

A F R

(SEE RULE 102 (1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH
O.A NO. 59/2012

THIS 21ST DAY OF AUG, 2015

CORAM

HON'BLE JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

APPLICANT(S)

No. 4573684L Ex Sep Mihir Roy
S/o Sri Amrit Roy
Village – Paik Puri
P.O. – Bolluk Hat
Dist. – Purba Medinipur
West Bengal, Pin - 721137

-versus-

RESPONDENT(S)

1. The Union of India through the Secretary
Min of Defence, Government of India,
Ministry of Defence, South Block,
D.H.Q. P.O. New Delhi – 110 011
2. The Chief of the Army Staff
Through Adjutant General
Integrated HQ of MoD (Army)
South Block, DHQ P.O.
New Delhi - 110011.
3. GOC-in-C
Western Command
PIN – 900475
C/o. 56 APO
4. Additional Directorate General
Discipline & Vigilance (DV3)
Adjutant General's Branch
Integrated HQ of MoD (Army)
DHQ, P.O. – New Delhi – 110011.
5. The Commanding Officer
18th Battalion, The Mahar Regiment
C/o 56 APO.

For the petitioner (s)

Mr. Subhash Chandra Basu, Advocate

For the respondents

Mr. B.K. Das, Advocate

Assisted by OIC, Legal Cell.

PER JUSTICE DEVI PRASAD SINGH, MEMBER (JUDICIAL)

1. The instant application under Section 14 of the Armed Forces Tribunal Act 2007 (in short Act) has been preferred being aggrieved with the order of dismissal passed in pursuance to decision under Summary Court Martial. The relevant facts and proposition of law argued and pleaded are discussed herein after. **Applicant, Mihir Roy recruited as Sepoy in the Indian Army on 26.03.2001 and has served about 8 years 9 months 29 days.** On account of allegation with regard withdrawal of money from ATM, applicant was dismissed from service w.e.f. **25.01.2010.** In pursuance to order of Summary Court Martial (SCM) for the charges under Section 52A read with Section 2 (f) of the Army Act, it has been alleged that **ATM Card of No.457308K Sepoy Sankar Pattanayak** belonging to the same Regiment was allegedly by commission of theft taken into possession by the applicant with intent to cause wrongful loss and thereby withdrawn an amount of **Rs. 10000/- and Rs. 15000/- through the said ATM of SBI Palam Branch, Delhi and Indian Overseas Bank of Delhi Cantt.** The theft committed by the applicant was between **10.11.2009 and 11.11.2009** respectively. Two charges were framed under Section 52A of the Army Act with regard to theft committed from the ATMs of aforesaid 2 Banks on 10.11.2009 and 11.11.2009 through stolen **ATM Card No. 4221321512508388** belonging to No. 457308K Sepoy Sankar Pattanaik.

2. The charges were framed on 07 Dec 2009 against applicant of 18 Mahar Regt for committing theft through the stolen ATM Card on **10 & 11 Nov 2009.** 2 charges have been framed under **Section 52A and 52 (f) of the Army Act 1950** for committing theft of property belonging to army person subject to Military Law and action with intent to cause wrongful loss to a person respectively under **Army Rule 22** . The proceedings has been recorded which contain applicant's signature dated **07.12.2009** with an endorsement that applicant declined to cross examine the witness. 2 witnesses were produced i.e. Sepoy Sankar Pattanayak & Naik Prahaladh Mondal. The proceedings was held in the presence of 2 independent witness in pursuance to the provisions contained in Rule 22 (1) of the Army Rule namely Capt DS Ankhalekar and Sub Maj Shekhar Anand.

3. During course of Court Martial Proceedings by the CO on 25.01.2010, applicant made confession with regard to illegal withdrawal of money from ATMs of SBI, Palam Branch Delhi and Indian Overseas Bank, Delhi Cantt to both the parties and necessary endorsement was made in the arraignment in terms of Army Rule 115(2). During course of arraignment by the CO, the applicant pleaded guilty. The relevant portion containing the signature of the applicant, Sep Mihir Roy, on 25.01.2010, for convenience is reproduced as under :-

I.A.F.D. – 907

Proceedings of Summary Court Martial held at New Delhi

On Monday the twenty fifth day

Of January 2010 by IC-4846 H Col Lokinder Chandel

Commanding the 18th Battalion the MAHAR Regt

On the trial of all such accused persons as he may duly have brought before him.

