FORM NO – 21
(See Rule 102 (1)

ARMED FORCES TRIBUNAL, KOLKATA BENCH

APPLICATION NO : TA 08 OF 2011 (WP (S) 5362/2008)

THIS 13TH DAY OF DECEMBER, 2013

CORAM : Hon'ble Mr. Justice Raghunath Ray, Member (Judicial)
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

Bijay Shankar Kumar
S/o Ram Nath Kumar
R/o Quarter No. A-62, Section IV,
Dhurwa, PO Dhurwa, PS Dhurwa,
Dist. Ranchi - Jharkhand

…….. Petitioner

-VS –

1. Union of India through the Chief of Army Staff,
South Block, New Delhi-110 011

2. The GOC-in-C, Headquarters,
Western Command, Chandi Mandir,
Chandigarh

3. The Commandant, Ordnance Depot,
Shakurbasti, New Delhi

…… Respondents

For the appellant : Mrs. Maitrayee Trivedi Dasgupta, Advocate
Mr. Amit Sharma, Advocate

For the respondents : Mr. S.K.Bhattacharyya, Advocate

O R D E R

Per Justice Raghunath Ray,Member (J) :

A writ petition (WP(S) 5362 of 2008) was filed before the Hon'ble Jharkhand High Court at Ranchi by Shri Bijay Shankar Kumar, Ex-Sepoy/MA formally attached for training with Base Hospital, Delhi Cantonment, challenging the legality/validity of the punishment of dismissal from service imposed upon him in a SCM proceeding. In view of the provisions of Sec. 34(1) of the Armed Forces Tribunal Act, 2007 (in short AFT Act, 2007), the said writ petition subsequently stood transferred to this Tribunal vide order dated 22.07.2010 passed by a single Bench of the Hon'ble High Court, Jharkhand at Ranchi and it has been re-numbered as T.A. No.8/2011 in this Tribunal accordingly. The writ petition so transferred to this Tribunal has been treated as an appeal u/s. 15 of the AFT Act, 2007, for all practical purposes and was being dealt with accordingly.

Background facts :

2. The relevant facts leading to the filing of this appeal, in resume, are as under :- The appellant, Bijay Shankar Kumar was initially appointed to the post of Sepoy (Medical Assistant) in the Army Medical Corps on 28.06.1996. In the year 2005, while he was undergoing training in Base Hospital, Delhi Cantonment for further investigation Summary of Evidence was recorded and on the basis of Summary of Evidence the Summary Court Martial (in short, SCM) was conducted, a Court of Inquiry (for short, C.o.I) was initiated against him on the allegation of taking bribe from Shri Ashok Kumar Tuteja for procuring a job of Chowkidar for his son. On consideration of testimony of as many as six witnesses examined as also connected materials collected in course of court of inquiry coupled with other relevant circumstances on record, it was opined unanimously by all the three members of the

court of inquiry presided over by a Lt. colonel of Army HQ, Air Sp Sig Unit that the allegation against the appellant of cheating Sri Ashoke Kumar Tuteja of Rs. 55,000/- (Fifty five thousand only) by promising his son's recruitment for the post of Chowkidar could not be substantiated. Such findings of the court of inquiry were not, however, accepted by the competent authority. He was tried by the SCM accordingly on two counts of charges u/s 63 and 39(a) of the Army Act on 8.5.2008 and was sentenced "to be dismissed from service" by the Commandant, OD, Shakurbasti on the same day. He was further advised for presentation of a petition against the sentence of SCM to the Central Govt., the Chief of Army Staff or any other competent authority if he is aggrieved and so advised.

3. A statutory appeal u/s 164(2) of Army Act, 1950 was filed by the appellant before the Chief of Army Staff on 21.05.2008 (annexure-9). But despite several reminders and legal notice, the competent Authority failed to take appropriate steps to expedite the process of disposal of the said statutory appeal within a reasonable period of time. The appellant, therefore, had to approach the Hon'ble Jharkhand High Court at Ranchi for redressal of grievances by filing a writ petition on 10.11.08.

Appellant's version :

4. It is contended inter alia by the applicant in the writ petition that during the year 2004-05, he was sent to the Base Hospital, Delhi Cantonment for training for a period of 6 months. During his such posting, he was deputed for guard duty in the main gate of the said hospital at the end of February, 2005. One day, he noticed one civilian trying to enter into the main gate without any authority. On his query, it was learnt that the person was one Shri Ashok Kumar Tuteja and he had come to gather certain information in respect of his son Ankur's recruitment for the post of Chowkidar in the said Hospital for which he had applied for earlier. He wanted to

know the date of interview. Since that was a Sunday, the appellant advised the said civilian Ashok Kumar to come on any week day and meet the Company Commander for required information. It is, however, averred by the appellant that the said Ashok Kumar sought his assistance in confirming the date of interview of his son and the appellant volunteered to help him. He further assured that he would collect the necessary information from the recruiting branch and would inform him. At that point of time, another Sepoy, namely, Sanjeev Kumar also came there and the appellant introduced him to the said civilian Ashok Kumar. Since the appellant and the said Sepoy Sanjeev Kumar assured to help Shri Ashok Kumar, he gave his mobile number to the appellant and requested them to give a call subsequently. After 2/3 days, the appellant called Ashok Kumar on his mobile number and informed him that he could not get any information regarding the date of interview of his son. According to the appellant, the said Ashok Kumar requested him to pursue the matter and to pass on the information as and when available. Since the appellant could not get the required information, he intimated Shri Ashok Kumar not to contact him any further on this subject.

5. On 6th/7th July, 2005, the appellant was called at the Local Unit and was told by Major Harjinder Singh that one Ashok Kumar had lodged a police complaint against the appellant that he demanded Rs.30,000/- from him (Ashok Kumar) for procuring a job for his son. However, the appellant vehemently denied such allegation. According to him, at this point Major Harjider Singh and his JCO started beating him up with their uniform belts and also threatened him with dire consequences if he did not sign a statement admitting that he had taken the money from Ashok Kumar. The appellant had no other option than to sign the said document

under duress. However, at the same time he also lodged a complaint about this incident to the CHM of the said hospital.

6, During C.o.I, the appellant had stated that the confessional statement was obtained from him under threat and coercion and he totally denied the allegation that he was paid any money by Shri Ashok Kumar or his son Ankur Tuteja for latter's recruitment as Chowkidar. He also pointed out that the said Ashok Kumar had earlier made a police complaint wherein he alleged that he had paid Rs.55,000/- for such recruitment. However, such amount was reduced to Rs.29,500/- subsequently. This is indicative of a cooked up story to implicate the appellant falsely. The CoI was concluded and finally it was opined that the allegation levelled against the appellant could not be substantiated. It was observed by the CoI that neither the appellant nor Sepoy Sanjeev Kumar was assigned any duty at BHDC in connection with the recruitment process at the relevant point of time i.e. in Feb-March, 2005.

7. Subsequently, the appellant was intimated by a letter dated 26.12.2007about the holding of SCM against him and accordingly copies of Summary of Evidence, charge-sheet dated 05.12.2007 and also CoI proceedings were supplied to him. Meanwhile, the appellant, who was working in the Medical Deptt, was temporarily attached to the Ordnance Depot, Sakurbasti, New Delhi for the purpose of conducting the SCM proceedings. At this point of time, the appellant remained absent for certain period i.e. from January to March 2008 without any leave on account of a lot of personal and family problems. He, thereafter, rejoined voluntarily.

8. It, however, appears that the first charge sheet was not followed up and another charge-sheet was issued afresh upon him on 01.05.2008 (Annexure- A3). He was charged U/s 63 of the Army Act on the allegation of acceptance of

Rs.29,500/- from Ashok Kumar for securing employment of his son, Ankur in the post of Chowkidar, and further charged u/s. 39(a) of the Army Act for his absence without leave for the period on and from 02.01.2008 to 26.03.2008 (Annex. A4). It was intimated vide communication dated 02.05.2008 that the trial as per the charge-sheet which was served earlier, could not take place as the appellant was unavailable during the period from 02.01.2008 to 26.03.2008. Therefore, a fresh charge-sheet along with Summary of Evidence was forwarded to him.

9. It is contended by the appellant that the SCM proceeding was held and concluded against him on 08.05.2008. He was also dismissed from service by the Brigade Commander, Ordnance Depot, Shakrubasti, New Delhi on the same date. Being aggrieved, the appellant preferred a representation followed by a statutory appeal dated 21.05.2008 to the Chief of Army Staff. No decision on the statutory appeal was, however, communicated to him till the filing of the Writ Petition. In such a situation he was compelled to file the instant writ petition before the Hon'ble High Court at Ranchi challenging the SCM proceeding as also the punishment of dismissal from service. He has prayed for his reinstatement with all consequential benefits after quashing the findings impugned..

10. During the pendency of the Writ Petition, the appellant was served with an order dated 03.03.2009 (annexure-A14) rejecting the statutory appeal submitted by him. He, therefore, filed an interlocutory petition seeking amendment of para I as also prayer portion of the petition by incorporating his further prayer for quashing the order dated 03.03.2009 passed by the COAS rejecting his statutory appeal dated 21.05.2008. Thus, apart from the main relief, the appellant has further prayed for quashing of the order dt. 3.3.09 passed by the COAS.

Respondents' Contentions :

11. The respondents have contested the appeal by filing Affidavit-in-Opposition wherein they denied all material allegations. It is contended inter alia that the SCM proceedings were held against the appellant strictly in accordance with the prescribed rules and all reasonable opportunities were afforded to him to defend himself during trial. It is, however, submitted that the appellant was attached for disciplinary action to Ordnance Depot, Shakurbasti vide order dated 06.10.2005 which was issued in terms of direction of the GOC, Delhi Area. The appellant was tried by the SCM at Ordnance Depot, Shakru Basti, New Delhi on 08.05.2008. It is further submitted that the SCM was held independently and the earlier CoI proceedings in which the appellant was exonerated of the specific allegation of acceptance of bribe from one Asoke Kumar to secure his son's employment was not taken into consideration by the SCM. It is also stated that one Shri Asoke Kumar lodged a police complaint on 09.05.2005 (Annex. A) to the Dy. Commissioner of Police, South West Delhi. Apart from corroborative statements of material witnesses there are documentary evidence, i.e. telephonic call details & bank statements to prove the appellant's involvement in accepting illegal gratification as alleged. The appellant, knowing fully well that he was nowhere connected with the recruitment process, had voluntarily agreed to assist Ashok Kumar, the complainant with ulterior motive. According to the respondents, the appellant being a soldier of Indian Army and deputed on bona fide military duty, violated the service rules by his purported endeavor to assist the victim.. Such an act clearly raises doubts about the bona fides of the appellant. The mobile call details indicating frequent conversation between the appellant and Ashok Kumar clearly prove that they were in touch with each other regularly. It is denied that the appellant was beaten up by Major Harjinder Singh and his JCO in order to extract a

confessional statement under duress or coercion. The appellant's abscondance from the scene of the offence or from duty clearly tends to show that he had mala fide intention. The bank statement of Ankur and also the wife of Ashok Kumar during the relevant period further proves that the money was withdrawn from their respective bank account which is also indicative of the fact that their oral statement was correct and they actually had given money to the appellant.

12. It is further pointed out that the appellant never denied that he absented himself from duty without any authority from 02.01.2008 to 26.03.2008 and as such he has rightly been punished for an offence u/s 39(a) of the Army Act.

13. It is also specifically pleaded that once the SCM proceedings were held in accordance with the relevant provisions of Rules by following the established procedure and in complete conformity with the principles of natural justice, this Court should not interfere with the punishment that was inflicted upon the appellant being commensurate with the gravity of offence.

