petitioner has been using this channel in a clandestine manner. However, we are not concerned with this controversy because, in our opinion, no agreement has been proved on the record which would justify interference by the Divisional Canal Officer under section 30-FF.

(9) Mr. Jain then contended that the water-channel 'ADEFGH' does not effectively carry the water to the lands of the petitioner. He contends that the water properly runs upto the point 'G' but beyond point 'G' it is very difficult for the water to move on the lands of the petitioner. If this is so, the proper remedy of the petitioner is to move the Canal authorities for proper realignment of this channel; in other words, for the alteration or realignment of the channel. This is permitted under section 30-FF. In case such an application is made and the grievance is genuine, we have no doubt that redress will be available to the petitioner, but he cannot claim in the present proceedings that he is entitled to the user of the watercourse marked 'AB'. In our opinion, the decision of the Superintending Canal Officer was correct and no fault can be found therewith.

(10) The difficulty in the way of the petitioner at the moment is that the channel marked 'G to H' is no longer available to him and in order to safeguard his crop, we direct that he may be permitted to use the watercourse 'AB' for a period of six months to enable him to move the Canal authorities to give him redress.

(11) For the reasons recorded above, this petition fails and is dismissed. There will be no order as to costs.

B.S.G.

CIVIL MISCELLANEOUS

Before Bal Raj Tuli, J.

S. L. 221, MAJOR MANOHAR LAL,—*Petitioner.*

versus

THE UNION OF INDIA ETC.,—*Respondents.*

Civil Writ No. 2811 of 1970

September 16, 1971.

Army Act (XLVI of 1950)—Sections 108 and 113—Army Rules (1954)—Rules 40 and 41—Trial by General Court Martial of an Army Officer of the

rank of a Major—One of the members of the Court Martial being of the rank of a Captain—No certificate appended by the convening officer regarding the non-availability of an officer of the rank of a Major—Such Court Martial trial—Whether void.

Held, that from a perusal of Section 113 of the Army Act, 1950 and rule 40(3) of Army Rules, 1954 it is clear that a Captain is eligible for being a member of the General Court Martial. He is not disqualified to be such a member. A Captain being eligible to be made a member of the General Court Martial, then merely because the convening officer does not append the certificate that an officer of the rank of Major is not available, does not make the constitution of that General Court Martial invalid. The finding given by it is not without jurisdiction. The provisions of rule 40(2), in so far as the requirement of appending a certificate is concerned, are only directory. Moreover under Rule 41 of the Rules, a duty is cast on the members of Court Martial, when they assemble as a Court, to hold an enquiry as to its constitution. It is to be presumed that when it assembles, the members thereof made the enquiry with regard to the validity of its constitution and that no invalidity was found. Hence the trial of an Army Officer of the rank of a Major by a General Court Martial of which one of the members is a Captain without a certificate appended by the convening officer regarding the non-availability of a Major, is not void. (Paras 3 and 5).

Petition under Articles 226/227 of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the order convicting the petitioner and also quashing the orders dated 17th May, 1969 (Annexure 'A') and dated 6th April, 1970 (Annexure 'C').

H. L. Sibal, Senior Advocate, with S. C. Sibal, Advocate, *for the petitioner.*

Hari Mittal, Assistant Advocate-General (Haryana), *for the respondents.*

JUDGMENT

TULI, J.—(1) The petitioner is a Major in the army and is subject to the Army Act of 1950 (hereinafter called 'the Act'). He was tried by the General Court Martial at Jullundur Cantonment under section 63 of the Act, on October 8, 1968. The trial concluded on October 19, 1968, and the General Court Martial gave the verdict of 'not guilty' in his favour. The Court Martial had been convened

by the General Officer Commanding (Headquarters) 15 Infantry Division who had been empowered to convene the General Court Martial under section 109 of the Act. The General Court Martial forwarded its proceedings to the General Officer Commanding (Headquarters) Western Command, Simla, for confirmation under sections 153 and 154 of the Act read with Rule 63 of the Army Rules, 1954 (hereinafter referred to as 'the Rules'). The General Officer Commanding-in-Chief, Western Command, directed the General Officer Commanding (Headquarters) 15 Infantry Division, to hold a fresh trial on the ground that the proceedings of the first General Court Martial were null and void under rule 40(2) of the rules; the reason being that one of the members of the General Court Martial was of the rank of a Captain when a Major was available and no certificate had been issued by the convening authority that an officer of the rank of the petitioner was not available. A second General Court Martial was convened on November 1, 1968, and the trial of the petitioner commenced on November 6, 1968. The Court Martial held the petitioner guilty and the punishment of three years' loss of seniority for increments, promotion and pension, was imposed upon the petitioner. The petitioner filed a petition under section 164(2) of the Army Act to the President of India on July 27, 1969, which was rejected on April 6, 1970. The petitioner thereafter filed the present petition challenging the convening of the second Court Martial and the sentence imposed upon him. Return has been filed by respondents 1 and 2 to which an additional affidavit was filed by the petitioner. The respondents filed an affidavit in reply to the additional affidavit of the petitioner which has been taken on record.

