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been in custody for about 10 months before that. On a consideration of all the circumstances of the case we reduce the sentence on these women-appellants under s. 304 Part II read with s. 149, s 326 149 and s. 148 to the period of imprisonment already undergone.

Of the four male appellants Surjan was aged 70 at the time of the trial and Gokul 66. Surjan is thus about 73 years old now and Gokul just less than 70. In consideration of their age we think that the interests of justice will be served if their sentences are also reduced to the period of imprisonment already undergone. We reduce their sentences accordingly. Let these accused persons be set at liberty, if not required in connection with some other proceedings. We see no reason to interfere with the sentences passed on the other two male appellants.

The appeal by the accused persons is thus dismissed except as regards the modification in sentences of eight of them. The appeal preferred by the State of Punjab is dismissed.

Appeals dismissed.

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December 12

RAM SARUP

v.

THE UNION OF INDIA AND ANOTHER

(B.P. SINHA, C.J., K.N. WANCHOO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J.R. MUDHOLKAR, JJ.)

Army Act (XLVI of 1950), ss. 125, 126 and 164—Scope of——Constitution of India, 1950, Art. 33—Effect on fundamental rights—s. 125 of Army Act if violative of Art. 14 of the Constitution.

The General Court Martial sentenced the petitioner, a sepoy, to death under s. 69 of the Army Act read with s. 302 of the Indian

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Penal Code for shooting dead two sepoys and a Havildar. The Central Government confirmed the sentence. The petitioner filed writs of *habeas corpus* and *certiorari* for setting aside the orders of the Court Martial and the Central Government and for his release.

Held: (*i*) The petitioner made no request for being represented at the court martial by a counsel of his choice; consequently no such request was refused, and that there has been no violation of the fundamental right of the petitioner to be defended by a counsel of his choice.

(*ii*) There has been no non-compliance of the provisions of s. 132(2) of the Act. In view of the provisions of rr. 45, 46, 61(2) and 62 of the Army Rules, 1954, the petitioner's statement, that the death sentence was voted by an inadequate majority of the members of the Court which can be considered to be a mere allegation, cannot be based on any definite knowledge as to how the voting went at the consideration of the finding in pursuance of r. 61.

(*iii*) Section 164 does not lay down that the correctness of the order or sentence of the Court Martial is always to be decided by two higher authorities; it only provides for two remedies. The further petition can only be made to the authority superior to the authority which confirms the order of the Court Martial, and if there be no authority superior to the confirming authority, the question of remedy against its order does not arise.

(*iv*) Each and every provision of the Army Act is a law made by Parliament and that if any such provision tends to affect the fundamental rights under Part III of the Constitution, that provision does not, on that account, become void, as it must be taken that Parliament has in exercise of its power under Art. 33 of the Constitution made the requisite modification to affect the respective fundamental right.

(*v*) The provisions of s. 125 of the Act are not discriminatory and do not infringe the provisions of Art. 14 of the Constitution.

(*vi*) The discretion to be exercised by the Military Officer specified in s. 125 of the Act as to the trial of accused by Court Martial or by an ordinary court, cannot be said to be unguided by any other policy laid down in the Act or uncontrolled by any authority. There could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by ordinary criminal court and therefore becomes inevitable that the discretion to make the choice as to which court should try the accused be left to responsible Military Officers under whom the accused is serving. Those officers are to be guided by considerations of the exigencies of the service maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

This discretion is subject to the control of the Central Government.

(*vii*) According to s. 549 of the Code of Criminal Procedure and the rules thereunder, the final choice about the forum of the trial of a person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and Military authorities about the forum. The position under ss. 125 and 126 of the Army Act is also the same.

ORIGINAL JURISDICTION : Petition No. 166 of 1963.

Under Article 32 of the Constitution of India for the enforcement of fundamental rights.

O.P. Rana, for the petitioner.

C.K. Daphtary, *B.R.L. Iyengar* and *R.H. Dhebar* for the respondents.