PRESENT

IC-48968H Col Lokinder Chandel

Regt

Commanding the 18th Battalion the MAHAR

Banerjee

Attending the Trial IC-58730W Maj Sushil Kumar

JC-5698414Y Sub Paramjit Singh

of 18th Battalion the MAHAR Regt

Friend of the accused

IC-68044W Capt Kabithrtha Sanyal, 18th Battalion the MAHAR Regt.

Interpreter

IC-48968H Col Lokinder Chandel

The Officers and Junior Commissioned Officers assembled at the 18th Battalion the MAHAR Regt

And the trial commence at 1600 Hrs on 20th

The accused No 4573684L Sepoy Mihir Roy of the 18th Battalion the MAHAR Regt

Is brought ("Called" if a non-commissioned officer) into Court.

IC-48968H Col Lokinder Chandel Sworn (affirmed).

IC-48468H Col Lokinder Chandel is duly sworn (affirmed) as interpreter.

All witnesses are directed to withdraw from the Court.

Sd/-

Col

This charge sheet is read (translated) and explained to the accused marked B-2 signed by the Court and attached to proceedings.

Instructions:- Transaction of Superior authority for trial by summary court martial should be entered with the date and signature of the officer at the foot of the chargesheet, when sanction is necessary [See A.A, Sec 120(2)]

ARRAIGNMENT

Question to the Mihir Roy
Accused one against you? By the Court – How say you accused, No. 4573684L Sepoy are you guilty or not guilty of the first charge preferred

Answer one 'Guilty'
Sd/-
(MIHIR ROY)
25/01/2010

Question two (Signature of the accused)
Are you guilty or not guilty of the second charge

Answer two "Guilty"
Sd/-
(MIHIR ROY)
25.01.2010

(Signature of the accused)

The accused having pleaded guilty to said charges the provision of Army Rule 115(2) are here complied with.

Before recording the plea of guilty of the accused the court explained to the accused the meaning of the charges to which he had pleaded guilty and ascertained that the accused understood the nature of the charges in which he had pleaded guilty. The court also informed the accused the general effect of that plea and the difference in the procedure which will be followed consequent to the said plea. The court having satisfied itself that the accused understood the charges and the effect of his plea of guilty, accepts and records the same. The provision of Rule 115 (2) are thus complied with.

Sd/- 25/01/2010 Sd/-
(Signature of accused) Col
CO Unit

Attested

Sd/-

Adm.

17/05/12

PROCEEDINGS ON A PLEA OF GUILTY

The accused No. 4573684L Sep Mihir Roy

Of the 18th Battalion The MAHAR Regiment is found guilty of (all the charges)

Sd/-

Col

The CO Unit

The summary of evidence is read (translated), explained, marked Exhibit 'B' signed by the court, attached to the proceedings.

Do you wish to make any statement in reference to the charge or in mitigation of punishment?
Question to the accused three

The accused says :-

I committed a mistake. I will not repeat it in future. Answer three

Sd/-

(Mihir Roy)

(Signature of accused)

Do you wish to call any witness as to character? Question four

The accused declined to call any witness

Sd/-

(Mihir Roy)

Answer four

25/01/2010

(Signature of the accused)

Sd/-

Col

The CO Unit

Attested

Sd/-

Adm

4. While confessing applicant stated during course of court martial on 25.01.2010 that he has committed the mistake and shall not repeat it in future. He also declined to call any witness in his defence. Keeping in view the confession of guilt by the applicant and the evidence on record, applicant was dismissed from service by the impugned order dated 25.01.2010. Accordingly movement order was issued on the same day for him indicating that he is proceeding for home being dismissed from service. While passing the order of dismissal the CO also informed him that he has right to approach against the award of punishment to superior authority including GOC-in-C, Western Command. Order dated 26.01.2010 is reproduced as under :-

4573683/MR/A1

26 January 2010

ADJUTANT OFFICE

RIGHT OF PETITION

1. Any person subject to the Army Act who considers himself aggrieved by the finding or sentence of the Summary Court Martial may present a petition to the Central Government, the Chief of the Army Staff or 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.