14. In their supplementary counter-affidavit in response to the interlocutory petition filed by the appellant wherein he sought to challenge the final order passed by the COAS rejecting his statutory appeal, it is pleaded that the COAS had dealt with all the crucial points raised by the appellant and on consideration of all aspects both legal and factual, he passed a reasoned order which also may not be interfered with.

15. By filing a rejoinder, the appellant reiterated his earlier contention and forcefully asserts that he was not given proper and adequate opportunity to defend himself in the SCM proceedings and that the said SCM proceedings was conducted hastily in course of a single day only and without taking into consideration the findings of the C.o.I wherein such serious allegations of bribery could not be substantiated against the appellant.

Arguments :

16. Appearing for the appellant, it is argued by Mrs. Maitrayee Trivedi Dasgupta that the CO of Ordnance Depot, Shakurbasti, New Delhi Brig. A.K.Saxena had no legal authority to conduct the SCM proceedings against the appellant, who was ordered to be temporarily attached to the said Depot solely for the purpose of the proceeding in question. It is pointed out by her that the unit where the appellant was posted was 92 Base Hospital and he was later formally attached for training to Base Hospital, Delhi Cantt., where the alleged incident had happened. It would have been proper for the authorities to hold the SCM proceeding in that unit only. In this context, she has referred to Sec. 116 of the Army Act read with Note 5 and para 2 of Regulation 381 of the Defence Services Regulations which provides that a summary court martial has to be held by the commanding officer of the unit to which the delinquent is attached. The ld. counsel for the appellant further contends that inasmuch as the appellant was not regularly attached to Ordnance Depot. the commanding officer of that unit is not competent to hold the SCM proceeding. Since the appellant was tried summarily by a commanding officer of a different unit in utter disregard to the relevant rules and regulations of Army Rules and Defence Services Regulations, the entire proceedings stood vitiated.

17. She has, thereafter, proceeded to argue by referring to Sec. 120(2) of the Army Act, that in the instant case, there was no emergent requirement for holding a SCM for the simple reason that there was no grave compelling situation for immediate action. She contends that the alleged incident happened in March April 2005 and the SCM was held on 8th May 2008 i.e. after the lapse of long 3 years from the date of the alleged incident. According to her, it is, therefore, crystal clear that there was no

urgency or grave reason for holding the SCM and further such a course of action was resorted to by the authorities in order to deprive the appellant of a fair trial because in a General Court Martial, the appellant could have got sufficiently fair opportunity to defend himself whereas in a summary court martial, there is hardly any scope to build up an effective defence. Even the assistance of the "friend of the accused" cannot be requisitioned as per choice of the appellant. Such friend of the accused was thrust upon him in this case arbitrarily without consulting him and as such he was of no help. She emphasized that the authorities proceeding against him in a closed mind and was pre-determined to punish the appellant because he raised his voice against the job racket and mal practices that were going on in the said Base Hospital and Ordnance Depot. In fact, in his statutory appeal, the appellant raised all these points. Therefore, the authorities, in order to hush up the matter, held the SCM in course of a single day and passed a sentence of dismissal from service on the same day when the SCM was held i.e. on 8.5.08. In support of her contention, Ld. counsel for the appellant has placed reliance on a ruling of the Division Bench of the Hon'ble Delhi High Court reported in **147(2008) DLT 202** (**Ex Ln Vishav Priya Singh –vs- UOI & Ors)**. She has also referred to another decision of the Single Bench of the same High Court reported in **55(1994) DLT 176** (**Mahipal Singh-vs- UOI & Ors**,).

18. It is next argued by her that the appellant was initially charged under Sec. 69 of the Army Act which relates to a civil offence. But he was charged under Sec. 63 of the said Act which is of general nature i.e. violation of good order and discipline despite the fact that there was imputation of misconduct which tends to show that the appellant had allegedly accepted bribe from a civilian in order to procure a job in the Army as Chowkidar in favour of his son. Such offence clearly comes within the purview of Sec. 53 of the Act. But in order to avoid initiation of a GCM proceedings,

Sec. 63 of the Act has conveniently been invoked. She has also painstakingly taken us through the testimony of material witnesses examined in the enquiry level as also in the SCM proceeding to highlight glaring inconsistencies in their Statements/evidence on the exact quantum of gratification allegedly paid to the appellant, the place where such payment was made as also the name of the giver of such gratification.

19. She has, however, not seriously challenged the finding of guilt in respect of the charge u/s 39(a) of the Act. Our attention was, however, simply invited to the compelling circumstances prevalent at the material point of time which had, in fact, forced him to go on leave without authority. She forcefully contends that, even though he was guilty of the charge u/s 39(a) of the Act, the punishment of dismissal from service cannot reasonably be awarded to him since it was too harsh and absolutely disproportionate to the offence committed by the appellant. Therefore, he deserves compassionate consideration and sympathetic treatment from this appellate forum. She fervently urges this Court to take a lenient view in this regard. She further submits that the appellant had rendered more than 11 years service satisfactorily but in view of his dismissal he was deprived of any pensionary benefits. He is now virtually on the verge of starvation with his family members. She, therefore, solicits judicial intervention for granting appropriate reliefs even by moulding the appellant's prayer to that effect accordingly. In this context, reliance has been placed on an unreported decision of the Hon'ble Delhi High Court in **WP (C)4656/2003 dated 20.4.07 (Ex Sepoy Sube Singh –vs- UOI & Ors)** and also on another decision of the Principal Bench of AFT in the case of **Ex Maj Narender Pal –vs- UOI & Ors** in **TA 535 of 2009 reported in 2011(1) AFTLJ 84.**

20. **Per contra**, it is argued by Mr. S.K.Bhattacharyya, ld. Adv. for the respondents that the allegations against the appellant are very grave in nature since he being an army personnel acted in a most ignoble manner by accepting gratification to the tune of Rs. 29500/- from a civilian by promising to procure a job of Chowkidar in favour of his son knowing fully well that he was not in any way connected with the recruitment process, He accepted the money only with an ulterior motive and undoubtedly for personal gain.. A police complaint was lodged against the appellant by the said victim. Subsequently, when such misconduct was brought to the notice of the army authorities, initiation of disciplinary action was ordered against him and his colleague Shri Sanjeev Kumar. Mr. Bhattacharyya vigorously argued that institutional integrity overrides individual integrity. The appellant and his companion have lowered the dignity and prestige of the Army by accepting illegal gratification from a civilian victim. He further contends that to pursue an offender in the event of commission of an offence is to sub-serve a social need. In support of his contention, he has referred to two decisions of the Apex Court reported in (2009) 7 SCC 1 **(N.Kannadasan –vs- Ajay Khose & Ors)** & **AIR 2001 SC 1820** (**Monohar Lal –vs- Vinesh Anand**).

21. A C.o.I was held as per rules on receipt of information about such corrupt practice indulged in by the appellant. However, the said CoI exonerated the appellant without considering the evidence on record in its proper perspective. According to Mr. Bhattacharyya, the civilian victim succeeded in identifying the appellant and his partner (Sepoy Sanjeev Kumar) involved in commission of the alleged offence amongst many other persons present. Even though concrete evidence like telephone call details and bank statements showing such payment etc. were produced, the same were ignored during the CoI. The house owner where the appellant was residing

earlier on rent had also deposed confirming the presence of the victim at the residence of the appellant where the money was transacted. It is further pointed out by him that although at the initial stage in the police complaint, the amount of bribe was mentioned as Rs55000/-, the victim finally disclosed the correct amount i.e. Rs 29500/- in total. According to the ld. Adv. for the respondents, the opinion of the CoI exonerating the appellant and blaming the civilian, who gave the bribe is not tenable since CoI overlooked the immunity enjoyed by the bribe giver u/s 24 of the Prevention of Corruption Act, 1988.

22. It is further argued by Mr. Bhattacharyya that since the competent authority i.e. GOC, Delhi Area differed with such finding of CoI and passed an order on 2.6.06 to that effect and also accorded sanction for temporary attachment of the appellant to the Ordnance Depot, Shakurbasti, there is nothing wrong in trying the appellant summarily by the C.O. of a different unit. That apart, referring to Army Order No. 89/91 wherein such attachment during vigilance and discipline purpose is permissible, it is submitted by him that there was nothing illegal in attaching the appellant to the said Ordnance Depot. In support of his contention, he refers to the decision of the Hon'ble Apex Court reported in **(2000)5 SCC 742 (UOI –vs- Charanjit S Gill & Ors,)** and contends that "note" has no statutory force and, therefore, such attachment is not against the rule..

23. Mr. Bhattacharyya also refers to Sec. 20 of the Prevention of Corruption Act, 1988 and argues hat the appellant has to rebut the charges framed against him at the first instance but he has failed to rebut the charges brought against him. He further points out that a tentative charge u/s 69 of Army Act read with Sec. 7 of Prevention of Corruption Act was framed against the appellant but he chose not to rebut the said charges. Instead he absconded and went to Lucknow and stayed there in Anand Lodge

in order to influence the trial as the regimental centre of Army Medical Corps to which he belonged was located at Lucknow.

24. It is submitted by Mr. Bhattacharyya that the initial charge-sheet was subsequently amended to charges u/s 63 and 39(a) of Army Act. He, however, argues that mere conversion of charge from Sec. 69 to that of 63 and 39(a) of Army Act would not vitiate the proceedings. He further argues that the charge u/s 69 is classified as "civil offence" but that does not necessarily mean that the army authorities would have no jurisdiction to try such offence committed by an army personnel. He refers to the decision of Hon'ble Apex Court in the case of **Som Datt Datta –vs- UOI & Ors, (vide AIR 1969 SC 414)** in support of such contention. The ld. Counsel further refers to another decision of the Apex Court in **AIR 1990 SC 65** (**UOI & Ors –vs- Naib subedar Baleswar Ram**) to substantiate his argument that charging u/s 63 of Army Act instead of any other appropriate section as per Army Act would not make any difference since it does not cause any prejudice to the delinquent.

25. In the last leg of argument, it is submitted by Mr. Bhattacharyya that the appellant was given enough opportunity to cross examine the prosecution witnesses. According to him, evidence is that which withstands cross examination. In the present case, the evidence adduced by the PWs i.e. the complainant and his son remains unshaken even during cross examination by the accused appellant. Therefore, it is now not permissible for the appellant to contend that he is innocent even when the charge has already been proved against him by a court martial authority. He further contends that the law is well settled that when after cross examining a witness, nothing appears to be suspicious, the evidence of the witness has to be believed and that failure to cross-examine the witnesses properly cannot be a ground to discard their corroborative evidence, especially when no animosity could be proved against

any of the witnesses deposing against the appellant. In this connection it is further argued by him that since the appellant declined to put the defence case to the material witness despite opportunity being afforded to him for cross examining them, it is to be inferred that he accepts the opponent's case in its entirety. In support of afore-mentioned contentions he refers to the following decisions of the Hon'ble Apex Court :-

i) Sarwan Singh –vs- State of Punjab – AIR 2002 SC 3652

ii) Hindoostan Spinning & Weaving Mills Ltd. Mumbai –vs- Hindoostand Crown Mills Siddivinayak etc. etc. – 2007(4) SCC 563 (Bombay)

iii) Haru Ghosh –vs- State of West Bengal – (2009) 15 SCC 551 &

iv) **Dhannjoy Chatterjee –vs- State of West Bengal, (1994) 2 SCC 220**.

In addition to oral argument, Mr. Bhattacharyya has also filed a Memorandum of Written Argument on behalf of the respondents.

