REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 624 OF 2013
(@SPECIAL LEAVE PETITION (CRL.) NO. 5910 OF 2012)

STATE OF J & K … APPELLANT

VERSUS

LAKHWINDER KUMAR & ORS. …RESPONDENTS

WITH

CRIMINAL APPEAL NO. 625 OF 2013
(@SPECIAL LEAVE PETITION (CRL.) NO. 5911 OF 2012)

GHULAM MOHAMMAD SHEIKH … APPELLANT

VERSUS

STATE OF J & K & ORS. …RESPONDENTS

J U D G M E N T

CHANDRAMAULI KR. PRASAD, J.

The allegation in the case is very distressing. A Kashmiri teenager lost his life by the bullet of Lakhwinder Kumar, a constable of the Border Security Force (hereinafter referred to as “the Force”) at the Boulevard Road, Srinagar. He allegedly fired at the

instigation of R.K. Birdi, Commandant of the 68th Battalion of the Force. The cause of firing, as alleged by the prosecution, if true, is appalling. R.K. Birdi on 5th of February, 2010 had gone for Annual Medical Examination at Composite Hospital, Humhama. While on way back at 4.40 P.M. to the Force Headquarters at Nishat, Srinagar, accompanied by other Force personnel, they got stuck in a traffic jam. This led to a verbal duel with some boys present at Boulevard Road, Brain, Srinagar. The verbal duel took an ugly turn and the Force personnel started chasing the boys. It is alleged that at the instigation of R.K. Birdi, constable Lakhwinder Kumar fired twice and one of the rounds hit Zahid Farooq Sheikh. Zahid died of the fire arm injury instantaneously. The aforesaid incident led to registration of FIR No. 4 of 2010 at Police Station, Nishat. It is relevant here to state that the Commandant of the Force by his letter dated 10.02.2010 handed over the investigation to the police. The case was investigated without any murmur by the local police and, during the course of

investigation, both R.K.Birdi and Lakhwinder Kumar were arrested. On completion of investigation, the police submitted the charge-sheet on 05th of April, 2010 against both the accused for commission of offence under Section 302, 109 and 201 of the Ranbir Penal Code before the Chief Judicial Magistrate, Srinagar, whereupon an application was filed on behalf of the Force seeking time to exercise option for trial of the accused by Security Force Court. Accordingly, an application was filed by the Deputy Inspector General, Station Headquarters, Border Security Force, Srinagar before the Chief Judicial Magistrate, Srinagar on 6th of April, 2010 inter alia stating that the criminal case is pending against R.K. Birdi, Commandant and Lakhwinder Kumar, Constable and they are serving under his Command and both of them are in judicial custody. He went on to say that in exercise of his discretion under Section 80 of the Border Security Force Act, 1968 (hereinafter referred to as “the Act”) he has decided to institute proceeding against them before the Security Force Court. In the aforesaid premise it

was requested to stay the proceeding and to forward the accused persons along with all connected documents and exhibits for trial before the Security Force Court. This application was filed in the light of the provisions of Section 549 of the Code of Criminal Procedure, Svt. 1989, as in force in the State of Jammu & Kashmir. It was further stated that the outcome of the trial of the accused shall be intimated to the court as required under Rule 7 of the Jammu & Kashmir Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983. The prayer of the Force was opposed by the State of Jammu & Kashmir and the deceased's uncle Ghulam Mohammad Shiekh. The Chief Judicial Magistrate by his order dated 25th of November, 2010 allowed the application filed by the Commandant and handed over the accused together with the charge-sheet and other materials collected by the investigating agency for trying the accused by the Security Force Court. While doing so, the learned Chief Judicial Magistrate observed as follows:

> "In the light of the above discussion it has been shown that accused have committed

> alleged offence while on active duty and the case squarely falls within 1st exception to the general provisions of Section 47 of the BSF Act, for which option is available to the applicant either to try them at BSF Court or let the Criminal Court of Ordinary jurisdiction to go ahead with their trial. In the instant case applicant has chosen to try them at BSF Court. Therefore, this court has no option but to hand-over the accused together with the charge-sheet and other material collected by Investigating agency to the applicant for trying them at the BSF Court, Application is therefore accepted and accused are ordered to be handed over under custody so the applicant together with charge-sheet and the supporting material as well as all the seized articles. The Officer concerned shall try the accused expeditiously and convey the final out-come of the case to this court as soon as it is completed"

Aggrieved by the aforesaid order Ghulam Mohammad Sheikh and the State of Jammu & Kashmir filed separate revision applications before the High Court. Both the applications were heard together by the High Court and have been dismissed by the impugned order dated 21st of October, 2011. It is against this order the State of Jammu & Kashmir and Ghulam Mohammad Sheikh have preferred separate special leave petitions under Article 136 of the Constitution of India.

