IN THE ARMED FORCES TRIBUNAL
(REGIONAL BENCH) KOLKATA

T.A. NO.211/2010 (W.P. No.3075 (W) 2006)

THIS SECOND DAY OF APRIL, 2014

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

Ex Hav/Clerk Rajendra Kumar Mishra, Son of Late Param Hans Mishra, Permanently residing at Village Deoki Chapra, P.O. Raniganj Bazar, District – Ballia, Uttar Pradesh, presently residing at No.1, Rabindra Sarani, Kolkata-5 ……Applicant

-Vs-

1. Union of India, Service through the Secretary, Ministry of Defence, Government of India, North Block, New Delhi- 110 001

2. Under Secretary to the Government of India, Ministry of Defence, North Block, New Delhi – 110 001

3. The Director (Recruiting), Zonal Recruiting Office No.1, Gokhale Road, Kolkata-20

4. The Deputy Director General (Recruiting) Zonal Recruiting Office No.1 Gokhale Road, Kolkata-20

5. The Commanding Officer, 1841 Light Regiment, C/o 56 Army Postal Office (APO)

6. The Branch Recruiting Officer, Kanchrapara, 24 Parganas (North)

7. 157697551 Regt/Sal/Tech Babu Mondal, Service through Zonal Recruiting Office, No.1, Gokhale Road, Kolkata - 20

……..Respondents

For the Appellant : Mr. Amalendu Kumar Paul, Advocate with Mr. Sovan Chakrabarti, Advocate
For the Respondents : Mr. Sandip Kumar Bhattacharyya, Advocate

O R D E R

Per Justice Raghunath Ray, Member (Judicial):

Conspectus

A Writ Petition (WP 3075 (W) of 2006) filed by the above named convict Rajendra Kumar Mishra Ex-Havilder Clerk was transferred to this AFT, Regional Bench, Calcutta vide Order dated 21-7-2010 passed by the Single Bench of Hon'ble Calcutta High Court under the provisions of Section 34 of the Armed Forces Tribunal Act, 2007(for short Act 2007) with an observation that "since the petitioner was pursuing his remedy before this Court, the bar of limitation will not operate against him". Pursuant to such transfer of relevant case records the Writ Petition was renumbered as Transferred Application (T.A. No.211 of 2010). This Tribunal, however, proceeded to hear this Transferred Application treating the same as an appeal under Section 15 of the said Act, 2007, inasmuch as the petitioner has sought to challenge impugned proceedings of summary Court Martial (for short SCM) held by the Officiating Commanding Officer, 1841 Light Regiment wherein he was found guilty of the charge u/s 64(e) of Army Act, 1950 (for short Army Act). He was convicted and sentenced for commission of such offence accordingly.

Factual matrix

2. Relevant facts leading to filing of the instant appeal may be capsulised as under:

3. The convict appellant was enrolled in Military Service on 15-1-1985 and was posted at Branch Recruiting Office, Kanchrapara, North 24 Parganas under the Commanding Officer, 1841 Light Regiment (Respondent No.5) at the material point of time. While serving as a Havilder Clerk in Branch Recruiting Office, Kanchrapara an examination for recruitment of candidates in the Army was held at the said Branch Recruiting Office in October 1998. In connection with such recruitment process a written complaint dated 20-1-1999 (Annexure P2 of the writ petition) was lodged before the DDG, Zonal Recruiting Office, Calcutta by one of the recruits namely, Babu Mondal, the Respondent No.7 alleging payment of gratification of Rs14,500/- to the appellant. Pursuant to such written complaint a Court of Inquiry was held by a competent officer and, thereafter, summary of evidence was recorded in compliance with the provisions of Army Rules 23(1)(2)(3)(4). He was charged under Section 64(e) of Army Act for obtaining a gratification of Rs14500/- on 3-1-1999 and was tried summarily. On conclusion of such summary trial he was awarded sentence of (a) reduction to the ranks (b) R.I. for one year in civil prison and also (c) dismissal from the service. Such findings, sentence passed on conclusion of

SCM trial was promulgated on 15-4-1999. He, thereafter, preferred an appeal under Section 64(2) of the Army Act 1950 before the Appellate Authority from the Alipore Central Jail but to no effect. He preferred Writ Petition 15 (W) of 2005 which was disposed of by the Hon'ble High Court vide order dated 24-8-2005 directing the respondents to dispose of the petition under Section 164 of the Army Act within 2 months (Annexure P6).

4. In deference to the aforementioned order of the Hon'ble High Court, the Under Secretary to the Government of India rejected the petition dated 31st July 1999 together with Supplementary Petition dated 17th October, 2005 after giving a personal hearing in exercise of powers conferred on the Central Govt under Section 164 of Army Act (Exhibit P9) vide a speaking order dated 9-12-2005.

5. Being aggrieved and dissatisfied with the aforementioned order dated 9th December 2005 he approached the High Court Calcutta for redressal of his grievance against the punishment and sentence awarded upon him as already indicated earlier.

Contentions

6. It is contended inter alia in the appeal that when the process of recruitment of the candidates in the Army was going on at the Branch

Recruitment Office Kanchrapara, the Respondent No.6 being the Commanding Officer asked all the selected candidates including the candidate Babu Mondal vide an office order dated 17/19-12-98 to report to the office on 29-12-1998 with documents for verification. During such ongoing process of recruitment on 18-12-1998 the appellant lodged a written complaint to the commanding officer Respondent No.5 pointing out certain irregularities in the process of selection of candidates and he was assured that such complaint would be sent to the Zonal Recruiting Office, Kolkata as per his written prayer along with other documents before holding the SCM scheduled to be commenced on and from 10-4-1999. On 27-1-1999 the Zonal Recruiting Officer along with Maj A.S. Parmer informed the appellant about the receipt of a complaint alleging payment of gratification to him by the respondent No.7. Even though he was not involved in any such case of acceptance of illegal gratification, he volunteers to pay Rs14,500/- to Babu Mandal, the respondent No.7 to save himself from a bad name. On being asked by Col. G.K.S. Reddy of Zonal Recruiting Office HQ, he expressed his willingness in writing to pay the said amount in good faith to the complainant. The appellant being a layman and having no knowledge that the written statement was extracted from him for the purpose of incriminating him for future proceedings was beyond his imagination. In fact, he was not aware of any sort of complaint against him

lodged by Babu Mandal for taking gratification of Rs14,500/- from him. He was also not served with any show cause notice in respect of such complaint.