Discussions/Views

26. We have paid anxious consideration to the rival contentions of the parties in the light of the relevant provisions of the Army Act and also Rules and Regulations framed thereunder coupled with judicial pronouncements and relevant materials, circumstances and evidence on record, as have been made available to us. The points for determination are formulated as under :-

1) Whether the SCM in question can legally be held by the Commanding Officer of a different Unit where the appellant was ordered to be temporarily attached after the alleged incident only for the summary trial?
2) Whether the SCM impugned was held in gross violation of the principles of natural justice and requirement of relevant provisions of Army Act, Rules and Regulations?

3) Whether on the anvil of serious imputation of grave misconduct, i.e. acceptance of illegal gratification as a public servant the decision to hold a SCM was legally valid in the absence of grave reason for immediate action contemplated u/s 120(2) of the Army Act ?

4) Whether alteration/conversion of the charge originally framed u/s 69 of the Army Act contrary to Section 7 of the Prevention of Corruption Act, 1988 (in short Corruption Act) to a charge u/s 63 of the Army Act is justified in the facts and circumstances of the present case?

5) Whether charge under section 39(a) has been established against the appellant. If so, whether punishment imposed upon him is commensurate with the gravity of misconduct?

6) Whether impugned SCM proceeding as also findings thereto are legally sustainable?

27. Points 1 to 4 are taken up together for the sake of convenience in discussion and brevity in treatment since they are inter-linked with each other

Admittedly, the appellant belonged to the Unit of 92 Base Hospital, and formally attached for training with Base Hospital Delhi Cantt; but it is also not in dispute that he was ordered to be attached with the Ordnance Depot, Shakurbasti vide order dated 23rd Dec 2005 for early finalization of disciplinary case pending against him. Now the validity of the SCM proceeding is under challenge on the ground that the CO of Shakurbasi is not legally empowered to convene, constitute and complete the SCM on the sole ground that the appellant belonged to the unit of 92 Base Hospital, and was formally attached for training with Base Hospital, Delhi Cantt. at the time of commission of alleged offence. In this context section 116 of the Army Act together with Note 5 as appended thereto read with regulation 381 of Regulation

for the Army as also section 120 of the Act and Note 5 thereunder have been referred to on behalf of the appellant.

28. For a better appreciation of the appellant's challenge in this regard it would be convenient to quote the relevant section 116 of the Army Act from the Manual of Military Law, Vol. I-1983 Edn. which reads as under :-

> " **116. Summary Court-martial** – (1) A summary court martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.
>
> (2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed."

The afore-quoted Section speaks about constitution of the SCM and it provides that CO shall alone constitute the SCM and such proceeding shall be attended by two other persons who shall be officers or JCOs or one of either. In this context Note 5, appended to Section 116 of the Army Act indicating exception to general rule, is also reproduced below:

"NOTES

> **1.** *** ***
> **2.** *** ***
> **3.** *** ***
> **4.** *** ***
> **5. See Regs. Army Para 381 for circumstances under which a CO of a different unit may hold the trial by SCM of a person subject to AA."**

29. It would also be contextually relevant to quote Sec. 120 of the Army Act along with Note 5 appended thereunder :-

> **"120. Powers of summary court-martial** – (1) Subject to the provisions of sub-section (2) a summary court martial may try any offence punishable under this Act.

(2) **When there is no grave reason for immediate action and reference can without detriment to discipline be made 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, an officer holding a summary court martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court. (**Emphasis supplied)

(3) A summary court martial may try any person subject to this Act and under the 'command of the officer holding the court, except an officer, Junior commissioned officer or warrant officer.

(4) A summary court martial may pass any sentence which may be passed under this Act, except a sentence of death (imprisonment for life) or of imprisonment for a term exceeding the limit specified in sub-section (5)

(5) The limit referred to in subsection (4) shall be one year if the officer holding the summary court martial is of the rank of lieutenant colonel and upwards, and three months if such officer is below that rank.

NOTES

1. *** *** ***
2. *** *** ***
3. *** *** ***
4. *** ***
5. **A NCO or Sepoy cannot be attached to another unit for the purpose of this trial by SCM except as provided in Regs Army para 381"** **(** Emphasis is ours)

30. In both the Notes quoted above, reference has been made to para 381 of the Army Regulations. It is, therefore, apt to reproduce relevant Reg. 381 of Regulations for the Army as under :-

"**381 : Trial of Deserters** .- Under normal circumstances trial by summary court martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column one of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by summary court-martial by the OC of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter-insurgency operation or active hostilities or Andaman and Nicobar Islands.

In no circumstances will a man be tried by summary court-martial held by a CO other than the CO of the unit to which the man properly belongs; a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs." (Emphasis supplied)

(Table comprising of Column one and Column two referred to in the aforequoted regulation 381 being not relevant is omitted).

"This rule is not intended to limit the power of any convening officer, who at his discretion may order trial by General, Summary General, or District Court Martial at any place, if such a course appears desirable in the interest o discipline."

31. A combined reading of the aforequoted provisions of the Act coupled with relevant clarificatory Notes appended thereunder with a view to supplementing the respective provisions on the procedural aspects as also the relevant regulation reproduced hereinabove leads us to opine that there was a serious procedural lapse since the appellant being a Sepoy cannot be attached to another unit for the purpose of trial by SCM. In such view of the matter, we are, however, to deal with Mr Bhattacharya's forceful argument that the "Note" appended to the relevant provisions of the Act and Rule has no statutory force and, therefore, it cannot override the provisions of Act and Rule. This aspect of the matter has been taken into consideration by the Hon'ble Apex Court and different High Courts in various Judicial pronouncements on different occasions.

32. Now adverting to Charanjit Singh Gill's case (supra) heavily relied upon by Mr Bhattcharyya, we find that the core issue relates to the participation of JAG Advocate in a Court Martial proceeding even if he is lower in rank than the accused. In that context of the matter, the Hon'ble Apex Court was pleased to observe in para 23 of the Judgement as under :

"23. It is not disputed that Sec. 191 of the Army Act empowers the Central Government to make rules for the purpose of carrying into effect the provisions of the Act and Section 192 to make regulations for all or any of the

> provisions of the act other than those specified in Section 191. All rules and regulations made under the Act are required to be published in the official gazette and on such publication shall have the effect as it enacted in the Act. No power is conferred upon the Central Government of issuing Notes or issuing orders which could have the effect of the rules made under the Act. Rules and regulations or administrative instructions can neither be supplemented nor substituted under any provision of the Act or the Rules and regulations framed thereunder. The administrative instructions issued or the notes attached to the rules which are not referable to any statutory authority cannot be permitted to bring about a result which may take away the rights vested in a person governed by the Act. **The government, however, has the power to fill up the gaps in supplementing the rules by issuing instructions if the rules are silent on the subject provided the instructions issued are not inconsistent with the rules already framed.** Accepting the contention of holding Note 2 as supplementing Rule 39 and 40 would amount to amending and superseding statutory rules by administrative instructions. When rule 39 read with rule 40 imposes a restrictions upon the Government and a right in favour of the person tried by a court martial to the effect that a person lower in rank shall not be a member of the court martial or be a judge advocate, the insertion of note 2 to rule 102 cannot beheld to have the effect of a rule or regulations. It appears that the 'notes' have been issued by the authorities of the Armed Forces for the guidance of the officers connected with the implementation of the provisions of the Act and the rules and not with the object of supplementing or superseding the statutory rules by administrative instructions. …."
>
> (emphasis supplied)

34. It is obvious from a close reading of the afore-quoted observations of the Hon'ble Apex Court that the Government has the power to fill up the gaps in supplementing the rules by issuing instructions only in cases where rules are silent on the subject with the rider that in such cases also the instructions issued must not be inconsistent with the rules already framed. In that view of the matter while examining the possible justification for the insertion of Note 2 to Rule 102 of Army Rule, it was found that Note 2 cannot be regarded as supplementing Rule 39 & 40. Rather it would amount to amending and superseding statutory Rules by Administrative instructions because restrictions imposed under Rule 39 and 40 of Army Rule upon the Government and right to the effect, that a person lower in rank shall not be a member of the Court Martial or be a Judge Advocate, conferred in favour of the person tried by the Court Martial, cannot be taken away by insertion of the said rule. In that

context of the matter it is concluded by the Apex Court that Note 2 in question was not consistent with the rule 102 since the Note in question seeks to encroach upon the right of the accused vested in the rule itself. It is further opined by the Hon'ble Apex Court that Notes are issued by the authority for the guidance of the officers connected with the implementation of the provisions of the Act and rules and not with the object of supplementing or superseding the statutory rules by the administrative instructions. But in this case the reverse has happened. The authorities have endeavoured to take away the appellant's right of being tried by the Commanding Officer of the same unit in summary Court Martial proceeding and the Note 5 under section 120 of the Army Act is quite consistent with the rules and regulation made under the relevant Act. Be that as it may, the fact remains that there are other rulings of the Hon'ble Apex Court on identical issues and such decisions are also being followed by different High Courts including Delhi High Court.

35. It would be useful to refer to at least three rulings of the Hon'ble Apex Court reported in (i) **AIR 1954 SC 869** (**Shyam Lal vs State of UP & Others),**(ii) **AIR 1965 SC 280 (T.G. Shivacharana Singh v State of Mysore and others)** and (iii) **1975 4 SCC 86 (Tara Singh v State of Rajasthan)**, wherein it is uniformly held that Notes which are inserted to supplement the relevant provisions of the Act & Rule can be acted upon provided it is not inconsistent with the provisions of Act & Rules.

36. In Tara Singh's case (supra), the Hon'ble Apex Court has taken into consideration, Shyam Lal's Case (supra) and T.G Shivacharana Singh's case (supra) and in paragraph 20 of the said judgement it is held as under :

> "20 ……The notes are promulgated with the rules in exercise of legislative power. The notes are made contemporaneously with the rules. The

function of the notes is to provide procedure and to control discretion. The real purpose of the notes is that when rules are silent the notes will fill up gaps"

It is further held in para 25 of the said judgement as follow :

"25 …….The notes are part of the rules because they are for the guidance of the authorities. They are not inconsistent with the rules but are intended to fill up gaps where the rules are silent,,,,,,,,,The notes to the rule make explicit what is implicit in the rule."

37. It is, therefore, well settled position of law that Notes which are appended to Rules are of aid not only in applying the rules but also interpreting the true import of the rules [vide para 23 of T.G. Shivacharana's case (supra)].

The validity of Notes appended to the Statutory Rule has thus been upheld in all the aforequoted Rulings of the Hon'ble Apex Court.

38. It, however, appears that the Hon'ble Apex Court had no occasion to consider aforementioned rulings of the Hon'ble Apex Court in Charanjit Singh's case which was heavily relied upon by Mr.Bhattacharyya, learned counsel for the respondents. At any rate, Charanjit Singh case is distinguishable on facts as also legal issues involved in the given case. As already discussed earlier, even in Charanjit's case also it is laid down that instruction issued must not be inconsistent with the rules as already framed making it quite clear that the Government has the power to fill up the gaps in supplementing the rules by issuing instructions if the rules are silent on the subject. Mr. Bhattacharyya's argument on that score, therefore, stands overruled.