Leave granted.

We have heard Mr. Gaurav Pachnanda, Senior Advocate on behalf of the appellant, the State of Jammu & Kashmir and Ms. Kamini Jaiswal, Advocate for the appellant, Ghulam Mohammad Sheikh. We have also heard Mr. R.F. Nariman, learned Solicitor-General of India. Despite service of notice, Respondent Nos. 1 and 2 i.e., Lakhwinder Kumar & R.K. Birdi respectively have not chosen to appear.

It may be mentioned here that Section 47 of the Act bars trial of a person subject to the Act by a Security Force Court who has committed an offence of murder or of culpable homicide not amounting to murder or rape in relation to a person not subject to the Act. However, this bar will not operate if the person subject to the Act has committed the offence while on active duty. In other words, if a member of the Force commits offence of the nature specified above and the victim of crime is a civilian member, he cannot be tried by a Security Force Court but this bar will not operate if the offence has been committed while on active duty. The expression

'active duty' has been defined under Section 2(1)(a) of the Act, it reads as follows:

> "**2**. **Definitions**.-(1) In this Act, unless the context otherwise requires,-
>
> (a)"active duty", in relation to a person subject to this Act, means any duty as a member of the Force during the period in which such person is attached to, or forms part of, a unit of the Force-
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> (i) which is engaged in operations against an enemy, or
>
> (ii) which is operating at a picket or engaged on patrol or other guard duty along the borders of India,
>
> and includes duty by such person during any period declared by the Central Government by notification in the Official Gazette as a period of active duty with reference to any area in which any person or class of persons subject to this Act may be serving;"

Aforesaid provision makes the duty of the nature specified therein to be active duty and includes duty declared by the Central Government by notification in the official Gazette. From a plain reading of the aforesaid, it is evident that any duty as a member of the Force and enumerated in clauses (i) and (ii), i.e., engaged in operations against an enemy or

operating at a picket or engaged on patrol or other guard duty along the borders of India shall come within the definition of active duty. It shall also include such duty by the member of the Force as active duty declared by the Central Government in the Official Gazette.

The Central Government by Notification SO.1473(E) dated 8th of August, 2007 in exercise of the powers conferred under Section 2(1)(a) of the Act, had made a declaration that the duty of every personnel serving in the State as mentioned in the said Notification for the period 01st of July 2007 to 30th of June, 2010, shall be 'active duty'. The State of Jammu & Kashmir is at Serial Number 16 of the said Notification.

It is common ground that offence committed is a civil offence which is triable by a Criminal Court and at the time of commission of the offence, the accused persons were not engaged in any operation against any enemy or operating at a picket or engaged on patrolling or other guard duty along the borders

of India. According to the appellants, accused persons were not engaged in the duty of the nature specified above pursuant to any lawful command, therefore, they cannot be said to be on active duty so as to give jurisdiction to the Force to try them before Security Force Court. The learned Solicitor General does not join issue and accepts that accused persons were not performing duty of the nature mentioned in clauses (i) and (ii) of Section 2(1)(a) of the Act, but, according to him, in view of declaration of the Central Government, their act shall come within the inclusive definition of active duty.

There is no connection, not even the remotest one, between their duty as members of the Force and the crime in question. The situs of the crime was neither under Force control nor the victim of crime was in any way connected with the Force. But, for the notification, these could have been sufficient to answer that accused persons were not on active duty at the time of commission of the crime. However,

answer to this question would depend upon the effect of notification issued in exercise of the power under Section 2(1)(a) of the Act. From a plain reading of this section it is evident that 'active duty' would include duty of such person during any period declared by the Central Government by notification in the Official Gazette as a period of active duty. Section 2(1)(a) finds place in the definition section of the Act.

