submitted that the discretion exercised by the Vice-Chief of Army Staff, while passing the sentence of discharge under section 164(2) of the Act and imposing the said sentence with effect from the date of dismissal, should not be interferred by the Court.

(23) We have considered the respective submissions made by the learned counsel for the parties on this aspect of the matter and we are of the opinion that there is force in the contention of the learned counsel for the petitioner. Rule 18 of the Rules provides as under :—

> **"18. Date from which retirement, resignation, removal, release, discharge or dismissal otherwise than by sentence of court-martial takes effect.—**
>
> (1) The dismissal of an officer under section 19 or the retirement, resignation, release or removal of such officer shall take effect from the date specified in that behalf in the notification of such dismissal, retirement or removal in the official Gazette.
>
> (2) The dismissal of a person subject to the Act, other than an officer whose dismissal otherwise than by sentence of a court-martial is duly authorised or the discharge of a person so subject whose discharge, if duly authorised, shall be carried out by the commanding officer of such person with all convenient speed. The authority competent to authorise such dismissal or discharge may, when authorising the dismissal or

discharge, specify any future date from which it shall take effect :

Provided that if no such date is specified the dismissal or discharge shall take effect from the date on which it was duly authorised or from the date on which the person dismissed or discharged, ceased to perform military duty, whichever is the later date.

(3) The retirement, removal, resignation, release, discharge or dismissal of a person subject to the Act shall not be retrospective."

(24) Sub-rule (3) of the aforesaid Rule clearly imposes a restriction that in no case the discharge can be made with retrospective effect. A bare reading of the entire rule makes it clear that the competent authority may order the dismissal or discharge from any future date, but in no circumstances such order can be passed from a retrospective date. We are of the opinion that whether the discharge is made in the ordinary course or has been made as a matter of punishment, in no case, the same can be made with retrospective effect. There is no force in the contention of the respondent that the provisions of Rule 13 or 18 are not applicable in case of the petitioner becuase he had been punished for dismissal from service by the Summary Court Martial and thereafter he ceased to be a member of the service, and these rules are only applicable to the persons who are still in service and subject to the Act. Merely becuase the petitioner was punished by the Court Martial, it cannot be said that the aforesaid rules are not applicable on him and the punishment of discharge can be given to him with retrospective effect. Therefore, to this extent, the impugned order dated 2nd March, 1995 (Annexure P-4),—*vide* which the petitioner was ordered to be deemed to have been discharged from service from the date his dismissal order became effective, is set aside and the order of discharge of the petitioner will be effective from the date it was passed by the Vice Chief of Army Staff.

(25) In view of the aforesaid discussion, this writ petition is partly allowed with the aforesaid modification in the impugned order qua the date it became effective, with no order as to costs.

R.N.R.