(2) The first submission made by the learned counsel for the petitioner is that the General Officer Commanding-in-Chief, Western Command, had erred in Law in holding that the proceedings of the first General Court Martial were null and void. That Court Martial was convened by the General Officer Commanding, 15 Infantry Division by an order dated October 4, 1968. The members of that Court Martial were Col. Rattan Lal Puri, Lt. Col. Sharma Vishwa Nath, Lt. Col. Kuldip Singh Gill, Major Kelkar S. G. and Captain Ranbir Singh. In that very order, Major Sabharwal Surinder Kumar and Captain Hari Singh were nominated as waiting members. On the basis of this order the General Officer

Commanding-in-Chief, Western Command, concluded that a Major was available when Captain Ranbir Singh was made a member of the General Court Martial without the convening authority appending a certificate that no officer of the rank of the petitioner, that is, a Major, was available. Section 108 of the Act enumerates the kinds of Court Martial, one of them being General Court Martial; section 109 gives the list of authorities who can convene the General Court Martial and section 113 provides for the composition of the General Court Martial. According to this section, a General Court-martial is to consist of not less than five officers, each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of Captain. In the absence of anything else, under the provisions of this section a Captain could be a member of the General Court Martial but it is urged on behalf of the respondents that under rule 40(2) of the rules, a Captain could only be appointed in the present case if no Major was available. This rule reads as under:—

"40(1) A General Court Martial shall be composed, as far as seems to the convening officer practicable, of officers of different corps or departments, and in no case exclusively of officers of the corps or department to which the accused belongs.

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

(3) In no case shall an officer below the rank of captain be a member of a court-martial for the trial of a field officer."

(3) According to the definition of the 'field officer' a Major is a field officer. According to this rule, therefore, a Captain could be appointed a member of the General Court Martial if a Major was not available. Although the convening officer mentioned the name of a Major as a waiting member, no reason has been stated why he was not appointed as a member of the General Court Martial, if

he was available. The convening officer also did not append the certificate that an officer of the rank of Major was not available and, therefore, a Captain was being appointed. The question that arises for determination is whether the provisions of rule 40(2) are mandatory or only directory in so far as the requirement of appending a certificate is concerned. From the perusal of section 113 and rule 40(3) it is clear that a Captain is eligible for being a member of the General Court Martial and, therefore, it cannot be said that he was not qualified to be a member of the General Court Martial convened in the case of the petitioner. Their Lordships of the Supreme Court pointed out the distinction between a mandatory provision of law and that which is merely directory in *State of Punjab* v. *Satya Pal Dang and others* (1), as under (per head-note 'I'):—

> The distinction between a mandatory provision of law and that which is merely directory is this that in a mandatory provision there is an implied prohibition to do the act in any other manner while in a directory provision substantial compliance is considered sufficient. In those cases where strict compliance is indicated to be a condition precedent to the validity of the act itself, the neglect to perform it is fatal. But in cases where although a public duty is imposed and the manner of performance is also indicated in imperative language, the provision is usually regarded as merely directory when general injustice or inconvenience results to others and they have no control over those exercising the duty."

(4) The General Court Martial was to be convened by the General Officer Commanding (Headquarters) 15 Infantry Division and the petitioner had no control in that behalf. Under Rule 41 of the rules, a duty is cast on the members of the Court Martial, when they assemble as a Court, to hold an inquiry as to its constitution. It is to be presumed that when the General Court Martial assembled on October 8, 1968, to try the petitioner, the members thereof made the inquiry with regard to the validity of its constitution and that no invalidity was found. The setting aside of the proceedings

(1) A.I.R. 1969 S.C. 903,

of that Court as null and void, did a great injustice to the petitioner who after a proper trial was held 'not guilty' of the charge levelled against him. When the petitioner was informed of the constitution of a second General Court Martial, he immediately represented against its constitution on October 30, 1968, by submitting a representation, a copy of which is Annexure 'D' to the writ petition. There is no doubt that under section 193 of the Act the rules framed under the Act have the same statutory force as if enacted in the Act and, therefore, we have to read the provisions of section 113 of the Act and Rule 40 of the rules in a manner in which they can be harmonised. According to these provisions, a Captain is eligible to be made a member of the General Court Martial and merely because the convening officer did not append the certificate that an officer of the rank of the accused was not available, does not make the constitution of that General Court Martial invalid nor can it be held that the finding given by it was without jurisdiction or that the proceedings of the trial before it were null and void. The petitioner had no say in the constitution of the General Court Martial and having suffered that trial, the proceedings thereof could not have been declared null and void on this highly technical ground. In this view of the matter I need not decide whether a second trial could be ordered by the General Officer Commanding-in-Chief, Western Command, when the proceedings were forwarded to him for confirmation by the General Court Martial. The second trial of the petitioner held by the General Court Martial convened by the order, dated November 1, 1968, was clearly without jurisdiction and the sentence imposed on the petitioner in consequence of that trial is wholly illegal.

(5) For the reasons given above, this petition is accepted and the proceedings of the second General Court Martial holding the petitioner guilty and the sentence imposed on him are hereby quashed. The order of the President rejecting the petitioner's representation against the sentence imposed on him is also quashed. Respondent 2 is directed to pass his orders on the proceedings of the first General Court Martial which held the trial of the petitioner from October 8, 1968, to October 19, 1968, in accordance with the provisions contained in Chapter XII of the Act. As the point involved was not free from difficulty I leave the parties to bear their own costs.

B.S.G.