7. It is contended further that even though Sub Maj Gurnam Singh of Branch Recruiting Office, whom the Respondent No.7 identified as the person present at the time of incident on 3-1-1999 was neither examined nor interrogated by the Court of Inquiry (in short C.O.I) to elicit the truth of alleged complaint. His further contention is that no prima facie case against the petitioner was made out to face any court martial and the evidence of witnesses recorded in the summary of evidence is full of inconsistencies and, according to him, a summary of evidence being a basic document, the commanding officer or the convening authority is to be satisfied whether any prima facie case against the petitioner to the exclusion of the complainant and Sub Maj Gurnam Singh could be made out in the background of particular facts and circumstances of the case, which do not warrant issuance of any charge sheet against him alone. His further contention is that to ensure free, fair and unbiased enquiry, better quality of evidence in a legally flawless manner is sine quo-non of the C.O.I anterior to Summary Court Martial (in short S.C.M) Trial. The petitioner has, therefore, suffered a grave and prejudicial injury by the act, omission and commission of respondents for withholding the materials and vital witnesses who were supposed to ensure a better

investigation of the alleged offence. It, therefore, clearly speaks of biased mind of the respondent No.5 and as such he failed to elicit the truth during SCM trial.

8. He further asserted that the date for holding S.C.M. trial was fixed on 8-4-99 while relevant papers were supplied on 4-4-99, i.e. clear 96 hours were not covered for commencement of trial as per the requirement of Rule 34 of Army Rules. Moreover, he was also not afforded any reasonable opportunity of engaging a defending officer for his defence. On the contrary, respondent No.5 suo motu engaged an officer as per his whim on 4-4-1999 even without ascertaining the desire of the appellant. The service of such officer was, therefore, imposed upon him in contravention to sub rule 2 of Rule 95 of Army Rules 1954 (in short Army Rules). He was thus completely left at the mercy of the respondent No.5 and could not defend himself in the proceeding conducted by the respondent No.5 adequately.

9. Further, the principle of natural justice was also grossly violated because of engagement of respondent No.5 as the Presiding Officer of SCM even though the said respondent himself held the Court of Enquiry and framed the charge against the appellant. The respondent No.5 acted in excess of his jurisdiction by holding the SCM for trying the appellant since he was under the command of Respondent No.6 who was competent and or vested with the

jurisdiction to take cognisance of any offence, if at all committed by the appellant while on duty under Respondent No.6. In fact, the appellant had to face the S.C.M. before the Respondent No.5 in hostile atmosphere where the said respondent had prejudged the guilt of the petitioner in the C.O.I to the exclusion of Respondent No.7 who also prima facie committed the offence. Furthermore, Sub Maj Gurnam Singh, an accomplice attached to 15 Rajput Regiment had also not been tried along with the appellant. Even in course of S.C.M. trial some material witnesses who were conveniently left out during investigation have been summoned by the prosecution to prove the charge against him. It is, therefore, contended by him that the charge under Army Act is not maintainable since the charge of acceptance of gratification as a motive for procurement of enrolment of respondent No.7 in the Army has no leg to stand upon on the face of the record that the respondent No.7 has received the appointment letter from respondent No.6 on 20th November 1998 and also despatch certificate from Sub Maj Gurnam Singh on 3-1-1999. It is forcefully contended by him that he was in no way involved in the offence as alleged against him. But, he became a helpless victim of unholy circumstances hatched up by interested persons. According to him, he was compelled to write a letter of commitment to pay Rs14,500/- from his salary under duress as also to save his fair name in the Army service without

admitting his guilt in any manner. He was, in fact ,made a scape goat by the respondent No.4 as is evident in the manner by which the Respondent No.7 was paid Rs14,500/- on 2-2-1999 by Sub Clerk Satywan Singh by order of Res No.6 in presence of Maj Parmer. Even though a sum of Rs15000/- was withdrawn on the recommendation of respondent No.6 from his salary and out of the said amount Rs14,500/- was paid to the respondent No.7 the balance amount of Rs500/- was never returned to him.

Additional Supplementary Affidavit

10. By filing additional supplementary affidavit the appellant has sought to rectify certain mistakes which occurred due to inadvertence and/or typographical errors in different paragraphs of writ petitions. It has further been averred therein that from the unchallenged testimony of Babu Mandal before the C.O.I and the summary court martial, it is evident that he was asked by one Col to give in writing if he had paid any amount to anybody for his recruitment and pursuant to the said instructions the respondent No7 wrote a complaint in Bengali and handed over the same to the Col on 16-1-99. It is further averred by him that the said complaint was never placed on record nor a copy of such complaint was ever served upon him. The copy of the alleged complaint of respondent No.7 was, however, annexed to the writ petition (Annexure-P). But such an important document was neither proved

nor exhibited through any of the prosecution witnesses. According to the appellant, above material omission alone vitiates the entire proceedings and without considering this aspect of the matter the respondent No.2 mechanically upheld the proceedings in close mind.

11. It is further contended by him that on conclusion of C.O.I, he was confined in military custody and he was not served with neither any notice nor the terms of reference of the convening authority or the convening order. During such confinement a copy of charge sheet signed by respondent No.5 was served on him 4-4-99 at about 7 p.m. to face the S.C.M. scheduled to be held on 8-4-1999. It is further averred in the Supplementary Affidavit that on 8-4-99 at the time of convening the S.C.M. the respondent No.5 who convened the C.O.I even did not ask him whether he had any objection in holding the trial by the said respondent. He could have raised his voice of protest, if such question was put to him. He was thus denied of his right. It is reiterated therein that the respondent No.5 acted in close mind, even though there are overwhelming and clinching materials on record against the finding of respondent No.5, the Union of India mechanically upheld the impugned findings and sentence of the SCM. It is, therefore, submitted by the appellant in the supplementary affidavit that this Tribunal should interfere in the present case since errors and illegalities stare on the face of the record otherwise the

appellant would be seriously prejudiced and the ends of justice would be defeated.

Affidavit-in-reply

12. In his affidavit-in-reply the appellant has sought to controvert the contention of the respondents made in the affidavit in opposition. It is submitted by him that the impugned punishment was arbitrarily awarded to him and it suffers from manifest error and serious legal infirmities. It was, passed in close mind mechanically. Further, such illegal findings were upheld by the appellate authority after a lapse of about 6 years only after an intervention by the Hon'ble High Court in the year 2005. It is further pointed out by him that the statement of the co-accused has no value and inadmissible in evidence, but Babu Mondal has been produced as a prosecution witness with the malafide motive without declaring him as an approver. The appellant has, therefore, urged before the Court to quash the impugned findings of the SCM and to direct the respondents to reinstate him in service with all the consequential benefits.