It is well settled that legislature has authority to define a word even artificially and while doing so, it may either be restrictive of its ordinary meaning or it may be extensive of the same. When the legislature uses the expression "means" in the definition clause, the definition is prima facie restrictive and exhaustive. However, use of the expression "includes" in the definition clause makes it extensive. Many a times, as in the present case, the legislature has used the term "means" and "includes" both and, hence, definition of the expression "active duty" is presumed to be

exhaustive. In our opinion, the use of the expression “includes” enlarges the meaning of the word “active duty” and, therefore, it shall not only mean the duty specified in the section but those duty also as declared by the Central Government in the Official Gazette. The notification so issued by the Central Government states that “duty of every person” of the Force “serving in the State” of Jammu and Kashmir “with effect from the 1st of July, 2007 to 30th of June, 2010 as active duty”. The notification does not make any reference to the nature of duty, but lays emphasis at the place where the members of the Force are serving, to come within the definition of ‘active duty’. In view of the aforesaid, there is no escape from the conclusion that the accused persons were on active duty at the time of commission of the offence.

The natural corollary of what we have found above is that the bar of trial by the Security Force Court provided in Section 47 of the Act would not operate.

Section 47 of the Act which is relevant for the purpose reads as follows:

> **"47. Civil offences not triable by a Security Force Court.-** A person subject to this Act who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject to this Act shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force Court, unless he commits any of the said offences,-
>
> (a) while on active duty; or
>
> (b) at any place outside India; or
>
> (c) at any place specified by the Central Government by notification in this behalf."

The aforesaid provision makes it clear that a member of the Force accused of an offence of murder or culpable homicide not amounting to murder or rape shall not be tried by a Security Force Court, unless the offence has been committed while on active duty. As we have found that the accused persons have committed the offence while on active duty within the extended meaning, the bar under Section 47 of the Act shall not stand in their way for trial by a Security Force Court. The bar of trial by a Security Force

Court though is lifted, but it does not mean that the accused who had committed the offence of the nature indicated in Section 47 of the Act shall necessarily have to be tried by a Security Force Court. In a given case, there may not be a bar of trial by a Security Force Court, but still an accused can be tried by a Criminal Court. In other words, in such a situation, the choice of trial is between the Criminal Court and the Security Force Court. This situation is visualized under Section 80 of the Act, which reads as follows:

> "**80.Choice between criminal court and Security Force Court.-** When a criminal court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within whose command the accused person is serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted, and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody."

As we have observed above, in the present case, the Criminal Court and the Security Force Court each

have jurisdiction for trial of the offence which the accused persons are alleged to have committed. In such a contingency Section 80 of the Act has conferred discretion on the Director General or the Inspector General or the Deputy Inspector General of the Force within whose Command the accused person is serving, to decide before which court the proceeding shall be instituted. Section 141 of the Act confers power on the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. It is relevant here to state that the Central Government in exercise of the powers under Section 141 (1) and (2) of the Act has made the Border Security Force Rules, 1969, hereinafter referred to as "the Rules". Chapter VI of the Rules is in relation to choice of jurisdiction between Security Force Court and criminal court. Thus, for exercise of discretion under Section 80 of the Act, Rules have been framed and Rule 41 of the Rules, which is relevant for the purpose, reads as follows:

> "**41. Trial of cases either by Security Force Court or criminal court.**- (1) Where an offence is triable both by a criminal

court and a Security Force Court, an officer referred to in section 80 may,-

(i) (a) where the offence is committed by the accused in the course of the performance of his duty as a member of the Force, or

(b) where the offence is committed in relation to property belonging to the Government or the Force or a person subject to the Act, or

(c) where the offence is committed against a person subject to the Act,

direct that any person subject to the Act, who is alleged to have committed such an offence, be tried by a Court; and

(ii) in any other case, decide whether or not it would be necessary in the interests of discipline to claim for trial by a Court any person subject to the Act who is alleged to have committed such an offence.