2. Number 4573684L Sepoy Mihir Roy of 18th Battalion The Mahar Regiment, sentenced for "**To be dismissed from service**" on 25 January 2010 may submit a petition against this award to any of the authorities specified in Paragraph 1 above. In case he wishes to address the GOC-in-C Western Command, or any authority superior to him, his petition, if any may be forwarded to the following address :-

Headquarters
Western Command
PIN – 900 475
C/O 56 APO

Sd/-
(Lokinder Chandel)
Colonel
Commanding Officer
18th Battalion The Mahar Regiment

4573684L Sepoy Mihir Roy Sd/-
(Mihir Roy)
4573684L

Witness

Sd/-
1. (IC-68044W Capt Kobitirtha Sanyal)

Sd/-
2. (JC-569602F Sub Annanur Rahaman)

Attested
Sd/- ,
Adm,
dated 17/05/12

5. Before the SCM proceedings, the prosecution witness No. 1, Sepoy Sankar Pattanayak appeared and certified the existence of his Savings Bank account in Indian Overseas Bank, Delhi Cantt Branch and the ATM Card No. (Supra). He admits that once on 07.11.2009 he requested his colleague Sepoy Mihir Roy to withdraw an amount of Rs. 15000/- from Indian Overseas Bank ATM Card and accordingly communicated him the ATM PIN No. The amount was withdrawn and paid to him. The ATM Card was also returned which was later on stolen by him. The factual metrics with record of theft of ATM Card and knowledge of Pin Code No. seems to be beyond doubt from the statement of Sepoy Sankar Pattanayak. The statement provided by Indian Overseas Bank also shows withdrawal of aforesaid amounts of both dates.

6. The Prosecution Witness No. 2, Nk Prahalladh Mandal of Delta Coy reiterated the intimation of Sepoy Mihir Roy and Sepoy Sankar Pattanayak and handing over of ATM for withdrawal of money from time to time. He stated that Sepoy Sankar Pattanayak on 11.11.2009 enquired from Sepoy Mihir Roy with regard to whereabouts of his missing ATM Card. He further stated that on 12.11.2009 Major Ashok Kumar asked a question and applicant Mihir Roy confessed that he has stolen the ATM Card of Sepoy Sankar Pattanayak.

7. Major Ashok Kumar appeared as PW 3 and in his statement he admitted that Sepoy Sankar Pattanayak has raised doubt with regard to missing ATM Card on applicant Mihir Roy on the ground that it was he who knows the PIN No. of ATM which was kept in his suitcase. The commission of theft was denied by Sepoy Mihir Roy before Major Ashok Kumar at initial stage. However, on 12.11.2009 Major Ashok Kumar told the applicant that theft may be verified from close circuit television installed in the ATM, then Sepoy Mihir Roy confessed that he has stolen ATM Card and withdrawn aforesaid amount on respective dates. On query applicant informed that he has destroyed the ATM Card and transferred the amount to his brother's account but brother refused that he has received any amount from the applicant.

8. Later on Sepoy Mihir Roy confessed that money had been kept in cupboard of Company Line. Cupboard was opened at 1630 h in presence of Lance Havildar Lalit Mohan Pathak, Sepoy Sankar Pattanayak, Lance Naik Pradip Singh and Sepoy

Prakash Gurjar belonging to the Support Company of 18th Battalion The MAHAR Regiment and Rs. 25000/- was recovered. The amount was handed over to Sepoy Sankar Pattanayak.

9. Maj Ashok Kumar further stated that he received the CD of the Video recording of ATM of Indian Overseas Bank, Delhi Cantt Branch which has been marked as **Exhibit 'Three'** and attached to Summary of Evidence. Bank Certified that the Video recording has been taken through close circuit television installed in its ATM on 11.11.2009 at 0832 hours to 0834 hours. The certificate has been marked as **Exhibit 'Four'** attached to Summary of Evidence.