13. By filing an affidavit-in-opposition, the respondents have forcefully denied all material allegations levelled against them in the writ petition. It is emphatically averred therein that the charge against the petitioner has been

proved in the S.C.M. and he was given adequate opportunities to defend his case. One captain H.S. Randhawa was detailed as the friend of the accused petitioner as per provisions enshrined in Rule 129 of Army Rule. According to the deponent, the Captain Randhawa was present all through the Court Martial proceedings to defend the petitioner. It is further averred that the SCM examined all the material witnesses and found that there was sufficient evidence available to prove the charge against the petitioner. It is further asserted forcefully that the C.O.I was convened and finalised under the directions of the competent authority prior to the holding of S.C.M. proceeding against the writ petitioner. It is, therefore, averred that mandatory provisions in respect of pre-trial procedure were duly complied with and no prejudice was caused to him. Further, all the necessary documents were provided to him to defend his case. It is also strongly denied that respondent No.5 has no jurisdiction to try and convict him. As a matter of fact, the punishment awarded by the respondent No.5 was lawful under Section 71 & 73 of the Army Act. It is also specifically pleaded that the S.C.M proceedings do not require any confirmation under Section 153 of the Army Act.

14. It is further contended inter-alia by the deponent that the appellant was afforded sufficient opportunity by the respondent No.2 while deciding the matter under Section 164(2) of the Army Act in compliance with the Court

Order. According to the respondents, the S.C.M may try any person other than Jr. Commissioned Officer and Warrant Officer in terms of Section 120(3) of the Army Act. The petitioner being a Havilder (non commissioned officer) can, therefore, be tried by S.C.M. In such circumstances, the Writ Petition is liable to be dismissed in limini with exemplary cost.

15. During the pendency of the appeal before the Tribunal the appellant filed an application under Section 17 of the Armed Forces Tribunal (in short, AFT Act, 2007) seeking an appropriate direction upon the Respondents to ensure production of certain documents as specified in 3(a) to (l) of the said application filed before this Appellate Court since he was denied production of those documents before the Trial Court and such production of documents is essentially required to meet the ends of justice equity and fair play.

16. The said application under Section 17 of the AFT Act 2007 is opposed on behalf of respondents No.1-6 by filing an objection thereto. It is submitted in the said objection that the documents under reference in the petition relate to office administration in respect of the different units involved and as such those documents have no bearing on the judicial merit of the case as decided by the S.C.M. It is further, contended therein that documents demanded in Para 3(a) have not been exhibited both in summary of evidence as also in S.C.M. It is further submitted on behalf of the respondents that, even though

the written complaint submitted by the recruit Babu Mandal, the respondent No. 7 herein had been the precursor to the court martial proceeding, the same was not part of the exhibit marked during the summary of evidence or S.C.M proceeding. However, the copy of the said complaint was annexed hereto and marked with letter Annexure-2. In respect of rest of the documents, it is categorically averred that since those documents were not the part of exhibits either of the prosecution or of the defence and thus their production from the records as maintained at the office of Mechanised Infantry Regiment Records is not required. That apart, with the influx of time of more than 13 years those documents might have been destroyed in accordance with the statutory rules.

Arguments

17. In addition to their oral arguments both sides have also filed memorandum of written arguments which have been kept with the record.

18. Appearing on behalf of the appellant, Mr. Amalendu Paul, the learned counsel assailed the legality/validity of the S.C.M proceedings as also its findings on the following grounds :

a) The recording of summary of evidence was concluded on 4-4-1999 and at about 7 pm on the same day, while the appellant was in

confinement he was served with the charge sheet signed by respondent No.5 along with summary of evidence of 5 witnesses and “warning of the accused” informing him that he would be tried by the respondent in the S.C.M to be held on 8-4-1999. The interval between his being so informed and his arraignment is unmistakenably less than 96 hours. Thus there is a gross violation of Rule 34 of the Army Rules and such failure to comply with mandatory provisions of Rules has rendered the S.C.M proceeding void ab initio.

b) The written complaint lodged by the respondent No.7 (PW 1) which formed the basis of C.O.I as also S.C.M proceeding was not exhibited at any stage of the proceedings including the recording of summary of evidence. This fatal flaw in not getting the basic document which sets the law into motion exhibited is sufficient to affect the credibility of the prosecution story of demanding gratification for issuance of despatch certificate from one of the recruits, respondent No.7. By withholding such basic documents during trial by S.C.M serious prejudice has been caused to the defence case.

c) Non-production of a host of vital documents which were required to prove the innocence of the accused and was accordingly demanded as per application dated 10-4-1999(Annexure P4) of the Writ Petition

during SCM trial must lead the appellate court to draw an adverse inference against the prosecution for withholding relevant documents which were essentially required for eliciting truth.

d) Non production of the documents as specified in his application under Rule 17 of the AFT Act before this appellate court has caused grievious injury to the petitioner since he was deprived of reasonable opportunity of defending himself.

e) The officiating Commanding Officer who held the C.O.I also conducted S.C.M proceeding and in such a situation it can be presumed that he proceeded to try the case in a closed mind. He was likely to have been biased because of his participation during investigation in C.O.I which was a fact finding body to inquire into the allegation levelled against the appellant.

f) Even though the appellant highlighted certain irregularities in the process of recruitment seeking interference from the Zonal Recruitment Authority long before lodgement of purported complaint against him by respondent No.7, the authorities despite assurance to take appropriate steps in this regard remained tight over the matter. Such inaction on the

part of the Respondent infringes an individual's right to know whether the process of recruitment has been conducted in a transparent manner.

g) Such lackadaisical approach of the respondent authorities as a whole and Respondent No.5 in particular who held the S.C.M. trial clearly reflects their close mind and biased attitude to find him guilty even at the cost of violation of the principles of natural justice as also mandatory requirement as envisaged in a good number of Army Rules.

h) There is also clear breach of the Rule 133 of Army Rules which mandates that the proceedings of S.C.M immediately on promulgation are to be forwarded immediately to the officer authorised under Section 162 of Army Rule and after review by him the relevant records pertaining to the proceedings of S.C.M shall be returned to the accused person's crops for preservation in accordance with sub rule 2 of Rule 146. Such mandatory requirement has not been satisfied in this case establishing a serious procedural lapse.

i) The cumulative effect of gross irregularities as also the manner in which the proceedings were carried out by the respondent authorities more particularly by the respondent No.5 who heard the charge as per Rule 22 of the Army Rule on 26-3-1999 without ensuring compliance

with the provisions of rule 180 of the Army Rule in all essential particulars during C.O.I.

j) Immediately on conclusion of recording of summary of evidence on4/ 4/99 the appellant was charge sheeted on 4-4-99 by the same commanding officer i.e. respondent No.5 without applying his mind, to the materials collected during C.O.I and recording of summary of evidence, within the meaning of provisions of Army Rule 179 for the purpose of an effective consideration as to whether the materials so collected would justify further proceeding by holding S.C.M trial. In fact, S.C.M proceedings were conducted in hottest haste for oblique reasons. The conduct of the respondent No.5 who acted both as prosecutor and a judge caused a serious prejudice to the case of petitioner subverting the interest of justice.

k) Failure to furnish information of the appellant's arraignment in the form of warning for trial keeping the interval not less than 96 hours mandatorily required under Rule 34(1) of Army Rules has also grossly violated the golden principles of natural justice.