39. It would also be contextually relevant to refer to a decision of the Division Bench of Delhi High Court reported in **147 (2008) DLT 202 (Ex LnVishav Priya Singh vs Union of India and others)** and relied upon by Mrs Dasgupta, learned counsel for the appellant. We find therefore that in almost identical facts and

circumstances, two similar issues i.e.(a) whether an SCM can be convened, constituted and completed by the Commanding Officer (CO for short) of a Unit to which the accused did not belong and (b) circumstances in which an SCM can be convened rather than a General Courts Martial (GCM) or District Courts Martial (DCM) or Summary General Courts Martial (SGCM) as envisaged in Section 108 of the Army Act, 1950 (Army Act for short) were framed in the case before the Delhi High Court. While considering issue (a), it was observed by the Division Bench of the Delhi High Court as follows :

> "14. **The contention on behalf of the respondents is that Notes 5 appended to Sections 116 and 120 are not statutory notes and have been issued by the authorities merely for the guidance of the officers responsible for the implementation of the Act and rules. The notes, the submission continues, is intended neither to supplement nor to supersede the statutory rules by this means of administrative instructions. Our immediate response is that this is contrary to the stand taken by the respondents themselves in Charanjit S Gill which we have extracted above for highlighting this very point. We are in no doubt that if the notes are inconsistent with the Act or rules or regulations, we would immediately strike them down and render them legally inefficacious. However, beyond articulating this well established legal proposition, learned counsel for the respondents have not shown in what manner the notes supplement or supersede any legal provision. It seems to us that the rules are merely clarificatory and have always been relied upon and applied by the Army Authorities as per their own submission in Charanjit S gill before the Supreme Court. Reference by learned counsel for the respondents to the definition of CO found in Regulation 9 of Defence Services Regulations, Regulations for the Army, in our view militates against the position posited by them.** ……"

40. In the aforementioned judgement, Delhi High Court also placed reliance upon the rulings enunciated in Tara Singh's case, Shymlal's case and T.G. Shivacharana's case (supra) by the Hon'ble Apex Court and did not find any merit in the arguments of the respondents counsel that two Notes 5 cannot be given any legal effect. It is accordingly held by Delhi High Court in Para 12 of the Judgement that :

> "In the backdrop of three precedents there is no justification or scope for the respondents to raise the objection as to the binding force of the rules……."

41. It is further held on the first question of law formulated under (a) as follows:

> **" 22. We shall endeavour to discharge this duty by enunciating firstly that it is the CO of the unit to which the accused belongs who is empowered to convene an SCM. This is not an empty formality or pointless punctilio. There is an abiding and umbilical connection between the CO and his regime. The ranks have always looked up at their CO as the father figure who will be as concerned with their welfare as with their discipline. This is the only conclusion that can be arrived at on a holistic reading of the Army Act, Rules and Regulations.**
>
> **23. As per our analysis above, the exception to this rule is restricted to the case of Deserters and that too where the CO of the unit to which they belong is snot readily and easily available. Secondly, an SCM must be the exception and not the Rule. It can only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications. Obviously, where the delinquent or the indisciplined action partakes of an individual character or has civil law dimensions, an SCM should not be resorted to. Delay would thus become fatal to an SCM. Thirdly, the decision to convene an SCM must be preceded by a reasoned order which itself will be amenable to judicial review. We are certain that once this formality is complied with, the inevitable disregard of the accused rights for a fair trial shall automatically be restricted to those rare cases where the interests of maintaining a disciplined military force far outweighed the protection of the minor civil rights of a citizen of India.'**

42. Applying the ratio discendi of several rulings of the Apex Court quoted above as also the yardsticks laid down in the aforequoted paragraphs by the Division Bench of Delhi High Court to the factual matrix of the given case which is almost identical to the case decided by the Delhi High Court it can safely be concluded that the SCM conducted by the Commanding Officer of a different unit to which the appellant did not belong to is not legally sustainable since it contravens Note 5 of Section 120 of the Army Act. That apart, the legal requirement as stipulated in the provisions of Section 120(2) of Army Act has also not been satisfied in the present case. In fact, there is nothing on record to indicate that the appellant was tried summarily since immediate action was warranted because of grave reason without detriment to discipline as contemplated under section 120(2) of Army Act.

43. As a sequel to foregoing discussion we are unable to accept Mr. Bhattachryya's argument that it has nowhere been mentioned in section 116 of the Army Act that the Army personnel shall be tried summarily by the commanding officer of the Unit to which the accused is regularly attached, and therefore, it is not necessary that only the CO of the unit where the appellant is attached must hold the SCM. Accordingly, it, is reiterated that Notes and Instructions usually play an important role whenever the provisions of Act and Rules are silent on procedural aspect. Notes and Instructions are, in fact, intended to clarify the relevant provisions of Acts and Rules. In that view of the matter Mt Bhattacharyya's contention that since the appellant was attached to the Ordnance Depot temporarily by the competent authority there is no legal bar for the a CO of that unit to conduct the S.C.M does not appear to be meritorious one. We also do not find much substance in Mr. Bhattacharyya's argument that inasmuch as institutional integrity overrides individual integrity the society cannot afford a criminal to escape his liability, and, therefore, the Courts should not lay much importance on technicalities. We are, also, unable to subscribe to Mr Bhattacharyya's view, that since the courts are duty bound to inflict punishment upon the criminals they should not be permitted to go scot free on the plea of non-compiancee of procedural rules and regulations. The Rulings reported in **(2009) 7 SCC 1 (N. Kannadasan -vs- Ajay Khose & Others)** & AIR 2001 SC 1820 **(Monohar Lal vs. Vinesh Anand)** as cited by Mr. Bhattacharyya are neither relevant nor applicable to the facts and circumstances of the present case.

44. More importantly, the charge levelled against the appellant constitutes mainly a civil offence and further since the appellant was posted in a peace station and not in any field area the holding of SCM is not necessitated to meet the exigencies of extra ordinary circumstances. The most disturbing feature of the present case is that the

incident allegedly occurred in March-April 2005 and the CoI was commenced in November 2005 and it continued till March 2006 and summary of evidence was recorded on 7-3-2007. However, the SCM impugned was held long thereafter on 8th May 2008. Therefore, it is quite evident that there was no immediate urgency as per mandatory Statutory requirement under Section 120(2) of Army Act. No plausible explanation justifying inordinate delay in holding SCM which was required to be held for immediate action to maintain strict discipline in the Armed Forces is also forthcoming from the respondent authorities. In that view of the matter inaction on the part of Military Authorities to hold SCM on emergent basis appears to be a colossal failure causing gross violation of the appellant's invaluable right to prepare defence as enumerated under Army Rule 33(1) to (7) and 34(1) of Army Rules. In our considered view the Army Authorities ought to have held a regular Court Martial by providing reasonable opportunities to the appellant to defend his case as per safe guards which have been made available to him in terms of relevant provisions of Army Act & Rule instead of subjecting him to an extra ordinary measure of SCM. The golden principles of natural justice have also thus been grossly violated.

45. Turning to the form and contents of several charge sheets purportedly served upon the appellant at different point of time, it appears that initially the appropriate authority intended to hold District Court Martial (DCM) against the appellant since it was a civil offence and the offender was charged accordingly. The sequence of service of charge sheet upon the appellant, if put in chronological order, will give us an impression that it is a clear case of abandonment of trial under section 69 of Army Act read with Section 7 of Corruption Act twice even after service of charge sheet under the afore-quoted section of two different Acts. Of course, there was a charge hearing in presence of the appellant as required under Rule 22 of Army Rules,

wherein the participation of the accused is mandated. It is beyond our comprehension as to how charge under Section 69 of Army Act contrary to Section 7 of Corruption Act stood altered without rhyme or reason. Rather, it is indicative of a determined bid of the competent authority to deny a qualitative better right of defence before a District Court Martial to which he would have been entitled to and, in fact, the tentative charge under section 69 of Army Act, contrary to Section 7 of Corruption Act dated 7-3-2007 was served upon the appellant and such charges were to be tried under District Court Martial. Even though the assembling of a District Court Martial was recommended by the Commanding Officer concerned vide his letter dated 6th June 2007 to the competent authority, such recommendation for DCM was, rejected by the then GOC In Charge. Importantly, no convincing reason had, however, been assigned for such rejection by the competent authority.

46. The next question follows as to what are the materials revealing emergent circumstances which prompted them to abandon the district court martial which was recommended by the Commanding Officer to the GOC in charge of the command and to make a sudden switch over to summary court martial in utter disregard to the statutory requirements envisaged in 120(2) of Army Act. Against such factual scenario it would be apt to reproduce all the successive charge sheets whose perusal would throw light on their inexplicable dilemma in holding district Court Martial.

The **first charge-sheet** in tentative form was issued on 7th March 2007. On completion of recording of summary of evidence as ordered vide convening order dated 7th March 2007 since the opinion of CoI was not accepted by the GOC-N-C Delhi. The tentative charge-sheet is reproduced as under :

TENTATIVE CHARGE SHEET
(vide page 78 of original SCM proceeding file)

"The accused No. 13995700-M Sep/MA Bijay Shankar Kumar of 92 Base Hospital, aff to OD Shakurbasti is charged with –

Army Act
SEC 69 " COMMITTING A CIVIL OFFENCE THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING FOR HIMSELF GRAFIFICATION OTHER THAT (THAN) LEGAL REMUNERATION, AS A MOTIVE FOR ARRANGING AN OFFICIAL ACT, CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT, 1988"

In that he,
At Delhi during the period 15 Mar 2005 and 03 Apr 2005 accepted Rs. 29500/- (Rupees twenty nine thousand five hundred only) from Shri Ashok Kumar for arranging enrolment of his son Mr. Ankur Tuteja for the post of Chowkidar at Base Hospital Delhi Cant-10.

Sd/-
(AK Saxena)
Brig.
Commandant"

Unit : OD Shakurbasti
NewDelhi-56
Dated : 07 Mar 2007

Second charge-sheet in final form was issued on 6.6.07 presumably after compliance of sub rule 1 of Rule 22 of Army Rules the Commanding Officer was of the opinion that charge ought to be proceeded with and accordingly charge sheet was served upon the appellant and the said charge sheet is also reproduced as under (vide page 124 of original SCM proceeding file) which is as under :-

" CHARGE SHEET

The accused No. 13995700-M Sep/MA Bijay Shankar Kumar of 92 Base Hospital, aff to OD Shakurbasti is charged with –

Army Act
SEC 69 " COMMITTING A CIVIL OFFENCE THAT IS TO SAY, BEING A PUBLIC SERVANT, ACCEPTING FOR HIMSELF GRAFIFICATION OTHER THAT (THAN) LEGAL REMUNERATION, AS A MOTIVE FOR ARRANGING AN OFFICIAL ACT, CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT, 1988.

In that he,

At Delhi during the period 15 Mar 2005 and 03 Apr 2005 accepted Rs. 29500/- (Rupees twenty nine thousand five hundred only) from Shri Ashok Kumar for arranging enrolment of his son Mr. Ankur Tuteja for the post of Chowkidar at Base Hospital Delhi Cant-10.

Sd/-
(AK Saxena)
Brig.
Commandant"

Unit : OD Shakurbasti
NewDelhi-56
Dated : 06 Jun 2007

Unfortunately the Trial under the said charge sheet was not proceeded with despite Commanding Officer's specific recommendation to hold District Court Martial (DCM) since the offender was arraigned on the charge under section 69 of Army Act contrary to Section 7 of the Corruption Act, 1988 on the allegation of acceptance of illegal gratification from a civilian for arranging enrolment of his son to the post of Chowkidar at Base Hospital Delhi Cantt. and lastly another charge-sheet was issued on 1st May 2008 (vide page 183 of original SCM proceedings).