10. During course of proceedings Video Recording was shown to accused applicant who recognized his own video while withdrawing money.

11. The applicant has made a statement during course of proceedings and he was cautioned in terms of Army Rule 23 (3) in the presence of SS-42502K Capt Mimar Ete, an independent witness. Accordingly, applicant Mihir Roy made a statement which was duly recorded during course of proceedings by Major Mayank Chandola and also signed by Capt Mimar Ete. For convenience the statement recorded during the proceedings which has been certified by Capt Mimar Ete as an independent witness is reproduced as under :-

CONFIDENTIAL

"The accused elected to make a statement.

Statement of the accused.

I, Number 4573684L Sepoy Mihir Roy of Support Company of 18th Battalion The Mahar Regiment states :-

I, Number 4573684L Sepoy Mihir Roy am serving in Support Company of 18th Battalion The Mahar Regiment since six years.

I was detailed to man the exchange of Officer Mess whenever Sepoy Sankar Pattanayak was not present.

On 07 November 2009, Sepoy Sankar Pattanayak requested me to withdraw an amount of Rs. 15,000.00 through his Indian Overseas Bank ATM Card Number 4221321512508388. He also told me his ATM PIN Number.

On 08 November 2009 at 1430 hours, I returned his ATM Card along with Rs. 15,000.00. He placed his ATM Card inside the suitcase in front of me.

On 10 Nov 2009 at 1000 hours, I relieved Sepoy Sankar Pattanayak from Officer Mess exchange. Sepoy Sankar Pattanayak went out to repair the geyser in the guest room. At 1030 hours when I was alone in the exchange, I took his suitcase keys which were kept in his bag and stole his ATM Card from the suitcase.

On 10 November 2009 at 1500 hours, I withdrew Rs. 10,000/- from ATM installed in State Bank of India, Palam Branch. I did this without any knowledge of Sepoy Sankar Pattanayak and with the intention of stealing the amount.

On 11 November 2009 at 0833 hours, I again withdrew Rs. 15,000.00 from ATM installed in Indian Overseas Bank, Delhi Cantt Branch. I did this without any knowledge of Sepoy Sankar Pattanayak and with the intention of stealing the amount.

On 11 November 2009 at 1630 hours, I was questioned by Naik Prahalladh Mondal about the ATM Card and whether I had withdrawn Rs. 25,000/- from Sepoy Sankar Pattanayak's ATM Card. I informed him that I had neither taken his ATM Card nor withdrawn money from Sepoy Sankar Pattanayak's ATM Card.

On 12 November 2009 at 1450 hours, I confessed voluntarily in presence of Major Ashok Kumar. Sepoy Sankar Pattanayak and Naik Prahalladh Mondal.

I regret my act of stealing and request that I may please be pardoned.

Sd/-

(Mihir Roy)

Accused

Sd/-

(Major Mayank Chandola)

Officer Recording S of E

Sd/-

(Captain Mimar Ete)

Independent Witness"

CONFIDENTIAL

Attested

Sd/-

Adm

17/05/12

12. Applicant has submitted a representation to the Secretary, Ministry of Defense on 08.02.2012 for annulment of Summary Court Martial proceedings held on 25.01.2010.

13. Later another petition was submitted on 25.03.2010. The Adjutant General vide his letter dated 24.06.2010 advised the applicant to file fresh petition under Army Act Section 164 duly addressed to appropriate authority. It appears that the applicant has submitted an application against dismissal from service dated 25.01.2010 which was replied by letter No. 4573684/MR/A1 dated 02.06.2010 by Capt DS Ankolekar, Adjutant on behalf of CO. During course of proceedings with the consent of both the parties, we have seen the CD which contains the CC TV recording of the ATM of Indian Overseas Bank in presence of counsel for both sides. The order of the Tribunal Serial No. 23 dated 22.07.2015 for convenience is reproduced as under :-