December 12, 1963. The Judgment of the Court was delivered by

RAGHUBAR DAYAL J.—Ram Sarup, petitioner, was a sepoy in 131 Platoon DSC, attached to the Ordnance Depot, Shakurbasti. As a sepoy, he is subject to the Army Act, 1950 (XLVI of 1950), hereinafter called the Act. *Raghubar Dayal J.*

On June 13, 1962 he shot dead two sepoys, Sheotaj Singh and Ad Ram and one Havildar Pala Ram. He was charged on three counts under s. 69 of the Act read with s. 302 I.P.C. and was tried by the General Court Martial. On January 12, 1963 the General Court Martial found him guilty of the three charges and sentenced him to death.

The Central Government confirmed the findings and sentence awarded by the General Court Martial to the petitioner. Thereafter, the petitioner has filed this writ petition praying for the issue of a writ in the nature of a writ of *habeas corpus* and a writ of *certiorari* setting aside the order dated January 12, 1963 of the General Court Martial and the order of the Central Government confirming the said findings and sentence and for his release from the Central

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Jail, Tehar, New Delhi, where he is detained pending execution of the sentence awarded to him.

The contentions raised for the petitioner are: (1) That the provisions of s. 125 of the Act are discriminatory and contravene the provisions of Art. 14 of the Constitution inasmuch as it is left to the unguided discretion of the officer mentioned in that section to decide whether the accused person would be tried by a Court Martial or by a Criminal Court. (2) Section 127 of the Act which provides for successive trials by a Criminal Court and a Court Martial, violates the provisions of Art. 20 of the Constitution as it provides for the prosecution and punishment of a person for the same offence more than once. (3) The petitioner was not allowed to be defended at the General Court Martial by a legal practitioner of his choice and therefore there had been a violation of the provisions of Art. 22(1) of the Constitution. (4) The procedure laid down for the trial of offences by the General Court Martial had not been followed inasmuch as the death sentence awarded to the petitioner was not passed with the concurrence of at least two-thirds of the members of the Court. (5) Section 164 of the Act provides two remedies, one after the other, to a person aggrieved by any order passed by a Court Martial. Sub-s. (1) allows him to present a petition to the officer or authority empowered to confirm any finding or sentence of the Court Martial and sub-s. (2) allows him to present a petition to the Central Government or to any other authority mentioned in that sub-section and empowers the Central Government or the other authority to pass such order on the petition as it thinks fit. The petitioner could avail of only one remedy as the finding and sentence of the Court Martial was confirmed by the Central Government. He, therefore, could not go to any other authority against the order of the Central Government by which he was aggrieved.

It will be convenient to deal with the first point at the end and take up the other points here.

The petitioner has not been subjected to a second trial for the offence of which he has been convicted by the General Court Martial. We therefore do not consider it necessary to decide the question of the validity of s. 127 of the Act in this case.

With regard to the third point, it is alleged that the petitioner had expressed his desire, on many occasions, for permission to engage a practising civil lawyer to represent him at the trial but the authorities turned down those requests and told him that it was not permissible under the Military rules to allow the services of a civilian lawyer and that he would have to defend his case with the counsel he would be provided by the Military Authorities. In reply, it is stated that this allegation about the petitioner's requests and their being turned down was not correct, that it was not made in the petition but was made in the reply after the State had filed its counter-affidavits in which it was stated that no such request for his representation by a legal practitioner had been made and that there had been no denial of his fundamental rights. We are of opinion that the petitioner made no request for his being represented at the Court Martial by a counsel of his choice, that consequently no such request was refused and that he cannot be said to have been denied his fundamental right of being defended by a counsel of his choice.

In paragraph 9 of his petition he did not state that he had made a request for his being represented by a counsel of his choice. He simply stated that certain of his relatives who sought interview with him subsequent to his arrest were refused permission to see him and that this procedure which resulted in denial of opportunity to him to defend himself properly by engaging a competent civilian lawyer through the resources and help of his relatives had infringed his fundamental right under Art. 22 of the Constitution. If the petitioner had made any express request for being defended by a counsel of his choice, he should have stated so straight-forwardly in para 9 of his petition. His involved language

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could only mean that he could not contact his relations for their arranging a civilian lawyer for his defence. This negatives any suggestion of a request to the Military Authorities for permission to allow him representation by a practising lawyer and its refusal.