l) Questioning witness and recording evidence during SCM trial were not done in conformity with the prescribed mode as laid down in Rule 141 (1)(2)(3) & (4) of Army Rules.

m) The purported findings of the Appellate Authority to the effect that the petitioner was provided the required documents and sufficient time was given to prepare his defence before trial as required under section 33 & 34 of Army Rules clearly indicate sheer non-application of mind by the authority for the simple reason that such findings are factually incorrect since interval between warnings and arraignment was, less than ninety-six hours and therefore compliance of mandate of Rule 34 (1)(2) & (3) was not done in letter and spirit and its non-compliance, as is evident from the relevant documents of SCM proceedings itself, is fatal to the prosecution and the entire proceeding is liable to be quashed on the sole ground of non-compliance of Rule 34 of Army Rules.

n) The purported commitment to pay back the amount in question (Ext. K) as also request for draw of credit balance (Ex.L) does not bear any evidential value since it is hit by Article 20(3) of the Constitution of India and further such commitment was not made in consonance with

any order passed in the judicial proceeding under the Army Act and Army Rules.

19. Apart from all these procedural lapses highlighted above, Mr. Paul also proceeded to argue that there is no documentary evidence to indicate that the petitioner demanded gratification in the manner as alleged by respondent No.7 Babu Mandal PW-1. There is also no eyewitness to prove the allegation that alleged demand was made to respondent No.7 when he approached the appellant for the despatch certificate. It is further forcefully submitted by him that there is nothing on record to indicate that the respondent No.7 lodged any written complaint against the appellant prior to giving the alleged sum of Rs14500/- or soon after giving the amount on 3-1-1999 either to the respondent No.6 or to the Police. He, thereafter pointed out serious discripancies in the testimony of Babu Mandal PW-1 and K.C. Mandal PW-3, the Uncle of the complainant by village courtesy, who happens to be an ex-serviceman. PW3 claimed in his testimony that on being informed by PW 1 Babu Mondal about the demand of Rs15000/- for giving the despatch certificate he advised the PW1 not to pay any amount and further he rang up the Dy Director General (Recruiting) ZRO HQ respondent No.4 on 13-12-98 to apprise him of the happenings. However, in his absence his wife advised him to call up the officer concerned on 1-1-1999 which he did and was asked by the

wife of the Respondent No.4 to visit the office on 4-1-1999 along with Babu Mondal. Such statements, according to Mr.Paul were not corroborated by PW-1 Babu Mandal in his evidence at all. Despite such omission/inconsistencies neither the respondent No.4 nor his wife was asked to tender evidence in the context of above statement of PW-3 during trial. It is further contended by Mr Paul that in absence of any contrary version to the above statement, the unchallenged testimony of PW-3 K.C. Mondal tends to show that he had direct link with Respondent No.4 in the matter of recruitment of candidates in the Army.

20. It is further argued on behalf of the appellant that the letter of commitment to pay Rs14,500/- to PW-1 extracted from the appellant on 27-1-1999 appears to have been relied on by PW 2 in his Inquiry Report without at all implicating PW-1 Babu Mandal for his culpability of abetting the offence and further Sub Maj Gurnam Singh was also subsequently excluded from the purview of further investigation even though there are sufficient materials to indicate that Sub Maj Gurnam Singh's case also stood on the similar footing with that of the appellant regarding alleged demand of gratification prior to issuance of discharge certificate. Therefore, on the face of serious discripancies striking at the root of the prosecution case, the appellant's involvement in

accepting gratification from Babu Mondal, PW1, one of the recruits cannot be conclusively proved.

21. **Per contra**, it is argued by Mr. Bhattacharyya, ld. Counsel for the respondents that admittedly First Information Report (F.I.R) was not registered before the Police against the appellant and further that the complaint had also not been exhibited at any stage of the proceedings. It is, further, argued by him that FIR i.e. the basic document for initiation of any criminal proceeding is not a substantive evidence. It can only be used by way of corroborations or contradictions and as such FIR/complaint against the accused is admissible u/s 8 of the Indian Evidence Act, 1872 as part of informant's conduct (vide 1944 CLJ 253 = AIR 1937 Cal 17- Ajimauddy –vs- R). FIR can also be treated as dying declaration u/s 32 of the Indian Evidence Act, 1872. In such a situation, it is forcefully submitted by him that failure to register FIR by the complainant has not at all weakened the prosecution case. Further, even though the complaint has not been exhibited at any stage of the proceedings, there is no question of causing any prejudice to the case of the appellant inasmuch as during the C.O.I he had been given the right of cross examination in terms of Rule 180 of Army Rule, 1954. That apart, he was also afforded opportunity to rebut the charge at the stage of hearing of charge. He had also exercised the right to cross-

examine the witnesses during recording of summary of evidence as also during trial by S.C.M.

22. On the contention of non-compliance with several provisions of Army Rules as also denial of natural justice to the appellant at pre-trial enquiry /investigation stage and also during S.C.M Trial, it is forcefully submitted by him that in the event of commission of an offence, the main consideration for a criminal court is to protect the institutional integrity which overrides individual integrity. In this context he has referred to a ruling of the Hon'ble Apex Court reported in **(2009) 7 SCC 1 (In re: N . Kannadasan -vs- Ajoy Khose & Ors).** It is further argued by him that to pursue an offender in the event of commission of an offence is to sub-serve the social need and in the supreme interest of society the court cannot afford a criminal to escape his liability since that would bring about the state of social pollution which is neither desirable nor warranted. He has placed reliance in this regard upon a ruling of the Hon'ble Apex Court reported in **AIR 2001 SC 1802 (Monohor Lal –vs- Vinesh Anand).**

23. It is pointed out by him that in the present case there was initiation of a C.O.I against the delinquent appellant at the first instance and, thereafter, necessary disciplinary proceeding was contemplated against him. In fact, a detailed inquiry was conducted in course of C.O.I by visiting the village of the

complainant. During such on-the-spot enquiry pitiable financial constraints of the complaint and his family members were invariably taken into account in course of the C.O.I. There is positive evidence on record to indicate that the complaint and his family members had to suffer serious financial hardship to ensure payment of Rs14,500/- to the appellant to secure the job.

24. It is further contended by him that attachment of the appellant to 1841 Lt Regiment is quite in conformity with the Army Order 89/81 for vigilance and discipline purpose. Mr. Bhattacharyya further proceeds to argue that there was no scope of violation of Rule 34 of the Army Rules 1954 for the simple reason that the appellant was issued the charge-sheet together with the entire proceeding of summary of evidence well ahead of the commencement of S.C.M. trial and thus allowing him ample time and opportunity to prepare for his defence for contesting the case in the S.C.M proceedings in accordance with law.