“We have seen the CD, which contains the recording of CCTV Camera of the respective ATM of Indian Overseas Bank in presence of Mr. Subhash Chandra Basu, the learned counsel for the applicant, Mr. B.K. Das, the learned counsel for the respondents and Maj Narendra Singh, OIC Legal Cell in the Chamber of Member (J). In the video it is seen that the applicant, Ex Sep. Mihir Roy, who is well uniformed is withdrawing money from the ATM. The CD displays the figure in the manner given below:-

09-11-11-08-33-04-

At the bottom of the CD displays as under :-

2009/12/19

3. The matter is adjourned till 3rd August, 2015.
4. All the records including the CD shall be kept in a sealed cover by the Registry.
5. A plain copy of the order be given to both the parties observing the usual formalities.

Sd/-

(LT GEN GAUTAM MOORTHY)
MEMBER (ADMINISTRATIVE)

Sd/-

(JUSTICE DEVI PRASAD SINGH)
MEMBER (JUDICIAL) “

14. The aforesaid CCTV recording seems to be of 11.09.2009 at 0830 hrs and the CD player, as submitted, was played on 19.12.2009 and the copy of the CD Player were of the interesting feature on record seems that the applicant has not categorically denied that he does not figure in CCTV recording and the applicant was found to be withdrawing money from the ATM. The presence of the applicant, in such a situation, there appears no room of doubt that on 11.09.2009 theft was committed by the applicant from the ATM of his own colleague.

Discussion and finding :-

15. Ld counsel for the applicant relying upon the case reported in **AIR 1987 Supreme Court 2386 Ranjit Thakur v. UOI and others, AIR 1978 Supreme Court 597 Maneka Gandhi vs UOI & Ors, AIR 1953 SC 244 State of Bombay vs Pandurang**. Procedural safeguard provided under the Statute must be adhered to otherwise all trial shall vitiate. However, under the present case as we have discussed (supra) procedure prescribed by law seems to have been followed. Hence does not help the applicant.

16. Ld counsel for the applicant further relied upon **1982 III SCC Page 140 Lt Col Prithi Pal Singh vs. UOI and in 1987 Cri 1386 Avtar Singh -Vs- UOI**, which submits that Army Rule 22 (1) has not been complied with, hence suffers from substantial illegality. Army Rule 22 (1) provides an opportunity of hearing, cross examination of the witness and also lead evidence. In the present case as held and discussed (supra), the provisions contained in Army Rule 22 (1) seems to have been complied with.

17. Subject to aforesaid material on record and pleadings the controversy in question is required to be adjudicated. It has been vehemently argued by the learned counsel for the applicant that Rule 180 of the Army Rules has not been complied with. For convenience Rule 180 of the Army Rules 1954 is reproduced as under:-

“180. Procedure when character of a person subject to the Act is involved. – Save in the case of a prisoners of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and making any statement, and giving any evidence he may wish to make or give, and of cross examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witness in defence of his character or military reputation. The presiding officer of the court shall take

such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule.”

18. A plain reading of the Army Rules (supra) shows that it co-relate to an enquiry not court martial. Section 180 of Army Rules deals with a situation with a fact finding enquiry instituted to find out certain allegations or factual dispute which may be basis for follow up action for a court martial trial on every proceedings in the law. It is well settled law that fact finding enquiry instituted under Section 180 of the Army Rules is not substantial evidence. It may only be used in a court martial proceedings be for the purpose of contradiction or utilize it during course of cross examination when a summary court martial is initiated. Under SCM proceedings a charged individual is tried for punishment in accordance with procedure prescribed thereon. The accused has right to cross examine the witness during course of enquiry or during course of SCM. In the present case applicant himself declined to cross examine the witnesses. Hence no illegality may be attributed to the CO in conducting the SCM proceedings. Once a charged official himself declines to cross examine the witness then he missed the bus to set up a case of procedural illegality and it shall be deemed that natural justice is complied with.