We therefore hold that there had been no violation of the fundamental right of the petitioner to be defended by a counsel of his choice, conferred under Art. 22(1) of the Constitution.

Further, we do not consider it necessary to deal with the questions, raised at the hearing, about the validity of r. 96 of the Army Rules, 1954, hereinafter called the rules, and about the power of Parliament to delegate its powers under Art. 33 of the Constitution to any other authority.

The next point urged for the petitioner is the sentence of death passed by the Court Martial was against the provisions of s. 132(2) of the Act inasmuch as the death sentence was voted by an inadequate majority. The certificate, signed by the presiding officer of the Court Martial and by the Judge-Advocate, and produced as annexure 'A' to the respondent's counter to the petition, reads:

> "Certified that the sentence of death is passed with the concurrence of at least Two-third of the members of the Court as provided by AA Section 132(2)."

It is alleged by the petitioner that this certificate is not genuine but was prepared after his filing the writ petition. We see no reason to accept the petitioner's allegations. He could not have known about the voting of the members of the General Court Martial. Rule 45 gives the Form of Oath or of Affirmation which is administered to every member of a Court Martial. It enjoins upon him that he will not on any account at any time whatsoever disclose or discover the vote or opinion of any particular member of the Court Martial unless required to give evidence thereof by a Court of Justice

or Court Martial in due course of law. Similar is the provision in the Form of Oath or of Affirmation which is administered to the Judge-Advocate, in pursuance of r. 46. Rule 61 provides that the Court shall deliberate on its finding in closed Court in the presence of the Judge-Advocate. It is therefore clear that only the members of the Court and the Judge-Advocate can know how the members of the Court Martial gave their votes. The votes are not tendered in writing. No record is made of them. Sub-rule (2) of r. 61 provides that the opinion of each member of the Court as to the finding shall be given by word of mouth on each charge separately. Rule 62 provides that the finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in the rules, shall be recorded simply as a finding of 'guilty' or of 'not guilty'. In view of these provisions, the petitioner's statement, which can be considered to be a mere allegation, cannot be based on any definite knowledge as to how the voting went at the consideration of the finding in pursuance of r. 61.

Further, there is no reason to doubt what is stated in the certificate which, according to the counter-affidavit, is not recorded in pursuance of any provision governing the proceedings of the Court Martial, and does not form part of any such proceedings. It is recorded for the satisfaction of the confirming authority. The certificate is dated January 12, 1963, the date on which the petitioner was convicted. The affidavit filed by Col. N.S. Bains, Deputy Judge-Advocate General, Army Headquarters, New Delhi, contains a denial of the petitioner's allegation that the certificate is a false and concocted document and has been made by the authorities after the filing of the writ petition. We see no reason to give preference to the allegations of the petitioner over the statement made by Col. Bains in his affidavit, which finds support from the contents of Exhibit A signed by the presiding officer of the Court Martial and the Judge-Advocate who could possibly have no reason

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for issuing a false certificate. We therefore hold that there had been no non-compliance of the provisions of s. 132(2) of the Act.

Next we come to the fifth point. It is true that s. 164 of the Act gives two remedies to the person aggrieved by an order, finding or sentence of a Court Martial, they being a petition to the authority which is empowered to confirm such order, finding or sentence and the petition to the Central Government or some other officer mentioned in sub-s. (2), after the order or sentence is confirmed by the former authority. The final authority to which the person aggrieved by the order of the Court Martial can go is the authority mentioned in sub-s. (2) of s. 164 and if this authority happens to be the confirming authority, it is obvious that there could not be any further petition from the aggrieved party to any other higher authority against the order of confirmation. The further petition can only be to the authority superior to the authority which confirms the order of the Court Martial and if there be no authority superior to the confirming authority, the question of a remedy against its order does not arise. Section 164 does not lay down that the correctness of the order or sentence of the Court Martial is always to be decided by two higher authorities. It only provides for two remedies.