25. Mr. Bhattacharyya has also sought to argue that the provisions of Prevention of Corruption Act, 1988 (for short, Corruption Act) can be made applicable to the army personnel since they were not excluded from the application of Indian Penal Code 1860 prior to its repeal after the enactment of Corruption Act, 1988. In this context by referring to Sec. 28 of the Corruption Act it is submitted by him that the provisions of the said Act are in addition and

not derogation of any other law for the time being in force. According to him, Sec. 25 of the Corruption Act provides that jurisdiction exercised by Armed Forces would not be affected by the provisions of the Corruption Act. Taking it for granted that the relevant provisions of Corruptions Act are equally applicable to the army personnel, he proceeds to argue that as per provision of Sec 21 of the Corruption Act, accused can be regarded as a competent witness and further Sec. 22 of the Corruption Act also makes it quite clear that the provisions of Code of Criminal Procedure, 1973 are applicable to a trial for illegal gratification subject to certain modifications.

26. He has further sought to highlight Sec 22 of the Corruption Act by arguing vehemently that presumption is against the accused and at the first instance a duty is cast upon him to rebut the charge preferred by the complainant. In this connection, he, however, submits that it is settled law that the standard of proof by the accused for rebuttal shall not be as much stringent as the standard of proof generally applicable for prosecution in criminal trials. In that context of the matter, it is further argued by him that since the appellant did not adduce any evidence to rebutt charges at any stage of the proceedings of C.O.I, hearing of charges, summary of evidence or S.C.M, it is in terms of Sec. 20 of the Corruption Act that presumption would go against him.

27. The next limb of his argument is that the victim i.e. recruit complainant, Babu Mondal was consistent in his evidence during C.O.I, recording of summary of evidence as well as trial during SCM and as such, his oral evidence being direct as envisaged u/s 60 of Indian Evidence Act should be given much weight. Further he has very successfully withstood the test of cross-examination conducted by the appellant. Therefore, there is hardly any scope to disbelieve his cogent and consistent testimony. More so, whenever the appellant has also exercised his substantive right of cross-examining the victim, the charge of accepting money as illegal gratification levelled against him has been well proved. It is further pointed out by him that no case of animosity has ever been suggested from the side of the appellant to the victim during cross examination, and hence, it would not be right in the fitness of things to accept the appellant's contention that he has falsely been implicated in this case. That apart, the appellant has also declined to put his essential material case to some of the witnesses during cross examination and in such a situation the legal presumption must follow that the appellant has, in fact, accepted the complainant's case in its entirety. In this context he has relied upon the ruling of the Hon'ble Apex Court reported in **AIR 2002 SC 3652 (Sarwan Singh -vs- State of Punjab).** In afore cited case it has been fully established that it is within the competence of the prosecution to draw an inference of acceptance

of prosecution case by the defence. He has further placed reliance on another ruling of the Hon'ble Apex court reported in **2009(15) SCC 551(Haru Ghosh –vs- State of West Bengal).** It is held therein that when during cross-examination of a witness nothing transpires suspicious, evidence of the witness is to be believed. He has further referred to a decision of the Hon'ble Apex Court reported in **1994(2) SCC 220 (Dhananjoy Chatterjee -vs- State of West Bengal).** It is ruled therein that failure to cross examine the witness properly does not confer any right upon the accused. In this context it is submitted by him that educational qualification and ability of Bablu Mondal, the complainant/victim was not above than the appellant/accused and further whenever during summary of evidence the army authorities did not step into the shoes of prosecution, the appellant had sufficient opportunity to put his case before the complainant in clear terms.

28. It is also contended by him that summary of evidence being a part of court martial proceedings under rule 116(2) and (3) of Army Rules and is part of evidence u/s 62 of Indian Evidence Act, 1872, is not required to be exhibited separately as the same can be made part of judicial proceeding as envisaged in Sec. 80 of Indian Evidence Act.

29. Mr. Bhattcharyya concludes his arguments by making a specific submission that whenever the constitution of S.C.M does not suffer from any

infirmity in its convening and the appellant had failed to disprove evidence against him through cross examination and the level of intelligence of the recruit complaint was inferior to the level of intelligence of the appellant, the court should accept the respondents' contention that the appellant has been provided a fair trial. It is further argued finally that the punishment awarded to the appellant was commensurate not only with the gravity of offence but also with the desirability that such persons should not further be able to obtain any Government service- both Central or State Govt. He has placed reliance in this regard upon two rulings of the Hon'ble Apex Court reported in (i) **AIR 2001 SC 3053 (UOI –vs- R.K.Sharma)** and other (ii) **1998(1) SCC 537 (UOI –vs- Major A. Hussain).**

30. We have paid earnest consideration to rival submissions advanced by the learned counsel for both sides coupled with relevant averments made in their affidavits in the light of judicial pronouncements cited on behalf of the parties.

31. The points for determination are formulated as under :

I Whether charge against the appellant was heard as per legal requirement envisaged in Rule 22 of Army Rules?

II Whether there was violation of Rule 34(I), 106,107,135 & 141(2)(3) & (4) of Army Rule?

III Whether the appeal should succeed on the ground of non-compliance of mandatory provisions of Army Act and Army Rules and also the principles of natural justice?

IV Whether Statement of the particulars of the act together with circumstances constituting the offence u/s 64(e) of Army Act have adequately been described in the charge and the same are sufficient to enable the appellant to know what act, neglect or omission is intended to be proved against him as per requirement of Rule 30(2)(3) & (4) of Army Rules?

V Whether the single count of charge under Section 64(e) of Army Act has been proved on the strength of cogent, consistent and convincing evidence on record?

VI Whether impugned order of conviction and sentence passed in SCM trial is legally sustainable?

Discussion/Views

32. Point No.I,II & III : These three points are taken up together for the sake of convenience in discussion since they are interlinked with each other. We now proceed to deal with the contention of Mr. Paul pointwise in the light of factual scenario projected through evidence and circumstances on record

coupled with the proposition of law enumerated in various judicial pronouncements of the Hon'ble Apex Court & High Courts.

Re : Contention – (a),(k)&(m)

33. On the issue of violation of mandatory Rule 34 of Army Rules we have taken into consideration objection raised on behalf of appellant as also Mr. Bhattacharyya's counterargument with reference to Original Records pertaining to Summary of Evidence as also S.C.M proceeding. It appears therefrom that the recording of Summary of Evidence was concluded on 4-4-1999 and the appellant was served with the Charge Sheet together with evidence of all five witnesses at about 7 p.m. on 4-4-1999 informing him that he would be tried by the respondent No.5 in the S.C.M to be held on 8-4-1999 at 10 am. It is, therefore, well established that the interval between his being informed about the commencement of his trial in respect of the offence over which he had been charged is less than 96 hours.