47. Curiously enough after the lapse of more than one year from the date of arraignment of the offender on the aforequoted two counts charges, another charge sheet was issued on 1st May, 2008 (vide page 183 of the original SCM proceedings) without even serving any Notice upon the offender as to why there was abrupt alteration/amendment of charges. It is, however, interesting to note that all the aforementioned charge sheets which were served upon the appellant in contemplation of holding District Court Martial (DCM) are also available in the file pertaining to SCM proceedings. The charge sheet dated 1st May, 2008 is reproduced as under :

THIRD CHARGE SHEET

"The accused No. 13995700-M Sep/MA Bijay Shankar Kumar of 92 Base Hospital, aff to OD Shakurbasti is charged with –

1st Charge

Army Act
SEC 63 " AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,
at Delhi during the period between 08 Mar 2005 and 03 Apr 2005 improperly and without authority accepted Rs. 29500/- (Rupees twenty nine thousand five hundred only) from Shri Ashok Kumar for arranging enrolment of his son Mr. Ankur Tuteja for the post of 'Chowkidar' at Base Hospital Delhi Cantt. Thereafter evaded by absconding during period 02 Jan 2008 to 26 Mar 2008.

2nd Charge
Army Act ABSENTING HIMSELF WITHOUT LEAVE
Sec. 39(a)

In that

at Delhi on 02 Jan 2008 absented himself without leave from 02 Jan 2008 to 26 Mar 2008

Sd/-
(AK Saxena)
Brig.
Commandant"

Unit : OD Shakurbasti
NewDelhi-56
Dated : 01 May 2008

48. It is, therefore, evident that the tentative charge-sheet was issued on 7th March 2007 and the appellant was sought to be charged u/s 69 of Army Act contrary to Section 7 of Corruption Act, 1988 and the hearing under section 22 (1) of the Rule was taken up and concluded on 7-3-2007. The contents of afore mentioned two counts of charge were read over and explained to the appellant who also signed the proceedings. Two witnesses viz., Ashok Kumar Tuteja and his son Ankur were also

present in the Court The accused was also informed by the Commanding Officer, Sukurbasti who presided over the Court Martial that he was at liberty to make any statement and call any witness in defence. On conclusion of the hearing of charge or after going through the whole of evidence the CoI and the statement of the accused, the Court passed the following order :

“

Date of Order	Order
07 Mar 07	The case is adjourned for the purpose of having the evidence recorded to writing

8. The above proceedings under Army Rule 22 (I) were heard by me in the presence of the following independent witnesses :

a) IC-47429-A Lt Col SS Kulkarni (OD Shakurbasti)

b) IC-54973-K Major Suresh Kumar (OD Shakurbasti)

Sd/-
(A.K. Saxena)
Brig

Place : Shakurbasti, New Delhi
Dated : 07 Mar 2007

Commandant
Unit : OD Shakurbasti”

(Page 80, 81 & 82 in original SCM proceeding)

However it is quite evident from subsequent happenings that no evidence was ever recorded as ordered in the aforementioned proceeding under section 69 of the Army Act contrary to Section 7 of Corruption Act, 1988.

49. Surprisingly trial under Section 69 contrary to Section 7 of Corruption Act 1988 was never proceeded with. The aforementioned trial was, perhaps, thus abandoned. Another charge sheet dated 05 Dec 2007 (no copy is available) was also served on the appellant on 27th Dec 2007 and he received it under his signature (vide

receipt dated 27-12-2007 page 173 of the original SCM proceeding). Obviously, this charge sheet was also not acted upon and another charge sheet dt. 1st May 2008 was issued afresh with two different counts of charges. The first charge was u/s 63 of Army Act and 2nd one u/s 39(a) of Army Act. It is curious to note that the second charge u/s 39(a) i.e. absence without leave relates to an incident of early 2008 whereas the main incident of taking illegal gratification as alleged was of 2005. Both these incidents have been clubbed together in the ibid charge-sheet which was ultimately followed up. Further, in a communication dt. 2nd May 2008 signed by one Lt. Col for Commandant an explanation has been put forward to the effect that since the appellant was on AWL from 2nd Jan to 26th Mar 2008, the trial in respect of charge sheet dt. 27th Dec 2007 could not be proceeded with. Such explanation appears to be not plausible on the face of the record. The tentative charge sheet was issued on 7th March 2007 about a year ago from the date when he was on AWL. On conclusion of charge hearing, the charge sheet under section 69 of Army Act contrary to Section 7 of Corruption Act was served upon the appellant on 6th June, 2007. It is therefore factually incorrect to suggest that the charge sheet dated 27th December, 2007 (which is not available in the original SCM proceeding) is the only charge sheet on the strength of which Court Martial proceeding was held. There are other charge sheets as already referred to herein before. Therefore the respondents are liable to explain as to why earlier charge sheets prior to 27-12-2007 were not acted upon. At any rate, such being the factual position we cannot but hold that such inordinate delay in holding SCM from the date of service of charge sheet being not explained satisfactorily is fatal for the prosecution case

50. It further appears that a ‘friend of accused’ was appointed on 7th May 2008 (Nb Sub NK Mohanta) and a copy of charge sheet and summary of evidence were

supplied to him. The SCM was held on the same day and concluded on the next day i.e. 8th May 2008 with the imposition of punishment of dismissal from service upon the appellant. It is distressing to note that when the incident happened in March-April 2005, a court of inquiry was held in Nov 2005-March 2006, the authorities took almost three years to finalise the charge sheet but the proceedings was concluded hastily in course of single day with the award of punishment. In fact, the friend of the accused had no scope to render any effective assistance to the appellant. Such undue haste with which the proceeding was concluded raises serious doubt about the reasonableness and bona fide of the SCM, especially when the Army Authorities sat tight over the matter for a pretty long time. In such circumstances, irresistible conclusion is that there was no urgency arising out of any emergent situation and the offences as alleged against the appellant could have been dealt with by holding a regular court martial instead of resorting to a summary court martial which is an exception to the established procedure, and principles of natural justice. As a matter of fact, SCM is done only in exceptional cases when there arose grave urgency and maintenance of strict discipline in the forces is at stake.

51. In this context it is to be borne in mind that failure of justice does not merely mean any erroneous decision. When the procedure which would give a person affected a better opportunity to clear the position has not been followed, it would be a case of failure of justice. In that view of the matter it cannot be said by any stretch of imagination that such serious legal flaw in not following the requirement of Section 120(2) of Army Act in emergent circumstances as mandated therein conducting a summary court martial can be justified or cured in any manner whatsoever. It is also settled position of law adoption of defective/illegal procedure would invariably lead to deprivation of accused's legal rights, even if no prejudice is caused to him.

52. It is, therefore, manifestly evident that, even though the appellant was initially charged u/s 69 for commission of a civil offence, he was subsequently charged u/s 63 of Army Act together with Section 39(a) of Army Act. It seems that this has been done purposely to avoid a regular court martial proceeding where the matter would have been proceeded with more elaborately and the appellant would have got adequate opportunity to defend. His qualitative better right of defence before a Court Martial other than Summary Court Martial has thus been denied to him presumably on a wrong assumption that this can be covered u/s 63 of the Act and not by 69 of the Act. More so, whenever there is nothing on record to indicate that there was existence of any grave reason for immediate action so as to justify trial by an officer holding Summary Court Martial. If the allegations levelled against the appellant are assumed to be true then the appellant being a public servant resorted to corrupt practices by ignobly accepting bribe from a civilian to procure employment for his son. In such a situation both clauses (a)&(b) of 53 of Army Act are, of course, clearly attracted and on conviction by a District Court Martial the appellant is liable to suffer more severe punishment. In almost identical situation, trial by Summary Court Martial and the decision arrived at therein were held to be without jurisdiction and accordingly the impugned trial by SCM was quashed by the Hon'ble Apex Court in **Ex-Havilder Ratan Singh's** case reported in **AIR 1992 S.C. 415**. It is held therein that even though there was no grave reason for immediate action and urgency as per Sec. 120(2), SCM was resorted to in gross violation of legal requirement as envisaged in Section 120(2) of the Act. We are, therefore, not impressed by Mr. Bhattacharyya's strenuous argument that no illegality was committed by trying the appellant summarily.

53. Another limb of Mr. Bhattacharyya's contention that the provisions of Corruption Act, 1988 could be made applicable to the Army Personnel cannot be disputed provided he is charged under the relevant provision of the Special Act in question. True, the appellant was initially charged u/s 7 of Corruption Act. But the respondents on their own subsequently amended the charge and the appellant was charged under section 63 of Army Act instead of 69 of Army Act contrary to Section 7 of Prevention of the Corruption Act. He has referred to Sections 25 and 28 of the Corruption Act to argue that the jurisdiction exercised by the Armed Forces Tribunal would not be affected by the provisions of Corruption Act and the provisions of the said Corruption Act is in addition to and not in derogation of any other law for the time being in force. The public servant shall not, therefore, be exempted from any proceeding which might, apart from the Corruption Act, be instituted against him.

On the question of applicability of the relevant provisions of Corruption Act in the present case, we are, however, of the opinion that the provisions of Prevention of Corruption Act can be made applicable only in such cases wherein the public servants are to face trial under section 7 and or any other appropriate provision of Corruption Act together with the relevant sections of Army Act. As discussed earlier, the appellant was also initially charged under Section 69 of Army Act as also Section 7 of the Corruption Act. But both the charges were subsequently altered and he was subsequently tried under other two Sections of the Army Act only. There is also, no doubt, that if it is proved that the accused person has accepted gratification (other than legal remuneration) it shall be presumed unless contrary is proved that he accepted gratification as a motive or reward. Such presumption is, however rebuttable. At any rate, whenever the appellant was not tried for Commission of any civil offence as contemplated under 69 of Army

Act contrary to Section 7 of Prevention of Corruption Act, under which he was initially charged, the relevant provisions of prevention of corruption Act cannot be made applicable against the appellant in a trial under Section 63 read with Section 39(a) of Army Act. Considering all these, we are unable to accept Mr. Bhattacharyya's argument on that score.

54. On a meticulous analysis of both factual and legal aspects involved in this case we are of the definite view that SCM can legitimately be convened and constituted only in those compelling circumstances where there exists grave and serious cause for taking immediate action otherwise the main objectives for holding speedy trial would be defeated. In such a situation reference to an appropriate authority for holding district court martial instead of summary court martial would invariably debar the authorities from taking immediate action on emergent basis. In other words, in order to avoid delayed action in some extreme cases where immediate action is warranted to meet the exigencies of circumstances recourse is taken to such an extraordinary measure of holding trial by SCM. Therefore, it can safely be concluded that the holding of a SCM is the exception and not the rule. Applying these tests we are of the considered opinion that the holding of SCM cannot be found imperative to ensure immediate action which has been urgently necessitated in the facts and circumstances of the present case. It is importantly important to note that the imperative need warranting immediate action which can be accepted as good and sufficient ground of holding SCM is, therefore, required to be spelt out in writing in the order itself convening a SCM to put all sorts of controversies at rest in this regard. In the instant case the officiating G.o.C passed the convening order dated 19-7-2007 (page 158 of original SCM proceeding) is reproduced below :

> "1. I have perused the Summary of Evidence and other connected documents pertaintain to the case of No.13995700M Sep/NA Bijay Shankar Kumar of 92 Base Hospital att with OD Shakurbasti.
> 2. Considering the nature and gravity of the offence where the individual has been found to have accepted graft in return of illegal help for recruitment as a Chowkidar, I recommend that No.13995700M Sep/NA Bijay Shankar Kumar of 92 Base Hospital att with OD Shakurbasti be tried by a Summary Court Martial"

55. On a closer look to the afore-quoted convening order it appears that the Competent Authority considered the nature and gravity of offence of acceptance of graft for recruitment of Chowkidar. Even though the offence was graver in his consideration, he did not opt for District Court Martial, to ensure heavier punishment as deterrent for commission of such serious offence. No reason whatsoever justifying necessity of trying summarily with utmost promptitude has, however, as usual not been assigned in the convening order to meet the imperative requirement of Section 120(2) of the Army Act. There are a good number of safeguards which could have been made available to the army personnel in terms of the relevant provisions of Army Act and Rules framed thereunder when they are arraigned for trial. But unfortunately, in most of the cases they are always deprived of such safeguards at the whim of the superior Army Officers who are in the helm of affairs to conduct such court martial proceedings. In fact, procedural protections of law are not being afforded to those wretched army personnel for the reasons best known to the army authorities. Even on the question of imposition of sentence, the SCM, fails to take into account the benevolent spirit of Regulation 448 (c), causing much hardship to the erring army personnel even in maintaining their livelihood.