Section 153 of the Act provides *inter alia* that no finding or sentence of a General Court Martial shall be valid except so far as it may be confirmed as provided by the Act and s. 154 provides that the findings and sentence of a General Court Martial may be confirmed by the Central Government or by any officer empowered in that behalf by warrant of the Central Government. It appears that the Central Government itself exercised the power of confirmation of the sentence awarded to the petitioner in the instant case by the General Court Martial. The Central Government is the highest authority mentioned in sub-s. (2) of s. 164. There could therefore be no occasion for a further appeal to any other body and therefore no justifiable grievance can

be made of the fact that the petitioner had no occasion to go to any other authority with a second petition as he could possibly have done in case the order of confirmation was by any authority subordinate to the Central Government. The Act itself provides that the Central Government is to confirm the findings and sentences of General Courts Martial and therefore could not have contemplated, by the provisions of s. 164, that the Central Government could not exercise this power but should always have this power exercised by any other officer which it may empower in that behalf by warrant.

We therefore do not consider this contention to have any force.

Lastly, Mr. Rana, learned counsel for the petitioner, urged in support of the first that in the exercise of the power conferred on Parliament under Art. 33 of the Constitution to modify the fundamental rights guaranteed by Part III, in their application to the armed forces, it enacted s. 21 of the Act which empowers the Central Government, by notification, to make rules restricting to such extent and in such manner as may be necessary, the right of any person with respect to certain matters, that these matters do not cover the fundamental rights under Arts. 14, 20 and 22 of the Constitution, and that this indicated the intention of Parliament not to modify any other fundamental right. The learned Attorney-General has urged that the entire Act has been enacted by Parliament and if any of the provisions of the Act is not consistent with the provisions of any of the articles in Part III of the Constitution, it must be taken that to the extent of the inconsistency Parliament had modified the fundamental rights under those articles in their application to the person subject to that Act. Any such provision in the Act is as much law as the entire Act. We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental rights under Part III of the Constitution, that provision does not, on that account, become

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void, as it must be taken that Parliament has thereby, in the exercise of its power under Art. 33 of the Constitution, made the requisite modification to affect the respective fundamental right. We are however of opinion that the provisions of s. 125 of the Act are not discriminatory and do not infringe the provisions of Art. 14 of the Constitution. It is not disputed that the persons to whom the provisions of s. 125 apply do form a distinct class. They apply to all those persons who are subject to the Act and such persons are specified in s. 2 of the Act. The contention for the petitioner is that such persons are subject to be tried for civil offences *i.e.*, offences which are triable by a Criminal Court according to s. 3 (ii) of the Act, both by the Courts Martial and the ordinary Criminal Courts, that s. 125 of the Act gives a discretion to certain officers specified in the section to decide whether any particular accused be tried by a Court Martial or by a Criminal Court, that there is nothing in the Act to guide such officers in the exercise of their discretion and that therefore discrimination between different persons guilty of the same offence is likely to take place inasmuch as a particular officer may decide to have one accused tried by a Court Martial and another person, accused of the same offence, tried by a Criminal Court, the procedures in such trials being different.

We have been taken through the various provisions of the Act and the rules with respect to the trial of offences by a Court Martial. The procedure to be followed by a Court Martial is quite elaborate and generally follows the pattern of the procedure under the Code of Criminal Procedure. There are, however, material differences too. All the members of the Court Martial are Military Officers who are not expected to be trained Judges, as the presiding officers of Criminal Courts are. No judgment is recorded. No appeal is provided against the order of the Court Martial. The authorities to whom the convicted person can represent against his conviction by a Court Martial are also non-

judicial authorities. In the circumstances, a trial by an ordinary Criminal Court would be more beneficial to the accused than one by a Court Martial. The question then is whether the discretion of the officers concerned in deciding as to which Court should try a particular accused can be said to be an unguided discretion, as contended for the appellant. Section 125 itself does not contain anything which can be said to be a guide for the exercise of the discretion, but there is sufficient material in the Act which indicate the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it. Magistrates can question it and the Government, in case of difference of opinion between the views of the Magistrate and the army authorities, decide the matter finally.