34. On perusal of the ruling reported in **2009 (10) SCC 552 – Union of India and Others – Appellant vs. A.K. Pandey – respondent**, as relied upon by Mr. Paul, we find that the requirement of interval between accused being informed for which he is to be tried and his arraignment "shall not be less than ninety-six hours". In the case before Hon'ble Apex Court, Mr.A.K. Pandey, Army Personnel was charged vide Charge Sheet dated 26-10-95 which was

served upon him on 2-11-95 about 1800 hrs. He was informed that he would be tried upon by a General Court Martial on 6-11-95 at 1130 hrs. Mr. Pandey, however, pleaded guilty of both the charges and he was awarded punishment:-

(i) to suffer rigorous imprisonment for three years and (ii) dismissal from service. Being aggrieved, the Army Personnel submitted a petition under Section 164(2) of the Army Act, 1950 before the Chief of the Army Staff for setting aside the findings and sentence of the General Court Martial held on 6-11-95. Such prayer was, however, rejected by the Chief of the Army Staff. Against such rejection order Mr. Pandey moved before the Hon'ble Rajasthan High Court by filing a Writ Petition. The High Court allowed the Writ Petition and set aside the General Court Martial proceeding which was held on 6-11-95 as well as order of Punishment. Such order passed by the High Court was challenged before the Apex Court by the Union of India. It was argued before the Hon'ble Apex Court that since the dismissed soldier pleaded guilty of both the charges, no prejudice can be said to have been caused to him by non-compliance of the time frame provided therein. Such argument was not accepted by the Hon'ble Apex Court. It is held therein as follows :

> "15…….There being nothing in the context otherwise, in our judgment, there has to be clear ninety-six hours' interval between the accused being charged for which he is to be tried and his arraignment and interval time in Rule 34 must be read as absolute. There is a purpose

behind this provision : that purpose is that before the accused is called upon for trial, he must be given adequate time to give a cool thought to the charge or charges for which he is to be tried, decide about his defence and ask the authorities, if necessary, to take reasonable steps in procuring the attendance of his witnesses. He may even decide not to defend the charge(s) but before he decides his line of action, he must be given clear ninety-six hours". (Emphasis is ours)

It is further held in para 16 as under :-

"16. A trial before the General Court Martial entails grave consequences. The accused may be sentenced to suffer imprisonment. He may be dismissed from service. The consequences that may follow from non-observance of the time interval provided in Rule 34 being grave and severe, we hold, as it must be, that the said provision is absolute and mandatory. If the interval period provided in Rule 34 is held to be directory and its strict observance is not insisted upon, in a given case, an accused may be called upon for trial before the General Court Martial no sooner charge/charges for which he is to be tried are served. Surely, that is not the intention; the time-frame provided in Rule 34 has definite purpose and object and must be strictly observed. Its non-observance vitiates the entire proceedings." (Emphasis is ours)

35. We also do not find much force in the argument advanced by Mr. Bhattacharyya that non-compliance of Rule 34 of Army Rules should not be taken into account, since in the instant case the appellant could not suffer any prejudice in-as-much as during the C.O.I he had been given the right of cross-examination under Rule 180 of the Army Rules, 1954, and also an opportunity to rebut charges at the stage of hearing of Charges. Pausing for a moment it may be pointed out here that at a belated stage of this appeal, the respondents denied the factum of holding C.O.I by affirming a supplementary affidavit to that effect. It is further argued by him that the right of cross-

examination during the recording of Summary of Evidence as well as cross-examination during the S.C.M was also exercised by him. In such view of the matter non-compliance with Rule 34 of Army Rules, if any is not fatal for the prosecution. Such argument, however, does not appear to be a meritorious one in view of the principles of law laid down in the afore-quoted ruling of the Hon'ble Apex Court. In this context it is reiterated that while interpreting the language used in Rule 34(1) of Army Rule it is observed interalia in the said ruling by the Hon'ble Apex Court as follows :-

> 'The key words used in Rule 34 from the intendment is to be found are "shall not be less than ninety-six hours"….'

It is held accordingly that provision as enshrined in Rule 34 of Army Rule is not directory, rather it is mandatory. Relying upon the principles of law laid down therein, we have no hesitation in opining that non-compliance with this mandatory provision of Rule 34 in the SCM trial has, in fact, vitiated the SCM proceedings. We are, therefore, of the view that the requirement of interval of 96 hours as mandated in Rule 34 of the Army Rules is held by the Hon'ble Apex Court as absolute and mandatory and its non-compliance cannot be said to be inconsequential on the plea that such breach has not caused any prejudice to the appellant. Rather we are to opine that non-compliance with Rule 34 of Army Rule has led to gross violation of the golden principles of natural justice.

Therefore, in our considered view non-observance of mandatory provision envisaged in Rule 34 of Army Rule had, in fact, vitiated the entire SCM proceedings. Further, the appellate authority also failed to consider the genuine grievance of the appellant in its proper perspective while hearing the appeal and because of sheer non application of mind it ignored the bare fact that there was less than 96 hours' interval between the accused being charged for which he is to be tried and his arraignment. Consequently it was erroneously held by the appellate authority that none of the army rules including Rule 34 was violated. At any rate, it is quite evident from the materials and circumstances on record that there was breach of a good number of Army Rules, including Rule 34 of Army Rule. Accordingly, the findings of appellate authority are neither factually nor legally sustainable.

Re : Contention (b)

36. Mr. Paul's argument that the written complaint lodged by the respondent No.7 is the basic document which prompted the competent authority to order the C.O.I, recording of summary of evidence as also SCM proceeding but such vitally important document not being exhibited at any stage of the proceedings, the credibility of prosecution story regarding demand of gratification for issuing of dispatch certificate stands affected. Such contention has been countered by Mr. Bhattacharyya, learned counsel

for the respondents on the ground that FIR not being a substantive evidence can be used only by way of corroboration or contradiction. It is further argued by Mr. Bhattacharyya that in fact, FIR against the accused is admissible under Section 8 of the Indian Evidence Act, 1872 as part of the informant's conduct . Therefore, even if no complaint is exhibited or FIR is lodged to the Police, the prosecution's case could not be disbelieved. More so, whenever to pursue an offender in the event of commission of an offence is to subserve the social need since the society cannot afford a criminal escape his liability. In this connection he has referred to a ruling of Hon'ble Apex Court reported in **AIR 2001 SC 1820 (Manohar Lal – vs- Vinesh Anand)** and has argued that Army Authorities are duty bound to constitute first C.O.I, and, thereafter, to initiate necessary disciplinary proceeding. It is further contended by him that in the C.O.I the officer conducted a detailed inquiry at the village of the complainant, found out the pitiable financial constraints of the complainant which his family members had to undergo to make available the amount of Rs15,000/- for the recruit complainant so as to enable him to ensure the payment of Rs14,500/- to the appellant for obtaining a letter of appointment. Therefore, according to him, even though no FIR was lodged before the Police or no complaint was exhibited during trial, the genuineness of the prosecution case cannot be doubted.