(2) In taking a decision to claim an offender for trial by a Court, an officer referred to in section 80 may take into account all or any of the following factors, namely:-

(a) the offender is on active duty or has been warned for active duty and it is felt that he is trying to avoid such duty;

(b) the offender is a young person undergoing training and the offence is not a serious one and the trial of the offender by a criminal court would materially affect his training.

> (c) the offender can, in view of the nature of the case, be dealt with summarily under the Act."

Rule 2 (c) of the Rules defines Court to mean the Security Force Court. A bare reading of Rule 41(1) makes it evident that where the offence is committed in the course of the performance of duty as a member of the Force or where the offence is committed in relation to property belonging to the Government or the Force or a person subject to the Act or where the offence is committed against a person subject to the Act, the officer competent to exercise the power under Section 80 of the Act may direct that the members of the Force who have committed the offence, be tried by a Security Force Court. The allegations in the present case do not indicate that the accused committed the offence in course of performance of their duty as a member of the Force or in relation to property belonging to the Government or the Force or a person subject to the Act or the offence was committed against a person subject to the Act. In

that view of the matter, the aforesaid ingredients are not satisfied and, therefore, the jurisdictional fact necessary for trial of the accused persons by a Security Force Court does not exist. Rule 41 (1)(ii) further authorizes the officer competent to exercise its power under Section 80 of the Act to decide as to whether or not it would be necessary in the interest of discipline to claim for trial by a Security Force Court. It is worth mentioning here that Rule 41 (2) enumerates the factors which the officer competent under Section 80 of the Act is to take into account for taking a decision for trial of an accused by a Security Force Court. None of the clauses of Rule 41(1)(i) and 41(2) apply in the facts of the present case. The condition under which the authority could exercise the discretion is provided under Rule 41(1) (ii) of the Rules.

We must answer here an ancillary submission. It is pointed out that the Rules made to give effect to the provisions of the Act has to be consistent with it and if a rule goes beyond what the Act

contemplates or is in conflict thereof, the rule must yield to the Act. It is emphasized that Section 80 of the Act confers discretion on the Officer within whose Command the accused person is serving the choice between Criminal Court and Security Force Court without any rider, whereas Rule 41 of the Rules specifies grounds for exercise of discretion. Accordingly, it is submitted that this rule must yield to Section 80 of the Act. We do not find any substance in this submission.

One of the most common mode adopted by the legislature conferring rule making power is first to provide in general terms i.e., for carrying into effect the provisions of the Act, and then to say that in particular, and without prejudice to the generality of the foregoing power, rules may provide for number of enumerated matters. Section 141 of the Act, with which we are concerned in the present appeal, confers on the Central Government the power to make rules is of such a nature. It reads as follows:

"141. Power to make rules.-(1) The Central Government may, by notification, make rules for the purpose of carrying into effect the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for,-

(a) the constitution, governance, command and discipline of the Force;

(b) the enrolment of persons to the Force and the recruitment of other members of the Force;

(c) the conditions of service including deductions from pay and allowances of members of the Force;

(d) the rank, precedence, powers of command and authority of the officers, subordinate officers, under- officers and other persons subject to this Act;

(e) the removal, retirement, release or discharge from the service of persons subject to this Act;

(f) the purposes and other matters required to be prescribed under section 13;

(g) the convening, constitution, adjournment, dissolution and sittings of Security Force Courts, the procedure to be observed in trials by such courts, the persons by whom an accused may be defended in such

trials and the appearance of such persons thereat;

(h) the confirmation, revision and annulment of, and petitions against, the findings and sentences of Security Force Courts;

(i) the forms of orders to be made under the provisions of this Act relating to Security Force Courts and the awards and infliction of death, imprisonment and detention;

(j) the carrying into effect of sentences of Security Force Courts;

(k) any matter necessary for the purpose of carrying this Act into execution, as far as it relates to the investigation, arrest, custody, trial and punishment of offences triable or punishable under this Act;

(l) the ceremonials to be observed and marks of respect to be paid in the Force;

(m) the convening of, the constitution, procedure and practice of, Courts of inquiry, the summoning of witnesses before them and the administration of oaths by such Courts;

(n) the recruitment and conditions of service of the Chief Law Officer and the Law Officers;

(o) any other matter which is to be, or may be prescribed or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the

