A AJIT KUMAR, ETC.

v.

UNION OF INDIA AND OTHERS ETC.

B NOVEMBER 25, 1987

[B.C. RAY AND K. JAGANNATHA SHETTY, JJ.]

Plea for a set-off of pre-trial detention against the sentence of imprisonment under section 428 of the Cr. P.C.

C

The petitioners were convicted and sentenced by the General Court Martial under the Army Act, 1950 and lodged in Civil Jails. They sought a set-off of their pre-trial detention against the sentence of imprisonment. The jail and army authorities rejected their claim.

D **They moved this Court for relief by writ petitions.**

Dismissing the petitions, the Court,

HELD: The petitioners have been convicted and sentenced

E **under the Army Act. The Army Act is a special enactment containing elaborate procedure for the trial of the persons covered thereunder. In view of the various provisions in the Army Act, the petitioners cannot call into aid section 428 of the Code of Criminal Procedure. They may be entitled to remissions as provided in the jail manuals but not a set-off under sec. 428. The benefit of section 428 cannot be claimed by**

F **a person convicted and sentenced by a Court-Martial under the Army Act, as held by the Punjab and Haryana High Court in *Bhagwan Singh* v. *The Asstt. Superintendent*, [1977] 79 Punjab Law Journal 19. The High Courts of Delhi and Madras have also held likewise. But in *Subramonian* v. *O.C. Armoured Static Workshop*, [1979] Crl. L.J. 617—a contrary view has been taken by the Kerala High Court which**

G **cannot be said to have laid down the law correctly. [42G-H; 43A-C]**

ORIGINAL JURISDICTION: Writ Petition (Criminal) Nos. 225 and 513 of 1987.

H (Under Article 32 of the Constitution of India).

L.K. Pandey for the petitioner in W.P. No. 225 of 1987. A

M.S. Gupta for the petitioner in W.P. No. 513 of 1987.

Dalveer Bhandari, Ms. A. Subhashini and Mrs. C.K. Sucharita for the Respondents. B

The Judgment of the Court was delivered by

JAGANNATHA SHETTY, J. The petitioners have been convicted and sentenced by the General Court Martial under the Army Act, 1950. They have been lodged in civil jails. They seek a set off C of their pre-trial detention against the sentence of imprisonment. The claim has been made under sec. 428 of the Code of Criminal Procedure ("The Code"). The jail and the army authorities have rejected their claim.

D

If sec. 428 of the Code of Criminal Procedure is applicable to the case of the petitioners, there is no doubt that they are entitled to get the benefit thereof. The section provides that where an accused person has, on a conviction, been sentenced to imprisonment for a term (not being imprisonment in default of payment of fine), the period of detention, if any undergone by him during the investiga- E tion, inquiry or trial and before the date of such conviction, shall be set off against the term of imprisonment and the liability of such person to undergo imprisonment shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. The period of detention referred to in the section is of the accused person during the investigation, enquiry or trial of the offence against him. Section F 2(h) defines 'investigation' and sec. 2(g) defines "enquiry". Both refer to the proceedings under the Code. In the first place, there is nothing on the record to indicate that the cases against the petitioners were investigated or enquired into under the Code. Secondly, sec. 5 of the Code provides:

G

> "Nothing contained in the Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force." H

A The saving provisions in sec. 5 provides that the Code, as such, will not affect (I) any special law, (II) any local law, (III) any special jurisdiction or power and (IV) any special form of procedure, prescribed by any other law for the time being in force. The Army Act, 1950 is a special enactment applicable to persons covered under sec. 2 thereof. It also provides special procedure for court martial.

B

The learned counsel for the petitioner however, submitted that since the petitioners are lodged in the civil prisons, they are entitled to the benefit of sec. 428 of the Code just like any other convict in the jail. We are unable to agree with this contention. The petitioners may be entitled to remissions as provided in the jail manuals, but not set C off under sec. 428 of the Code. They have been lodged in the civil prisons by an order made under sec. 169(1) of the Army Act. Sec. 169(I) provides:

> " Whenever any sentence of imprisonment is passed under this Act by a court-martial or whenever any sen- D tence of death or transportation is commuted to imprisonment, the confirming officer or in case of a summary court-martial the officer holding the court or such other officer as may be prescribed, shall, save as otherwise provided in sub-sections (3) and (4), direct either that the sentence shall be carried out by confinement in a military E prison or that it shall be carried out by confinement in a civil prison.
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> xx xx xx xx xx xx
> xx xx xx xx xx xx"

F Section 167 of the Army Act also provides that the term of sentence imposed by a court-martial shall be reckoned to commence on the day on which the original proceedings were signed by the presiding officer or by the officer holding the court martial as the case may be.

G In view of these provisions in the Army Act which is a special enactment containing elaborate procedure for trial of the persons covered thereunder, we do not think that the petitioners could call into aid the provisions of sec. 428 of the Code. In *Bhagwan Singh* v. *The Asstt. Superintendent,* [1977] 79 Punjab Law Journal 19, the Punjab & Haryana High Court said that the benefit of sec. 428 can only H be claimed by a person whose case is investigated, inquired into or

tried under the Code of Criminal Procedure and it cannot be claimed by a person convicted and sentenced under the Army Act by a court-martial. A

The Delhi High Court in *F.R. Jesuratnam* v. *Chief of Air Staff*, [1976] Crl. L.J. 65 and the Madras High Court in *P.P. Chandrasekaran* v. *Government of India*, [1977] Crl. L.J. 677 have also taken the similar view. But the Kerala High Court in *Subramonian* v. *O.C. Armoured Static Workshop*, [1979] Crl. L.J. 617 has taken a contrary view. In our opinion, the Kerala High Court cannot be said to have laid down the law correctly. B

In the result, these petitions fail and are dismissed. C

S.L. Petitions dismissed.