37. After due consideration of the respective submission made by Mr. Pal, Ld. Counsel for the appellant as also Mr. Bhattacharyya, Ld. Counsel for the respondents we are to opine that it is the allegations of fact which constitute a complaint and further allegation which do not amount to an offence, would not be a complaint. It is, however, not necessary that a complaint should contain in verbatim all the ingredients of the offence. By no stretch of imagination it can be denied that it is a complaint which more importantly lays down the factual foundation of an offence. The appellant has, however, annexed a written complaint lodged by one Babu Mondal, respondent No.7 dated 20-1-1999 addressed to the Director General of Recruiting Office, Calcutta, respondent No.4 (Annexure P2). It appears therefrom that Rs15000/- was demanded by the appellant for issuance of appointment letter and subsequently on payment of such amount despatch letter was handed over to him. In affidavit-in-opposition the respondents have, however, not denied that such complaint was indeed lodged before the respondent No.4. In paragraph 14 of their affidavit-in-opposition it has been categorically averred that C.O.I Proceedings were conducted as per rules and the same has been finalised by the Competent Authority. The respondents, in fact, subsequently deviated from their positive stand of holding C.O.I by filing a Supplementary Affidavit wherein they denied holding of any Court of Inquiry even though reference to

some sort of investigation through some responsible officers by making an on-the-spot enquiry to ascertain veracity of allegations pertaining to payment of bribe of Rs15000/- to the appellant was made. Such averment on behalf of the respondents in their supplementary affidavit, however, stands corroborated by PW 1, the father of the victim Babu Mondal, respondent No.7 in his deposition during SCM. Notwithstanding, it is absolutely clear from the supplementary affidavit as also oral submission of Mr. Bhattacharyya, the learned counsel for the respondents that a Court of Inquiry was held prior to the recording of summary of evidence at pre-trial stage. Mr. Bhattacharyya however, argued that production of relevant records pertaining to C.O.I proceedings is of no use since it has got no evidentiary value. Such being the legal position, Mr. Bhattacharyya submits that the records of summary of evidence have been made part of SCM proceeding and as such non-production of Court of Inquiry proceeding is immaterial.

38. We are, however of the opinion that the result of investigation by a C.O.I can be subjected to judicial scrutiny for the simple reason that during the hearing of charge under rule 22(1) of Army Rules, by the Commanding Officer the accused shall have full liberty to cross examine any witness against him and call such witnesses and make such statement as may be necessary for his defence and, therefore, in such view of the matter the Court is required to go

through the C.O.I proceedings for ascertaining compliance/non-compliance with the provisions of Rule 180 of Army Rule. However, Commanding Officer may dispense with the procedure of sub rule I of Rule 22 as per proviso of the said Rule 22(1) of Army Rules, if there was compliance with the provisions of Rule 180 during C.O.I. In such a situation the proceedings of C.O.I shall not be admissible in evidence as stipulated in Rule 182 of Army Act, but, it can very well be used for the purpose of cross-examination by the prosecution or defence. It is also contextually relevant to mention that the respondents' failure to get the complaint lodged by Babu Mondal exhibited during SCM trial appears to be a serious lacunae on the part of the prosecution since the complaint is the foundation for constituting an offence as per allegations made therein. In the absence of a complaint, the accused has been denied the right to take contradiction/corroboration from the author of the complaint i.e. the victim who allegedly made payment of Rs15,000/- for procuring enrolment in the Army Service. However, consequent upon non-production of C.O.I proceedings, this Court is also not in a position to ascertain as to whether the C.O.I was proceeded as per the complaint lodged by Babu Mondal, and Arun Singh, two Recruits who were selected on the basis of a common entrance test and also received their respective appointment letter. It has simply been alleged by both the Recruits that the issuance of despatch letters was delayed

by the appellant and his associate Sub Maj. Gurnam Singh. Be that as it may, the fact remains that the authorities did not think it fit and proper to proceed against Sub Maj Gurnam Singh, another Hav. Clk. whose name also figured during the recording of Summary of Evidence as also from the evidence tendered during S.C.M. In that context of the matter, the production of C.O.I proceedings was of supreme importance especially to ascertain what actually transpires against Sub Maj. Gurnam Singh against whom similar allegations of accepting bribe was raised and further what prompted the enquiring authorities not to proceed with the complaint of Arun Singh, another complainant. There is also nothing on record indicating the compelling circumstances which led the authorities to single out this Hav. Clk, the appellant. Such being the factual and legal position, we are of considered view that valuable right to defend himself adequately cannot be denied during SCM trial by withholding production of C.O.I proceeding before the Tribunal on various pretexts and it would invariably lead this Appellate Court to draw an adverse inference against the prosecution under Section 114, illustration (g) of I.E. Act, 1872. In this connection, we may refer to the rulings of the Hon'ble Apex Court reported in **AIR 1976 SC 1668 (Baljit Singh Vs State of Uttar Pradesh)** and **(1976) 4 S.C.C. 355 (Ishwar Singh Vs State of Uttar Pradesh).** That apart, it is well settled principle of law that whenever the material and

important witnesses intimately connected with the recruitment process as a responsible Army Officer to control and supervise the entire process of recruitment are available and their examination was insisted upon by the appellant, a duty is cast upon the prosecution to examine them. But in the present case only interested witnesses have been examined. In such compelling circumstances the Court is bound to draw an irresistible adverse presumption under section 114 (g) of the Indian Evidence Act 1872 against the prosecution for non-examination of material witnesses. It also casts reflection in the fairness of trial.

39. Considering the combined effect of all these pitfalls and shortcomings, we cannot but hold that non-production of a basic document containing allegations in the shape of the exhibit during SCM trial which, in fact, constitute an offence under 64(e) of Army Act, is sufficient to affect the credibility of the prosecution story of demanding gratification for issuance of despatch certificate. Further, the respondents' failure to get the basic document proved during SCM trial has caused a serious prejudice to the defence in conducting examination and cross-examination of the complainant as also his father and other prosecution witnesses who have come forward to depose in support of the prosecution case. It is however, not possible to ascertain what exactly was in the version of the informant at the time when

the complaint was put down in writing or whether the writing represented a genuine version given by the informant himself or was coloured by influences from other sources. The defence would be prejudiced in exercising his right of defence adequately and effectively inasmuch as corroboration/contradictions of the contents of the complainant, could not be obtained. We are, therefore, to opine that the defence has thus deliberately been denied its right to confront the informant victim on the contents of the complaint for the purpose of obtaining contradiction/corroboration of the complainant's version during cross examination of the complainant in particular and his father and neighbours etc. in general. Failure to bring on record the complaint filed by the recruit complainant in the shape of an exhibit before the SCM heavily tells upon the prosecution.