> Central Government, necessary for the proper implementation of this Act.
>
> (3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

In our opinion, when the power is conferred in general and thereafter in respect of enumerated matters, as in the present case, the particularisation in respect of specified subject is construed as merely illustrative and does not limit the scope of general power. Reference in this connection can be made to a decision of this Court in the case of **Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U.P., AIR 1966 SC 1471**, in which it has been held as follows:

> "…….Section 15(1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and Section 15(2) specifies some of the matters enumerated by clauses (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the powers conferred on the appropriate Government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law……."
>
> (Underlining ours)

The Privy Council applied this principle in the case of **Emperor v. Sibnath Banerji, AIR 1945 PC 156**, to uphold the validity of Rule 26 of the Defence of India Rules, which though was found in excess of the express power conferred under enumerated provision, but covered under general power. Relevant portion of the judgment reads as under:

> "Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of Section 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that

> statement, or to maintain that R.26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt – as the learned Judge himself appears to have thought – that the general language of sub-section (1) amply justifies the terms of R.26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).
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> Their Lordships are therefore of opinion that Keshav Talpade v. Emperor, I.L.R. (1944) Bom. 183, was wrongly decided by the Federal Court, and that R.26 was made in conformity with the powers conferred by sub-section (1) of Section 2, Defence of India Act……"

A constitution Bench of this Court in the case of **Afzal Ullah v. State of Uttar Pradesh, AIR 1964 SC 264**, quoted with approval the law laid down by the Privy Council in the case of **Sibnath Banerji** (**supra**) and held that enumerated provisions do not control

the general terms as particularization of topics is illustrative in nature. It reads as follows:

> "13. Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by Section 298(1). It is now well-settled that the specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1), vide Emperor v. Sibnath Banerji, AIR 1945 PC 156. If the powers specified by Section 298(1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under Section 298(2) control the general words used by Section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by Section 298(2) may well be protected by Section 298(1), provided, of course, the impugned bye-law can be justified by-reference to the requirements of Section 298(1). There can be no doubt that the impugned bye-laws in regard to the markets framed by Respondent No. 2 are for the furtherance of municipal administration under the Act, and so, would attract the provisions of Section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."

In view of what we have observed above it is evident that Rule 41 of the Rules has been made to give effect to the provisions of the Act. In our opinion, it has not gone beyond what the Act has contemplated or is any way in conflict thereof. Hence, this has to be treated as if the same is contained in the Act. Wide discretion has been given to the specified officer under Section 80 of the Act to make a choice between a Criminal Court and a Security Force Court but Rule 41 made for the purposes of carrying into effect the provision of the Act had laid down guidelines for exercise of that discretion. Thus, in our opinion, Rule 41 has neither gone beyond what the Act has contemplated nor it has supplanted it in any way and, therefore, the Commanding Officer has to bear in mind the guidelines laid for the exercise of discretion.

To test as to whether the Commanding Officer, who had exercised the power under Section 80 of the Act, satisfied the aforesaid requirement, it is apt to reproduce the application filed by him in this regard. The relevant portion of the application reads as follows:

> "Whereas a criminal case under FIR No. 04/201 of Police Station Nishat titled State Vs. Lakhwinder Kumar and another is pending against Lakhwinder Kumar and Randhir Kumar Birdi before your Court for adjudication.
>
> 2. Whereas the said accused persons namely Lakhwinder Kumar (No. 01005455 Constable of 68 Bn BSF) and Randhir Kumar Birdi (Commandant BSF) are serving under my command and,
>
> 3. Whereas in exercise of my discretion as envisaged in Section 80 of the BSF Act, 1968, I have decided to institute proceedings against the said accused persons Lakhwinder Kumar and Randhir Kumar Birdi before the Border Security Force Court.
>
> 4. Whereas, the accused persons i.e. Lakhwinder Kumar and Randhir Kumar Birdi are presently under judicial custody and in your control.
>
> 5. I therefore request you to stay proceedings in your court against the two accused persons and may forward all connected documents and exhibits of this case and custody of accused person to the undersigned as per Section 549

of Cr.P.C. 1989 (J & K) for instituting proceedings against them under the BSF Act and Rules made thereunder.