19. Army Rule 23 provides for taking down of summary of evidence whereby statement of each evidence is recorded in accordance to rules and read over to the witness and his or her signature for the recorded statement is taken. The accused is permitted to cross examine the witness. He is further permitted to lead evidence in his defence. In case accused neither cross examines nor leads any evidence in defence and makes a statement accordingly, then it shall not be obligatory on the part of the SCM to form opinion in favour of the accused. The SCM is a quick method to take immediate action against the accused to maintain discipline in the Army with due compliance of natural justice. In case charged person declines to cross examine or lead evidence in defence then it is always open to finalise and form opinion on the basis of material on record. Rule 23 of Army Rules shall deem to be complied with. Applicant should be looked into urgency for trial keeping in view the facts and circumstances of

each case. In the present case allegations against the applicant was of theft through ATM of his own colleague and the charge is serious hence rightly SCM was held to adjudicate the controversy. To continue with a person charged with theft even for a day may be fatal and person having bad habit may be charged not only for theft of money but also for arms and ammunition of army which may cause irreparable loss and damage to set up. There appear to be no illegality in initiating the SCM proceedings.

20. It is incorrect to say that provisions of Section 34 of Army Rules has not been complied with. The charge sheet framed against the applicant does not seem to be suffered from any illegality. At every step SCM proceedings, the applicant has been duly informed of the charges and opportunity was given to him to submit reply. Summary of evidence was handed over to the accused in advance and sufficient time was given to him to prepare his case. The charge sheet on record seems to be in order. The proceeding under Rule 113 of Army Rules also does not suffer from any impropriety and illegality. No point to call any friend of the applicant, when he himself declined to call any witness. The compliance of the procedure prescribed under law does not seem to suffer from any impropriety or illegality.

21. One of the point advanced by the learned counsel for the applicant, Mr Basu, is that with record of theft in ATM on 11.11.2009 and video recording of CCTV is produced but no evidence has been produced with record to theft done in ATM on 10.11.2009. It is not necessary to produce CCTV recording for both the days. His statement has been recorded, the evidence of theft on 11.11.2009 as per CCTV recording is on record. The applicant has not come forward with a case that he has not gone to ATM for withdrawal of amount in question. In the CCTV recording on 11.11.2009, he is being seen to withdraw the amount of Rs. 15000/- from the ATM of IOC Bank. The fact has been admitted requires no proof under the provisions contained in Section 58 of the Indian Evidence Act.

22. Even for the sake of arguments if there is no use of relying on CCTV recording has been produced with regard to theft committed on 10.11.2009, the commission of theft on 11.11.2009 (supra) is enough to punish the applicant for committing theft

deceiving his own brother colleague betraying the trust reposed in him by his colleague.

23. It is argued by the learned counsel for the applicant that under Army Rule 23, learned counsel for the applicant relied upon a case reported **AIR 1980 (supra) SC 873 Para – 7, Hazari Lal –Vs - State**. The case of Hazari Lal relates to a proceedings in a regular criminal court where the Lordship held that statement of the case during enquiry and investigation cannot be used as substantive evidence. Arguments seems to be misconceived for the reason that proceedings of SCM is entirely different from proceedings under code of criminal procedure. In the present case no court of enquiry was instituted but army chose to proceed for SCM keeping with the gravity of misconduct. Hence they faulted on their part by following the procedure prescribed for the purpose. It has been argued that the provision contained in Section 130 of the Army Act has not been complied with. Section 130 of Army Act read with Army Rule 44 of 1954 seem to not applicable. Rule 44 of the Army Rule is reproduced as under :-

44. **Proceedings for challenges of members of court.** – The order convening the and the names of the presiding officer and the members of the court shall then be read over to the accused and he shall be asked, as required by section 130, whether he has any objection to being tried by any officer sitting on the court. Any such objection shall be disposed of in accordance with the provisions of the aforesaid section:

Provided that –

- (a) The accused shall state the names of all the officers constituting the court in respect of whom he has objection, before any objection is disposed of,
- (b) The accused may call any person to give evidence in support of his objection and such person may be questioned by the accused and by the court,
- (c) If more than one officer is objected to, the objection to each officer shall be disposed of separately, and the objection in respect of the officers of the lowest in rank shall be disposed of first; and on an objection to the officer, the remaining officers of the court shall, in the absence of the challenged officer,

vote on the disposal of such objection, notwithstanding the objections have been made to any of those officers.