Evidence Evaluation

56. A close scrutiny of SCM proceedings reveals that only four witnesses namely, (i) Asoke Tuteja, defacto complainant who lodged the Police Complaint (Exhibit 'C'.in summary evidence),(ii) Ankur Tuteja, his Son for whose employment, illegal gratification was allegedly paid and one K.G. Pandey (HM of Ord. Depot Shukur Basty), an official witness, have been examined as PW1, 2 and 3 respectively. One Cap. G. Vetrivel has also been examined as PW4 who produced the confessional statement (Exhibit 4) during SCM trial. PWs 1 and 2 have been cross examined by the appellant himself, while cross examination of PW3 & PW4 has, however been declined by the appellant.

57. Mr. Bhattacharyya, learned counsel for the respondents submits that the entire summary of evidence was produced before the SCM and the same have been made a part of SCM proceedings after due consideration. The relevant records pertaining to CoI were also produced before the SCM and such proceedings together with all its exhibits have also been tagged with the SCM proceedings. It is argued by him that Mr. Ahok Tuteja honestly admitted that he had given Rs29,500/- to the two Army Personnel instead of Rs55,000/- as he earlier alleged in his written complaint before the Police. According to him, the complainant himself disclosed the correct figure of illegal gratification before the SCM and as such he is a truthful witness since he had not fabricated any false evidence to enforce his earlier claim of Rs55000/- . The deponent divulged the absolute truth before the CoI that the exact sum given was to the tune of Rs29500/- and it was paid in two instalments. The first instalment of Rs10,000/- was paid to Bijay Shankar Kumar in presence of co-accused on 14th March, 2005 at his civil residence and the balance amount of Rs19500/- was paid to the appellant at Chowdhary Restaurant on 3rd April, 2005. Pausing for a moment, it is

to be pointed out here that such argument does not appear to be based on full facts which came to light in course of CoI. A close look to the proceedings of CoI reveals that on 15th December, 2005 when Ashok Kumar, the complainant gave statement before the Board of Court of Inquiry, he corroborated the contents of complaint lodged before the Police Authorities on 9-5-2005. Accordingly, he stated as under :

> "However, I bargained and we agreed on an amount of Rs55000/-. He told me to pay 50% of the money in a day or two and the rest after the work was done".

However, subsequently on 27th December, 2005 his additional statement was recorded and he contradicted the contents of the police complaint, as also his statement recorded earlier during CoI on a very material aspect of the matter and in his additional statement he brought a different story for the first time as follows:

> "……I had withdrawn Rs9000/- on that day. I added Rs1000/- and paid Rs10000/- (Rupees Ten Thousand only) to Sep B.S. Kumar in presence of Sep Sanjay on 14 Mar 05 at Qtr No.WZ 860 in Naraina Gaon on 30th March 2005I withdrew Rs20000/- from the account and paid Rs19500/- to Sepoy B.S. Kumar at Choudhary Restaurant, Naraina Gaon on 3rd April, 2005".

58. In response to additional query by the Court, the complainant has sought to explain discrepancy regarding the quantum of illegal gratification before the CoI as under :

> "…….I have earlier stated that I have paid Rs55000/- in all but that is a figure I made up to include the interest on the actual money paid and other incidental expenses that I anticipated in future".

59. Such cock and bull story endeavouring to dispel discrepancies is hardly acceptable. Such being the factual scenario, we do not find much substance in Mr. Bhattacharyya's argument that the complainant had respect for absolute truth. Rather veracity of his testimony before the SCM can seriously be called in question because

of his conflicting version of the exact quantum of illegal gratification followed by explanatory additional statement

60. Against the backdrop of afore-quoted statements given by the complainant at the stage of investigation/inquiry before the Army Authorities we are now to scrutinize the evidence adduced by the Complainant PW1, Ankur, PW2 and two other witnesses before the SCM with abundant care and caution. PW 1 states that he gave money for enrolment of his son Ankur for the post of Chowkidar at the Base Hospital, Delhi Cantt. On 8th March 2005 and on 3rd April, 2005 amounting to Rs29500/- in total to Sepoy/ Nursing Asstt. Vijay Sankar. Being cross examined by the Appellant, he asserts positively "Yes I have given the money". Interestingly enough, PW2 deposes before the Court Martial that Sepoy B.S. Kumar along with Sepoy Sanjeev Kumar had taken money from him on 8th March, 2005 and 3rd April 2005 at house No.WZ 860 amounting to Rs29500/- in total to secure his employment as Chowkidar at Base Hospital, Delhi Cantt. In his cross examination, the appellant categorically asks the deponent whether he is very sure that he had given him Rs29500/- He emphatically answered in affirmative by saying "Yes". Such claim and counter-claim raise intriguing questions as to whether Ashok, the complainant or his son Ankur made the actual payment as alleged to the suspect. However, astounding revelation in their respective cross examination casts a serious doubt about the genuineness of their claim of payment of illegal gratification in two instalments to the appellant. While PW 1 deposes that he gave 29500/- on two different dates to Vijay Sankar. His son Ankur also admits in cross-examination that he had given similar amount of money to both the appellant and his associate Sepoy Sanjeev Kumar on 8th March and 3rd April. However, the son said that the entire payment was made at House No.WZ 860, while his father said that he paid Rs29500/-

in total on 8th March, 2005 and 3rd April 2005 to Sepoy Vijay Kumar of 92 Base Hospital. He has however, not stated within the fourcorners of his evidence about the exact location where such amount was paid.

61. CHM K Y Reddy as PW3 proved the CoI records where the appellant was declared deserter and such proceeding was marked as Ex.1. He also proves the receipt (Ext 3), wherefrom it would appear that the appellant was served with charge sheet dated 27-12-2007 and other relevant documents pertaining to CoI & SE etc.. He also proves the Apprehension Roll marked as Ex 3. PW4 produces the confessional statement of Vijay Sankar (Ex 4).

62. Undisputedly, the complainant Ashok Kumar has categorically stated in his complaint (Ex.E in summary of Evidence Page 96 in original record of SCM proceedings) lodged before DC, South West, New Delhi on 9-5-2005 that initially Rs20000/- was paid on 14th March,2005 and the balance amount of Rs35000/- was paid on 3rd April, 2005. In the concluding para of the complaint the police was requested to investigate the matter as per law and help him to recover Rs55000/- which was taken by them. In his complaint he has named B.S Kumar, the Appellant and Sanjay Singh as recipient of illegal gratification. As already stated earlier, he also gave statement corroborating the contents of the complaint and confirming payment of Rs55000/- in total during CoI, even though after a gap of two weeks from recording of his statement during CoI he furnished one additional statement before the CoI claiming for the first time that he paid 29500/- in total in two instalments to the B.S. Kumar, the appellant. This is a case of payment of illegal gratification and as such the entire prosecution case on that score hinges upon the alleged payment of illegal gratification to a public servant. The glaring discrepancy in respect of quantum

of gratification paid to the appellant is to be viewed in the light of other evidence and attending circumstances on record.

63. It is well settled position of law that discrepancies are to be categorized under two broad heads, i.e. normal discrepancies and material discrepancies. Normal discrepancies are those which are due to normal errors of observation, normal errors of memory due to mental disposition such as shock and horror at the time of occurance and such normal discrepancies are bound to occur even in case of a truthful witness (vide **1981 2 SCC 75 State of Rajasthan vs.Kalki and another** and **AIR 2013 (SC) 1769 Babu and another vs. State Rep. by Inspector of Police, Chennai**). On the other hand, material discrepancies are those which are not normal and cannot be expected of a normal man. The sharp distinction between these two categories of discrepancies is that while normal discrepancies do not corrode the credibility of a party's case while material discrepancies do so (vide **AIR 2007 SC 3228 (Kulesh Mondal vs State of West Bengal**). Such being the legal position, Courts are to lebel the category to which a discrepancy may be categorized. A solemn duty is, therefore, cast upon the Court to test the evidence of a witness on the anvil of objective circumstances in each case. There is no doubt that undue importance should not be attached to the statements made during investigation earlier, i.e. in course of CoI or recording of summary of evidence and such statement recorded during investigation or inquiry are not admissible in evidence against the authority even though such statement and confession etc. can be used by the prosecution or the defence for the purpose of cross-examining any witness as provided in Rule 182 of Army Rules. But the fact remains that **such statement may be used for the limited purpose of impeaching the credibility of a witness [**vide **AIR 2004 SC 2943 Ram Swaroop vs. State of Rajasthan**]. Now the question crops up as to whether the

discrepancy in respect of exact quantum of gratification allegedly paid to the appellant and his colleague can be lebelled as minor or major discrepancy. In this context it is to be borne in mind that it is well settled that minor discrepancy which do not go to the root of the matter and shake the basic version of the witness cannot be given much importance and further unless the discrepancies and the contradictions are so material and substantial and that too in respect of vitally relevant aspects of the facts deposed the witness cannot straightway be condemned and their evidence also cannot be discarded in its entirety (vide **AIR 2000 SC 1068 Joseph vs State of Kerala**).

64. We have taken into consideration legal propositions as laid down in aforementioned rulings in its proper perspective with reference to materials and circumstances on record. We are of the definite view that discrepancies regarding the exact quantum of gratification paid to the appellant, location of payment, the name of the giver and persons present during such transaction are vitally relevant aspects to establish the payment of alleged gratification to the appellant conclusively. These discrepancies have, in fact, considerably shaken the substratum of the prosecution case. In that view of the matter the nature of those discrepancies cannot be regarded as minor by any figment of imagination. It can emphatically be opined that those discrepancies are undoubtedly major in nature since those discrepancies as pointed out above have gone to the root of the matter. We feel constrained to observe that both the witnesses, i.e. complainant, PW1 and his son PW2 do not inspire confidence in our mind and none of them can be categorized as a wholly reliable witness. In fact, what matters in the appreciation of evidence of witness is not the number of witness but the quality of evidence. It is well settled that even a single witness who is wholly reliable even though uncorroborated, can form the basis of conviction.

However, corroboration may be necessary when a witness is partially reliable (vide **Vadivelu Thebar v. The State of Madras and others AIR 1957 SC 641**). In the present case needless to say that there is not a single eye witness to corroborate the claim of the complainant that he actually paid any amount of money not to speak of Rs55000/- or Rs29500/- as subsequently claimed. It has rightly been pointed out by Mr.Bhattacharyya, learned counsel for the respondents that the entire case is based on circumstantial evidence and in support of his contention he has referred to the oft-quoted case of **Dhananjoy Chatterjee reported in (1994) 2 SCC 220**.