Section 69 provides for the punishment which can be imposed on a person tried for committing any civil offence at any place in or beyond India, if charged under s. 69 and convicted by a Court Martial. Section 70 provides for certain persons who cannot be tried by Court Martial, except in certain circumstances. Such persons are those who commit an offence of murder, culpable homicide not amounting to murder or of rape, against a person not subject to Military, Naval or Air-Force law. They can be tried by Court Martial of any of those three offences if the offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in that behalf. This much therefore is clear that persons committing other offences over which both the Courts Martial and ordinary Criminal Courts have jurisdiction can and must be tried by Courts Martial if the offences are committed while the accused be on active service or at any place outside India or at a frontier post. This indication of the circumstances in which it would be better exercise of discretion to have a trial by Court Martial, is an index as to what considerations should guide

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the decision of the officer concerned about the trial being by a Court Martial or by an ordinary Court. Such considerations can be based on grounds of maintenance of discipline in the army, the persons against whom the offences are committed and the nature of the offences. It may be considered better for the purpose of discipline that offences which are not of a serious type be ordinarily tried by a Court Martial, which is empowered under s. 69 to award a punishment provided by the ordinary law and also such less punishment as he mentioned in the Act. Chapter VII mentions the various punishments which can be awarded by Courts Martial and s. 72 provides that subject to the provisions of the Act a Court Martial may, on convicting a person of any of the offences specified in ss. 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable or in lieu thereof any one of the punishments lower in the scale set out in s. 71, regard being had to the nature and degree of the offence.

The exigencies of service can also be a factor. Offences may be committed when the accused be in camp or his unit be on the march. It would lead to great inconvenience if the accused and witnesses of the incident, if all or some of them happen to belong to the army, should be left behind for the purpose of trial by the ordinary Criminal Court.

The trials in an ordinary court are bound to take longer, on account of the procedure for such trials and consequent appeals and revision, then trials by Courts Martial. The necessities of the service in the army require speedier trial. Sections 102 and 103 of the Act point to the desirability of the trial by Court Martial to be conducted with as much speed as possible. Section 120 provides that subject to the provisions of sub-s. (2), a summary Court Martial may try any of the offences punishable under the Act and sub-s. (2) states that an officer holding a summary Court Martial shall not try certain offences without a reference to the officer empowered

to convene a district court martial or on active service a summary general court martial for the trial of the alleged offender when there is no grave reason for immediate action and such a reference can be made without detriment to discipline. This further indicates that reasons for immediate action and detriment to discipline are factors in deciding the type of trial.

Such considerations, as mentioned above, appear to have led to the provisions of s. 124 which are that any person, subject to the Act, who commits any offence against it, may be tried and punished for such offence in any place whatever. It is not necessary that he be tried at a place which be within the jurisdiction of a criminal court having jurisdiction over the place where the offence be committed.

In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to which court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.

Lastly, it may be mentioned that the decision of the relevant military officer does not decide the matter finally. Section 126 empowers a criminal court having jurisdiction to try an offender to require the relevant military officer to deliver the offender to the Magistrate to be proceeded against according to law or to postpone proceedings pending reference to the Central Government, if that criminal court be of opinion that proceedings be instituted before itself in respect of that offence. When such a request is made, the military officer has either to comply with it or to make a reference to the Central Government whose orders would be final with respect to the venue of the trial.

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The discretion exercised by the military officer is therefore subject to the control of the Central Government.