- (d) When an objection in respect of an officer is allowed, that officer shall forthwith retire, and take no further part in the proceedings,
- (e) When an officer so retires or is not available to serve owing to any cause, which the court may deem to be sufficient, and there are any officers in waiting detailed as such, the presiding officer shall appoint one of such officers to fill the vacancy. If there is no officer in waiting available, the court shall proceed as required by rule 38,
- (f) The eligibility, absence of disqualification, and freedom from objection of an officer filing a vacancy shall be ascertained by the court, as in the case of other officers appointed to serve on the court.

24. However, in the present case, it is incorrect to say that provisions contained in Rule 44 of Army Rule read with Section 130 of Army Act has not been complied with. Since these provisions are not applicable SCM proceedings otherwise also the applicant was given full opportunity during the court martial proceedings and he himself neither cross examined the witness nor raised any objection. Accordingly, reliance placed by the applicant on the case of **Ranjit Thakur –Vs- UOI and Ors and Lt Col Prithi Pal Singh –Vs- UOI** seems to extend no help on all the arguments advanced by the learned counsel for the applicant with no grave reason while proceeding in the SCM.

25. Learned counsel for the applicant relied upon case reported in **1992 Supp. (1) SCC 716, Para 6 & 7 : Ex. Hav. Ratan Singh –Vs-. UOI and 1994 Lab. I.C. 2365, Para – 9, 10 & 12 Mahipal – Vs – UOI**. The holding of SCM in the event of theft committed by army person requires immediate action and indication of grave reason which may be interference from factual matrices on record.

26. Learned counsel for the applicant also relied upon the case reported in **JT 1992 (4) SC 73, Para 52, State of Maharashtra – Vs – Sukdeo Singh, 2006 Cri L.J. 1188, Para – 26, State of Mizoram – Vs – Ramen, (1991)3 SCC 471, Para – 12, Sevaka –**

Vs – State of Tamilnadu and , 1997 Cri L.J. 1237, Para – 11, State of Rajasthan – Vs – Bhera. As the case of Ranjit Thakur – Vs – UOI, some State submitted that no hearing was provided to the applicant while awarding sentence and the punishment is disproportionate to the misconduct being in cause. It is settled law that the punishment being disproportionate to the misconduct in cause itself shakes the conscience of court. We are of the view that the applicant has committed theft of money through the ATM of his own brother colleague and breaking the trust reposed on the applicant and punishment awarded is just and does not seem to be disproportionate to the misconduct and offence.

27. Arguments advanced by the learned counsel for the applicant with regard preponderance coupled with no written complaint was filed and no date in summary of evidence was given. Learned counsel for applicant has relied upon the case recorded in **AIR 1968 SC 702, Para – 5 Munshi Ram – Vs – Delhi, AIR 1976 sc 966, Para – 20 Pratap – Vs – State of U.P., (1970) 1 SCC 665, Para – 11 B.B. Bhu – Vs – LS., 1992 Cri, L.J. 1712 (J & K), Para – 11 Balwant Singh – Vs – UOI,** Judgements relied upon by learned counsel for applicant do not seem to be fit in under the circumstances of the present case. When a written complaint was not filed but a statement was given by the person from whose ATM the amount was withdrawn by the applicant lead to proceed with the SCM. So far as the **preponderance** of the case relied upon by the applicant relates to offence committed under Indian Penal Code through regular trial seems to be not applicable under the facts and circumstances of the case. Otherwise also question of relief does not require to be considered when there is direct evidence in the form of CCTV recording where the applicant may be seen committing theft by withdrawing the money from the account of Sepoy Sankar Pattanayak. SCM Proceedings is not so exhaustive which may require to follow the procedure for GCM.

28. It is true that cash may not be a property but vide **AIR 1926 Sind 17 (D.B.), Para –P17 C2 Pursu – Vs – Emperor** but question involved is not with regard to definition of property but it relates to commission of theft and whether applicant has committed the theft or not which requires for adjudication through SCM.