65. It is, however, not clear to us as to how Dhananjay Chatterjee's case would come in aid of the prosecution. The principles as enunciated on the question of the nature of circumstantial evidence on which conviction can be maintained by the Appellate Court has been laid down in para 7 of the said judgement which may be read as under :

> " In a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis, except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. **Legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious the crime, the greater should be the care taken to scrutinize the evidence lest suspicion takes the place of proof**"

66. Applying the yardsticks formulated in the afore-quoted para to the facts and circumstances of the present case, we do not find any cogent consistent and reliable circumstantial evidence to prove the guilt of the accused conclusively. The Bank Statements (Ex D marked during recording of summary of evidence, however not proved before the SCM) can at best establish that certain amount of money was

withdrawn from the Bank Account of PW 1 and 2. But mere withdrawal cannot be the basis for drawing a legal presumption to the effect that the amount in question was withdrawn for the purpose of payment of illegal gratification and the same was, in fact, actually paid to the appellant or his associate. There is even no bald statement by any of the witnesses including the complainant himself examined by the prosecution to indicate that the amount so withdrawn was never utilized by the complainant for some other purpose. That apart, the telephone call details furnished during enquiry/investigation are of no avail to the prosecution for the simple reason that transcripts of such telephonic conversation were not made available for examining the extent and nature of such conversation between the appellant and the complainant. Such being the factual position, no adverse presumption can also be drawn against the appellant for conversing with the complainant at the material point of time. In this context it is also pertinent to mention that the appellant in his statutory appeal to the Chief of the Army Staff specifically brought it to the notice of the Military Authority that a job racket is operating in the Base Hospital and the Ord. Depot. Nothing has however, been brought on record to indicate that the army authorities took any serious note of all these grave happenings which are likely to affect the entire process of recruitment in the Armed Forces. At any rate, it is well settled principle of law that in cases where the evidence is purely circumstantial in nature the facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and such circumstances must be consistent and unerringly point to the guilt of the accused and the chain of circumstances must be established by the prosecution In the present case none of these essential legal requirements has been satisfied to come to a definite finding that the appellant

accepted the illegal gratification from the complainant. In such view of the matter Mr. Bhattacharyya's argument on that score appears to be devoid of any merit.

67. It is the cardinal principle of criminal jurisprudence that suspicion and conjecture are no substitute for proof. It is laid down in a ruling reported in **(2004) 10 SCC 699 (Narendra Singh v.State of MP)** that suspicion by itself, however strong, cannot take the place of proof. Therefore, in the absence of cogent, consistent and reliable evidence it is not prudent to act on mere suspicion, however strong it may be.

68. Adverting to the purported confessional statement itself (Ex 4) it appears that the said confessional statement was written in Hindi on 18-7-2005 by the appellant himself. Exhibit 4, however, does not carry any endorsement whatsoever to indicate as to before whom the said statement was submitted or at whose instance he scribed such self incriminating statement. It is, however, established from unchallenged evidence adduced by Cap Vetrivel (PW4) that such statement was produced by the complainant Ashok Kumar during the recording of summary of evidence. Now, turning to summary of evidence which is also a part of SCM proceedings it is found that in his second additional statement recorded on 10-1-2006 (page 33 of original SCM proceeding) the complainant stated before the CoI as under :

"As I have stated earlier before the Court, I have in my possession, the copies of the confessions of both the witnesses No.1&2 i.e. Sep B.S. Kumar and Sep Sanjay [Sep/AA Sanjeev Kumar].

I hereby produce copies of the statements for the perusal of the Court.

[Court peruses the photocopies of two statements signed respectively by witness No.1, Sep/NA B S Kumar and Witness No.2, Sep/AA Sanjeev Kumar, the Court directs the witnesses No.1 to peruse the documents produced before the Court]

[The photocopies are annexed as Exhibits 'G' & 'H']"

It is, therefore, clear that such confessional statement came from the custody of Ashok Kumar Tuteja PW1, the complainant. PW 4 who produced the purported confessional statement before the SCM and got the document exhibited, is however silent on the crucial question as to how and at what point of time and from whom he collected such statements for its production before the SCM.

69. In response to a query by the C.o.I, the appellant stated as follows :

"……..I accept that it is the statement written and signed by me at the LU but I wish to state that this statement was written by me under pressure as I was beaten up by the LU pers. All the details in the statement were written as was dictated by the LU pers to me. They are false and incorrect. Whatever I have stated earlier before this court in my statement is true".

70. Much reliance has been placed on confessional statement of the appellant(Ex 4) by Mr. Bhattacharyya. It is, however, to be borne in mind that a confession, if it is voluntary and true and not made under any inducement or threat or promise is the patent piece of evidence against the maker. One of the essential requirements in admitting confessional statement into evidence is, therefore, voluntariness of the accused in making such statement which can be used against him during trial. It is well settled that voluntary confession is one that is made by a person accused of a crime free from influence of any extraneous disturbing cause and in particular not induced or extorted by violent threat. However, whether the confession was voluntary would depend upon the facts and circumstance of each case judged in the light of Section 24 of Indian Evidence Act.

71. It is, therefore, well settled position of law that by virtue of section 24 of Indian Evidence Act, confession by accused is irrelevant, if making of confession is caused by inducement, threat or promise having reference to charge against the

accused person. In the present case as already discussed earlier no statutory warning was appended to the purported confessional statement and it is also not clear as to how he furnished the confessional statement which was earlier produced by PW 1 during the recording of summary of evidence, before the SCM and got it exhibited. The veracity of the purported confessional statement has thus not been clearly established to the satisfaction of the Court. Whenever the appellant himself unequivocally stated before the CoI that such confessional statement was obtained from him by force, such tainted confession becomes irrelevant and it cannot be used against him. In fact, the facts and circumstances surrounding the making of confession casts a serious doubt on the veracity and/or voluntariness of confessional statement in question. It is well settled that in such a situation the Court may refuse to act upon such confession, even if it is admissible in evidence. It appears that the movements of appellant were controlled by the Military Authorities for the purpose of securing a confession at the material point of time. Facts and circumstances unfolded in this case clearly indicate that confession was extracted from him and it was not a voluntary one. Reliance can be placed upon a ruling of Hon'ble Apex Court reported in **1971 (3) SCC 950 (Bharat vs. State of UP)** followed and cited in **(2005) 11 SCC 600 (State NCT of Delhi v. Navjot Sandhu)**. In the instant case the respondents have failed to establish that confession was voluntary and true and not made under coercion or threat. The law is clear that confession cannot be used against the accused unless the Court is satisfied that it was voluntary.

72. Having regard to the foregoing discussion regarding evidentiary value of confession we are of the view that purported confession (Ex 4) cannot be acted upon since we are not satisfied that such confession was voluntary and it was true. The voluntary nature of confession appears to have been tainted because of use of threat

and coercion allegedly extended by a superior Military Officer. That apart, while judging the veracity of such confession in the context of entire prosecution case, purported confession does not fit into the proved facts. We, therefore, do not feel inclined to attach much weight to purported confessional statement. In such view of the matter we do not find much substance in the argument canvassed by Mr. Bhattacharyya in this regard.

In view of foregoing discussions point Nos 1,3 & 4 are answered in negative, while point No.2 is answered in affirmative.

73. Point No 5 : Another charge under section 39(a) of Army Act relates to appellant's absence without leave on and from 2-1-2008 to 26-3-2008. A court of inquiry was conducted for his absence without leave and it appears from the proceedings of CoI (Exhibit 1) that it was recommended by the CoI that the delinquent was to be declared as a deserter under section 38 of Army Act. The Brigade Commandant also agreed to the opinion of CoI and the delinquent was declared deserter on 29-2-2008. However, on his surrender the disciplinary authority presumably took a lenient view and the appellant delinquent was not charged under section 38 of Army Act for commission of an offence of desertion. On proper consideration of facts and circumstances compelling his absence for about three months, the Military Authority thought it fit and proper to charge him under section 39(a) of the Army Act for absenting himself without leave from 2-1-2008 to 26-3-2008. He was charged under section 39(a) of Army Act accordingly. During trial by SCM it was proved on the basis of evidence of 69314971 CHM K.Y. Reddy, PW 3 that the appellant had absented himself without leave from 2-1-2008 to 26-3-2008. During enquiry/investigation, in response to a query by the Court the appellant

admitted his absence on the plea of some problems at home. At any rate, the charge under Section 39(a) of the Army Act is thus well established against the appellant.

74. In this context Mrs. Dasgupta's appeal for taking a lenient view in respect of the appellant's absence without leave, in view of his pressing domestic problems appears to be quite reasonable and modest. Her submission that the punishment of dismissal as imposed on him is harsh and not commensurate with the degree of offence committed by him cannot also be brushed aside having regard to the nature of offence and service record of the appellant which indicates that he used to discharge duties and responsibilities to the satisfaction of all concerned and his conduct was beyond reproach prior to his absence without leave. He had put in service for about 11 years 10 months and 10 days and his general character was exemplary. Although he was guilty of being absent without leave under Section 39(a) of the Army Act, 1950, we are of the view that it would be very harsh to try him through Summary Court Martial for such an offence. Moreover, considering his past exemplary record of service, it would be just and appropriate to try him summarily by the Commanding Officer under Section 80 of the Army Act, 1950. Admittedly, the appellant is guilty of an offence under Section 39 (a) of the Army Act for absenting himself without leave. Therefore, any of the summary punishment as prescribed for under Section 80 of the Army Act should have been more than adequate in his case. Therefore, we are inclined to set aside the Summary Court Martial proceedings for serious procedural lapses and some other compelling reasons as discussed earlier and even for this charge under Section 39(a) for being far too severe. Thereafter, the appellant having deemed to have received any punishment under Section 80 of the Army Act should normally have been allowed to serve and not dismissed/discharged prematurely having completed 11 years and 10 months of colour service. However, we cannot

ignore the fact that he has been out of Army Service for more than 5 and a half year now. In such a situation, his reinstatement in the Army is neither feasible nor desirable in the interest of discipline in an organised force like the Army. Therefore, reinstatement at this distant point of time is not considered appropriate. In that view of the matter, Mrs Dasgupta's submission that whenever charge under Section 39(a) has been proved, the punishment can be mitigated to an extent so as to allow completion of pensionable service of 15 years as per Army Rules read with relevant Pension Regulations, deserves a serious consideration. Therefore, taking the afore-narrated mitigating circumstances as also the nature of offence under Section 39(a) of the Army Act into account, we feel inclined to grant an appropriate relief in favour of the appellant to the extent that reinstatement to be treated as notional after punishment under Section 80 of the Army Act; thereafter the appellant be considered to be discharged on completion of 15 years of service. In this connection reliance can be placed on an unreported decision of the Division Bench of Delhi High Court in **WP(C) 4656/2003 (Ex Sepoy Sube Singh, Petitioner v. UOI and others, Respondents**) (supra) and also on another decision of the Principal Bench of AFT reported in **2011 (1) AFTLJ 94 (Ex Major Narendra Pal vs. UOI & Ors)** (supra)**.**

75. We have, however, very carefully taken into consideration her submission with reference to materials and circumstances on record. In our considered view, the appellant's dismissal through a SCM is not warranted for commission of an offence under Section 39(a) of Army Act. More so, whenever he explained his absence without leave citing pressing domestic problem in his house before the SCM and further he voluntarily surrendered before the Military Authority indicating his clear intention to continue his service in Armed Forces and as a disciplined member of the Armed Force and face CoI and other disciplinary action. That apart, the charge under

Section 63 of the Army Act could not be proved against the appellant but the charge under section 39(a) has been well-established. However, the appellant's character was exemplary and he had unblemished service records till he was found absent without leave. Considering all these extenuating aspects and circumstances we are of the view that the ends of justice would be adequately met if the applicant be punished summarily under powers vested upon Commanding Officer under Section 80 of the Army Act; wherein in this case a punishment of 7 days' detention is considered more than adequate. It would also be a stamp of approval on the fact that the appellant was indeed guilty of offence under Section 39(a) of the Army Act although committed under circumstances that are to a great extent condonable. Army, being a disciplined service, however, such offences cannot go unpunished. Therefore summary disposal under Section 80 of the Army Act will not only subserve the ends of justice but would uphold the stern discipline of the Indian Army. We are therefore, of the considered view that after mitigation of such punishment to 7 days' detention under Section 80(b) of the Army Act, it would not be prudent nor in the interest of a disciplined organisation for the appellant to be reinstated. Therefore, the period of five years that he has been out of service now notionally considered to be in service and accordingly the appellant shall be deemed to have been discharged from service from the date he attained his pensionable service and he would be entitled to pensionery benefits only with no back wages. In this context it is pertinent to mention that the appellant having rendered 11 years 10 months and 10 days active service would have completed his pensionable service by 30th June, 2011 had he not been dismissed in view of findings arrived at in Summary Court Martial proceedings.