Reference may also be made to s. 549 of the Code of Criminal Procedure which empowers the Central Government to make rules consistent with the Code and other Acts, including the Army Act, as to the cases in which persons subject to military, naval or air-force law be tried by a court to which the Code applies or by Court Martial. It also provides that when a person accused of such an offence which can be tried by an ordinary criminal court or by a Court Martial is brought before a Magistrate, he shall have regard to such rules, and shall, in proper cases, deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps, ship or detachment to which he belongs, or to the Commanding Officer of the nearest military, naval or air-force station, as the case may be, for the purpose of being tried by Court Martial. This gives a discretion to the Magistrate, having regard to the rules framed, to deliver the accused to the military authorities for trial by Court Martial.

The Central Government framed rules by S.R.O. 709 dated April 17, 1952 called the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, under s. 549 Cr. P.C. It is not necessary to quote the rules in full. Suffice it to say that when a person charged is brought before a Magistrate on an accusation of offences which are liable to be tried by Court Martial, the Magistrate is not to proceed with the case unless he is moved to do so by the relevant military authority. He can, however, proceed with the case when he be of opinion, for reasons to be recorded, that he should so proceed without being moved in that behalf by competent authority. Even in such a case he has to give notice of his opinion to the Commanding Officer of the accused and is not to pass any order of conviction or acquittal under ss. 243, 245, 247 or 248 of the

Code of Criminal Procedure, or hear him in defence under s. 244 of the said Code; is not to frame any charge against the accused under s. 254 and is not to make an order of committal to the Court of Session or the High Court under s. 213 of the Code, till a period of 7 days expires from the service of notice on the military authorities. If the military authorities intimate to the Magistrate before his taking any of the aforesaid steps that in its opinion the accused be tried by Court Martial, the Magistrate is to stay proceedings and deliver the accused to the relevant authority with the relevant statement as prescribed in s. 549 of the Code. He is to do so also when he proceeds with the case on being moved by the military authority and subsequently it changes its mind and intimates him that in its view the accused should be tried by Court Martial. The Magistrate, however, has still a sort of control over what the military authorities do with the accused. If no effectual proceedings are taken against the accused by the military authorities within a reasonable time, the Magistrate can report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law. All this is contained in rr. 3 to 7. Rule 8 practically corresponds to s. 126 of the Act and r. 9 provides for the military authorities to deliver the accused to the ordinary courts when, in its opinion or under the orders of the Government, the proceedings against the accused are to be before a Magistrate.

According to s. 549 of the Code and the rules framed thereunder, the final choice about the forum of the trial of a person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and the military authorities about the forum where an accused be tried for the particular offence committed by him. His position under ss. 125 and 126 of the Act is also the same

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It is clear therefore that the discretion to be exercised by the military officer specified in s. 125 of the Act as to the trial of accused by Court Martial or by an ordinary court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. Section 125 of the Act therefore cannot, even on merits, be said to infringe the provisions of Art. 14 of the Constitution.

The writ petition therefore fails and is dismissed.

Petition dismissed.

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December 13

ARJUN SINGH

v.

MOHINDRA KUMAR & ORS.

(B.P. SINHA, C.J., A.K. SARKAR AND N. RAJAGOPALA AYYANGAR, JJ.)

Code of Civil Procedure (Act V of 1908). *ss.* 11 *and* 151 *and O. IX, rr,* 3, 7 *and* 13—*Principle of* res judicata *when applicable—"Good cause" and "sufficient cause" if different.*

There were three suits in two of which the appellant was defendant and in the other the plaintiff. One of the three was the main suit (in which appellant was a defendant and the others were connected suits. They were ordered to be consolidated for the purpose of hearing and a day was fixed for pronouncing judgment. The appellant did not appear and *ex parte* orders were passed against him. He filed application (purporting to be under Or. IX, r. 7 Code of Civil Procedure) for setting aside the *ex parte* orders which were rejected. Thereupon he filed revision application before the High Court which applications were rejected. Within a short time he applied to the trial court for taking evidence and proceeding with the case. This application was rejected. Thereafter he filed again another application (under Or. IX, r. 13 Code of Civil Procedure) for setting aside the *ex parte* order alleging the same facts and reasons as before. The respondents raised the bar of *res judicata* which was accepted by the Court. On the rejection of his application he appealed to the High Court. The