29. Learned counsel for applicant relied upon case reported in **1992 Cri L.J. 1712 (J & K), Balwant Singh – Vs – UOI, 1994 (8) SLR 441 (Delhi) Mahipal Singh – Vs – UOI, 1983 Cri L.J. 1368, Bhagabam Singh – Vs – UOI, SPL Appeal No. 726/1997, Para – 16 (Allahabad H.C) UOI – Vs – Ram Adhar Tiwari, 1989 (3) SLR 405 Uma Shankar Pathak – Vs- UOI, 2003 Lab. I.C. 509 Lackman – Vs – UOI.** With a submission the respondent has proceeded in haste, hence an inference may be withdrawn with regard to likelihood of malafide. Learned counsel for the applicant could have some merit in case applicant could have not admitted the guilt. Once he admitted the guilt and denied to cross examine the witness and also in his statement he agreed that he has withdrawn an amount of Rs. 15000/- from ATM of Sepoy Sankar Pattanayak, question does not arise to consider his relief.

30. Cases relied upon by the learned counsel for the applicant does not help the applicant in any manner. While preferring the O.A. in Para 4.5 and also in sub paras applicant had alleged that CO has not acted fairly and entire procedure is conducted by him was with ulterior motive to punish the applicant. Arguments on malafide of the fact cannot be entertained unless the person to whom the accused malafide is alleged, is impleaded as respondent in present capacity and opportunity is given to defend himself. The allegation of applicant that the statement and the record does not contain his signature or he was compelled to sign over it, is not entertainable since it raises malicious approach of CO and for such scrutiny it was necessary for the applicant to implead the CO and members of SCM in person so that they would have got an opportunity to defend their action. In the absence of impleadment malafide may not be attributed to the members of the SCM. The malafide exercise or attributability may not be exercised unless a person accused of malafide is alleged, is permitted to defend his action and revert allegation vide **AIR 2007 Vol 8 SCC 418 Dhampur Sugar Kashipur Ltd. – Vs – State of Uttaranchal, J.T. 2009 Vol 10 SCC 472 Port Authority of India –Vs- Rajiv Ratan Pandey** to establish malis animus.

31. It shall be necessary to bring on record with pleading of malafide allegation and with necessary particulars making it a prima facie case against the person for whom the malafide is alleged and burden to prove malafide raised on the person who alleges it.

There must be sufficient material to establish malis animus **vide AIR 1977 SCC 567 Tarachand Khatri – Vs – Municipal Corporation of Delhi, AIR 1974 SCC 555 E.P. Rayappa – Vs – State of Tamil Nadu, AIR 1982 SCC 65 Sukhvinder Pal Bipin Kumar - Vs – State of Punjab, AIR 1987 SCC 294 Shivaji Nilanger Patil – Vs – Dr. Mahesh Madhav Gosav.** In view of the above allegations of the learned counsel for applicant that entire proceedings was a farce and the applicant was not permitted to defend his case in accordance with Rules and he was compelled to sign over the pre-written notes, there is differences of signatures etc seem to be based on unfounded facts and hence not sustainable.

32. For the sake of repetition, we again draw attention to CCTV footage where applicant has been seen withdrawing money from ATM and his presence has not been disputed by the learned counsel for the applicant when the footage seen in the Chamber (supra). There is no pleading on record by which applicant has denied the withdrawal of money from ATM on 11.11.2009 (supra). The entire evidence on record prove beyond doubt the guilt of the applicant. No lenient view may be taken of theft by army person.

33. In view of the above, the impugned order as well as SCM proceedings does not seem to suffer from any impropriety and illegality and call for any interference by this Tribunal. Hence the O.A. is rejected being devoid of merit. No cost.

34. Original documents submitted by the respondents be returned to them under proper receipt.

35. A plain copy of the order, duly countersigned by the Tribunal Officer be furnished to both sides after observance of usual formalities.

(LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE DEVI PRASAD SINGH)
Member (Judicial)

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