Point No.5 is answered accordingly.

FINDINGS

76. As a corollary to our foregoing discussion in preceding paragraphs we cannot but hold that there was no warrant and legal justification for the Respondents to frame successive charge sheets and to convert charge under Section 69 of the Act contrary to Section 7 of Corruption Act to one under section 63 of the Act without highlighting any sort of 'grave reason for immediate action' as stipulated in Section 120(2) of Army Act. This sort of action/inaction on the part of Commanding Officer/Competent Authority grossly manifests exercise of discretion vested in him most arbitrarily to the detriment of the legal and statutory right of appellant. It is also indicative of the fact that the appellant was sought to be tried summarily even though no such immediate action was warranted in terms of Section 120(2) of the Act for the sake of imperative need to maintain strict discipline in the Armed Forces.

77. A plain reading of Section 120(2) makes it obvious that in case of an offence under section 69 of Army Act there cannot be a Summary Trial in normal circumstances but exception to this general rule has been provided only in emergent circumstances wherein even minimum delay in holding trial cannot be tolerated to meet the exigencies of circumstances which may be detrimental to military discipline. In such a situation also he is to refer the matter to the appropriate authority justifying his action in holding summary trial in respect of any offence punishable under any of Sections 34, 37 & 69 etc. of Army Act. It, however, appears that recommendation was made by the Commanding Officer for holding District Court Martial vide letter dated 6th June, 2007. But such request was not acceded to by the G.O.C. in-Charge.

78. The appellant's absence without leave caused delay in holding SCM appears to be very feeble and not supported by any documentary evidence. On the contrary, it

is evident from the charge-sheet itself that the appellant was absent without leave on and from 02-01-2008 to 26-03-2008. But as already pointed out, in the original SCM proceeding order directing holding of SCM was passed on 27-07-2007 whereas the charge sheet u/s 63 of Army Act was served only on 01-05-2008. The respondents have not cared to explain as to why SCM could not be held for commission of alleged offence under section 69 of Army Act within the period of more than 6 months from the date of service of charge sheet U/S 69 of Army Act. Instead of holding DCM as suggested by the Commanding Officer vide his letter dated 6th June 2007, SCM was held after the lapse of at least more than six months despite service of charge sheet u/s 69 read with Section 7 of Corruption Act at least twice. Such inaction on the part of the Respondents has defeated the main objectives of holding the SCM with utmost promptitude. In fact, a reasonable inference for all these afore-mentioned facts can be drawn that the SCM was conducted only to deny the appellant to exercise his statutory right to set up a defence in an effective manner. More so, whenever the holding of SCM was delayed for three years from the date of commission of a serious offence as alleged, even though the appellant ought to have been tried for his civil offence under section 69 of Army Act read with Section 7 of Corruption Act in view of seriousness and magnitude of alleged offence.

79. It is not disputed that the appellant is governed by the provisions of the Army Act. Further, it cannot, be denied by any stretch of imagination that Section 69 of the Act is of wider importance in relation to seriousness of civil offence pertaining to the process of recruitment vis-à-vis demand and payment of illegal gratification as alleged whereas the scope and content of 63 of the Act is limited. No plausible explanation has been made available to us either from a meticulous scrutiny of original records pertaining to SCM proceeding produced before us or by the learned

counsel for the respondents as to why the charge under Section 69 of Army Act read with Section 7 of Corruption Act was affected. It has not ever been remotely hinted within the four corners of the original case records about the nature of compelling circumstances emerging out of military exigencies or the necessity of discipline which renders it impossible or inexpedient to hold any other kind of Court Martial except Summary Court Martial. In fact, recording of reasons is necessitated in the backdrop of rejection of Commanding Officer's recommendation for holding DCM by the G.O.C. (officiating) (vide his letter dated 6th June 2007).

80. The mandatory requirement envisaged in 120(2) of the Army Act has, on the face of records, not been satisfied. Such non-compliance has undoubtedly caused serious prejudice and untold sufferings to the appellant whose Court Martial proceedings have inordinately been delayed without sufficiently strong and adequate reasons. In the absence of any grave reason for immediate action, the Commanding Officer of the Unit rightly recommended for holding District Court Martial. But the G.O.C. in-charge rejected such recommendation in arbitrary exercise of discretion. As a matter of fact, it is obligatory on the part of the Competent Authority to specify the nature of Military exigencies and necessities of discipline for trying summarily a case of graver offence of serious nature involving acceptance of illegal gratification as a public servant having great impact on social order and public interest, especially whenever the rejection of Commanding Officer's recommendation for holding District Court Martial in respect of commission of such graver offence is warranted.

81. We are, therefore, of the considered view that the impugned S.C.M was conducted in gross violation of mandatory provisions of 120(2) of Army Act and non observance thereof amounts to denial of opportunity of defence to the accused. Such violation of mandatory and obligatory provisions of the Act vitiates the entire SCM

trial in toto. We are of further view that a serious breach of mandatory provisions of Act & Rules in holding SCM cannot be termed to be a mere irregularity which can be cured under Rule 149 of Army Rules as claimed by Mr. Bhattacharyya in course of his argument. That apart, even on merit the charge of acceptance of illegal gratification as a public servant is not proved beyond any shadow of doubt. Therefore, the appellant cannot be held guilty of the charge u/s 63 of Army Act and punished thereunder. Such finding of guilt and punishment thereupon are not legally sustainable and is, therefore, liable to be quashed.

82. It is also contextually relevant to note that violation of mandatory provision envisaged in 120(2) of Army Act is exclusively applicable to the graver charge framed under section 63 of Army Act on account of acceptance of illegal gratification, whereas an offence under section 39(a) of Army Act for absenting himself without leave for a period of about 3 months, even though detrimental to high standard of military as discipline, can well be dealt with administratively under section 80 of the Army Act. The punishment for commission of an offence under section 39 (a) of Army Act as prescribed in Section 80 of Army Act also includes detention upto 28 days, forfeiture of good service and good conduct pay and also fine upto 14 days' pay in any one month etc. In such a situation, we have no hesitation in opining that punishment of dismissal for commission of an offence under section 39 (a) would be disproportionate to the degree of offence committed by the delinquent appellant. The procedure of irregularity as pointed out earlier while considering the Summary Court Martial proceedings for trying an offence under section 39 (a) of Army Act cannot invariably, therefore, be protected under section 149 of Army Rules, since injustice is likely to cause to the appellant for such irregular procedure. Reliance can be placed on a ruling of the Division Bench of

Allahabad High Court in this regard [vide **2007 (3) SCT 378 (Chief of the Army Staff, Delhi and Ors – Appellants vs. M.Z.H. Khan – Respondent)**]. In that view of the matter, we do not find much substance in the argument of Mr. Bhttacharyya that SCM proceeding can be validated in certain cases despite irregularity in procedure. We are, therefore, not prepared to accept Mr. Bhattacharyya's argument on that score. We are however, of the view that in this summary trial the appellant could have been awarded a punishment less than discharge or dismissal from service. We, therefore, feel inclined to set aside the punishment of dismissal from service in toto. At any rate, more than 5 years from the date of dismissal have silently elapsed and, therefore, it would not be appropriate to reinstate the appellant in the Armed Forces wherein maintenance of discipline is sine-qua-non and of high water mark. Having regard to such an important and emergent aspect of the matter and also being fortified with the decision of the Division Bench of Delhi High Court in **Ex-Sepoy Sube Singh's case** (supra) and also the decision of Principal Bench of Armed Forces Tribunal in **Ex-Major Narendra Pal's case** (supra), we are of the considered view that the ends of justice would be adequately met if the order of dismissal passed in the SCM proceeding is set aside and summary punishment as specified in clause (b) of Section 80 of Army Act is awarded for commission of the offence under section 39 (a) of the Army Act.

DECISION

83. In view of findings recorded in foregoing paragraphs, the impugned SCM proceeding holding the appellant guilty of the charge under section 63 and 39(a) of Army Act and finding thereupon is liable to be quashed. However, trial of Summary Court Martial for an offence under Section 39(a) of the Army Act, 1950 resulting in dismissal of the appellant is very harsh in our consideration. Since it is evident that

the appellant was guilty of the offence committed under Section 39(a), it would be appropriate to have tried him summarily under Section 80 of the Army Act and not through a Summary Court Martial. Therefore, we are of the view that Summary Court Martial per se needs to be set aside and punishment of seven days' detention is to be awarded to him in terms of the provisions contained under Section 80 of the Army Act.

Point No.6 is thus answered in the affirmative.

Direction :

84. In the result TA No.8 of 2011 stands allowed with the following directions :-

i) The SCM proceeding impugned holding the appellant guilty of the charge under Section 63 & 39(a) of Army Act and inflicting punishment of dismissal from service thereupon is hereby set aside.

ii) Consequently impugned order dated 03-03-2009 (A14) passed by the C.O.A.S rejecting the statutory appeal of the appellant also stands quashed.

iii) Even though the appellant is admittedly guilty of the charge under Section 39(a) of the Army Act, trial of this offence through a SCM is considered severe and in such view of the matter, the appellant be awarded summary punishment of seven days' detention, as specified in clause (b) of Section 80 of the Army Act subject to set off under Section 169A of Army Act, if any.

iv) The appellant under sentence is directed to surrender before the appropriate Army Authorities to serve out sentence within three weeks positively.

v) On such surrender within the stipulated period of time , the appropriate Army Authorities shall ensure execution of sentence in terms of Section 169(3) of the Army Act forthwith.

vi) The appellant shall be deemed to have been discharged from service w.e.f. 30th June, 2011 on completion of 15 years of qualifying service for being entitled to pension in the Indian Army.

vii) The appellant shall be deemed to have completed his qualifying pensionable service on the date of his discharge.

viii) The appellant shall be entitled to all retiral/pensionery benefits admissible under rules on completion of pensionable service.

ix) The pension sanctioning authority shall proceed to sanction pension in terms of foregoing directions with utmost expedition preferably within four months from the date of receipt of this order.

x) The PCDA(P), Allahabad shall issue PPO in favour of the appellant and thus ensure release of monthly pension and allied pensionery benefits as expeditiously as possible but not later than 4 months from the date of communication of this order to the appropriate pension sanctioning authority.

xi) No arrears of salary however, shall be paid to the appellant for such notionally extended period of service.

xii) The arrears of pension w.e.f. 1st July 2011 shall also be worked out and paid to the appellant within six months from the date of pronouncement of this order, in default thereof the arrears of Pension shall carry interest @8% per annum for non-payment of arrears within the period stipulated in our order.

xiii) There will be no order as to costs.

85. Let the Departmental file pertaining to SCM proceedings in original be returned to the respondents under proper receipt.

86. Let a plain copy of this order be furnished to the parties free of cost on observance of usual formalities.

(LT. GEN. K.P.D.SAMANTA)
ADMINISTRATIVE MEMBER

(JUSTICE RAGHUNATH RAY)
JUDICIAL MEMBER