6. That the outcome of the trial of the accused persons by Border Security Force Court of the result of effectual proceedings instituted or ordered to be taken against them shall be intimated as per Rules 7 of the J & K Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983."

The Commanding Officer, thus, has exercised his power under Section 80 of the Act and excepting to say that the said power has been exercised in his discretion, there is not even a whisper as to why said discretion has been exercised for trial of the accused persons by a Security Force Court. The Commanding Officer has nowhere stated that the trial of the accused by Security Force Court is necessary in the interest of discipline of the Force. Once a statutory guideline has been issued for giving effect to the provisions of the Act, in our opinion, the exercise of discretion without adherence to those guidelines shall render the decision vulnerable. In our opinion, the Commanding Officer has exercised his power ignorant of the restriction placed on him under

the Rules. Having found that the Commanding Officer's decision is illegal, the order passed by the learned Chief Judicial Magistrate as affirmed by the High Court based on that cannot be allowed to stand.

It has also been pointed out on behalf of the appellant that after lodging of the first information report, the Force voluntarily handed over the custody of accused Lakhwinder Kumar on 10th of February, 2010 and R.K. Birdi on 4th of March, 2010 and allowed the investigation to be conducted by the police without any objection and did not exercise option for trial by Security Force Court. Later on, such an option cannot be exercised, submits the learned counsel. In support of the submission, reliance has been placed on a decision of this Court in the case of ***Joginder Singh v. State of H.P., (1971) 3 SCC 86,*** and our attention has been drawn to Paragraph 29 of the judgment which reads as follows:

> "29. Rule 4 is related to clause (*a*) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct

> the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under Rule 4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities, the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the Court-martial and that he could be tried by the ordinary criminal court."

This submission does not commend us. As observed earlier, on the very date of filing of the charge-sheet, an application was filed on behalf of the Force seeking time to exercise option for trial of the accused by the Security Force Court. On the following date such an application was filed. At that particular point of time the trial of the accused persons had not commenced and before it could commence, the option was exercised. As regards the authority of this Court in the case of **Joginder Singh** (**supra**), the same is clearly distinguishable. In the said case, the Criminal Court proceeded with the

trial of a military personnel without complying Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, which obliged the Criminal Court to give written notice to the Commanding Officer of the accused before trying the said accused. The Criminal Court did not give any notice to the Commanding Officer and proceeded to try the accused and ultimately conviction was recorded. Said conviction was assailed on the ground that the Criminal Court having proceeded to try the accused without giving any notice, the conviction is vitiated. While answering the said question this Court took into consideration the conduct of the Commanding Officer of releasing the accused from military custody and handing over the accused to the authorities and in that background observed that the Criminal Court was justified in proceeding with the trial and failure to give notice to the Commanding Officer by the Criminal Court shall not vitiate the conviction. Here, in the present case, the Force has exercised his option for trial of the accused immediately on submission of the charge-sheet and

before the commencement of the trial. Hence, the submission made has no substance and is rejected accordingly.

In the facts and circumstances of the case, we give liberty to the Director General of the Force, if so advised, to re-visit the entire issue within eight weeks bearing in mind the observation aforesaid in accordance with law and if he comes to the conclusion that the trial deserves to be conducted by the Security Force Court, nothing will prevent him to make an appropriate application afresh before the Chief Judicial Magistrate. Needless to state that in case the Director General of the Force takes recourse to the aforesaid liberty and files application for the trial by the Security Force Court, the Chief Judicial Magistrate shall consider the same in accordance with law. It is made clear that observations made in these appeals are for the purpose of their disposal and shall have no bearing on trial.

In the result, both the appeals are allowed, the impugned judgment and order of the Chief Judicial Magistrate dated 25th of November, 2010 and that of the High Court dated 21st October, 2011 are set aside. The Security Force Court shall forthwith transmit the record sent to it, to the Chief Judicial Magistrate, Srinagar, who in turn shall proceed in the matter in accordance with law bearing in mind the observation aforesaid.

……..……..J.
(CHANDRAMAULI KR. PRASAD)

……..……..J.
(FAKKIR MOHAMED IBRAHIM KALIFULLA)

NEW DELHI,
APRIL 25, 2013