RE : Contention (c) & (d)

40. It has rightly been pointed out by Mr. Paul that non-production of a good number of documents : (1) Complaint lodged by the petitioner on 18-12-98 before the respondent No.6 regarding irregularity in the process of recruitment of candidates in the Army (2) Complaint submitted by PW 1, Babu Mandal and Arun Kumar, two recruits (3) Certain other recruitment related documents as per petition dated 10-4-99 has deprived the appellant of his reasonable opportunity to defend himself. The reason for rejection of his

prayer and thereby non-production of these documents have nowhere been explained during the S.C.M proceeding or even before this Appellate Court when the appellant filed similar petition seeking production of those documents before this Appellate Forum. By filing affidavit-in-opposition, the Respondents took the plea that since those documents were not exhibited either during recording of Summary of evidence or S.C.M, their production is not necessitated. But such plea is not legally tenable for the simple reason that Section 17 of AFT Act 2007 confers wide power upon this Appellate Tribunal also to order production of documents or exhibits connected with the proceedings of Court Martial and further to receive evidence. In exercise of such powers vested under Section 17 of the AFT Act even if the documents which have not been exhibited during the S.C.M or at the pre-trial enquiry/investigation stage can be called for, if it is connected with the proceeding before the Court Martial. Since the appellant has averred in his appeal that the prosecution refused to call for the documents as per his prayer dated 10-04-98 and in the absence of any denial in this regard in their A/O, the Respondents' resistance to such prayer before this appellate court on the plea of documents not being exhibited during SCM trial is totally unacceptable. Rather on perusal of those documents which have been withheld from judicial scrutiny this Appellate Court could have ordered the attendance of witnesses

for recording their evidence or admitting the documents to evidence or obtain reports from Court Martial to elicit truth and thus to adequately meet the ends of justice in terms of section 17 of AFT Act 2007. In such view of the matter non-production of those documents either before the S.C.M. or before this Appellate Court has undoubtedly caused a serious prejudice to the Defence case. In this context it is relevant to refer to Rule 33 to 36 of Army Rules under the heading "*Preparation for Defence by accused person".*

41. A plain reading of those rules under reference would establish that the intention of the legislature is to provide the accused full opportunity of making his defence and that is why it is stipulated in those rules that accused shall be afforded every facility for preparing his defence which is practicable having due regard to the military exigencies or the necessities of discipline. In our considered view, procedural safeguards provided to the accused for exercising the right of his defence cannot be denied to him unless its suspension is ordered by making a declaration in writing to that effect by specifying such exigencies or necessities. Therefore, we are of opinion that because of withholding of these documents as also non-examination of material witnesses, the accused has undoubtedly suffered serious prejudice at the trial in view of non-compliance with these rules as also non-production of vital documents as asked for. In such a situation, the appellate court is also not in a

position to exercise its power under Section 17 of AFT Act, 2007 to prevent miscarriage of justice in this regard.

42. In this connection it is made clear that we are not impressed by Mr. Bhattacheryya's argument that since the appellant had been afforded sufficient opportunities at different stages of enquiry/investigation, all the rules 33 to 35 of Army Rules need not be rigorously complied with for the simple reason that observance of such rules cannot be dispensed with arbitrarily during a Court Martial trial without resorting to the provisions stipulated in Rule 36 of Army Rules. These rules, therefore, can only be suspended on the ground of military exigencies or necessities of discipline. For a better appreciation of the matter under reference Rule 36 of Army Rules 1954 is quoted as under :

> "36. **Suspension of rules on the ground of military exigencies or the necessities of discipline** – *Where it appears to the officer convening a court-martial, or to the senior officer on the spot, that military exigencies, or the necessities of discipline render it impossible or inexpedient to observe any of the rules 23, 24, 33 and 34 and sub-rule (2) of rule 95, he may, by order under his hand, make a declaration to that effect specifying the nature of such exigencies or necessities, and therefore the trial or other proceedings shall be as valid as if the rule mentioned in such declaration had not been contained herein; and such declaration may be made with respect to any or all of the rules aforesaid in the case of the same court-martial.*
>
> *Provided that the accused shall have full opportunity of making his defence, and shall be afforded every facility for preparing it which is*

practicable , having due regard to the said exigencies or necessities".

43. We have very meticulously examined the S.C.M proceedings in the light of the afore-quoted rule. It has, nowhere, been mentioned that in view of military exigencies or maintaining of discipline the prayer for production of relevant documents and important material witnesses as asked for by the appellant during the SCM has been turned down. It has specifically been mandated that the convening officer or the Senior Officer on the spot "……by order under his hand, make a declaration to that effect specifying the nature of such exigencies or necessities, and thereupon the trial or other proceedings shall be as valid as if the rule mentioned in such declaration had not been contained herein…..". In the absence of such declaration, we are unable to opine that non-production of material witnesses and necessary documents is warranted in view of military exigencies or necessities of discipline. Therefore, non-compliance with rules 33 & 34 of Army Rules has caused a grave violation of statutory rules which have undoubtedly caused serious prejudice to the defence case. It is quite evident from the SCM proceedings in original that despite specific prayer made on behalf of the appellant before the S.C.M, the prosecution did not call for Director or Recruiting Officer, Zonal Recruiting Officer, Dy. Director, Branch Recruiting Office, Kolkata, Respondent No.5, the Commanding Officer who were connected with the recruitment process to

give evidence even though as material witnesses they were supposed to throw sufficient light on the veracity of allegation levelled against the appellant by PW I, Respondent No.7. Non-examination of these material witnesses has also dealt severe blow to the prosecution. In fact, the non-examination of a good number of material witnesses casts a serious doubt about the genuineness of the prosecution story. In this connection, we may refer to a ruling of the Hon'ble Apex Court reported in **(1976) 4 SCC 348 (Verghese Thomas vs State Of Kerala)** , wherein it is ruled that all the witnesses essential to the unfolding of prosecution story must be examined.

44. Against such legal and factual backdrop, the appellant's apprehension of being victimised because of highlighting certain irregularities in the process of recruitment seeking intervention from the Zonal Recruiting Authority appears to have been substantiated. Such conduct of the appellant might have prompted the Commanding Officer to nail him on the basis of purported complaint lodged by Respondent No.7. More so, whenever despite insistence by the appellant during SCM, his application was not produced before the SCM for getting the same exhibited. There is also nothing on record to indicate that the complaint of irregularities as alleged by the appellant before respondent No.4 was ever inquired into. Mr. Paul's contention, that various documents including appellant's complaint pointing out certain irregularities/illegalities in

the recruitment process have been withheld in order to deprive him of his right of defence during trial since the appellant caused annoyance to the military authorities by alleging irregularities in the recruitment process cannot be overruled in the facts and circumstances of the present case.

RE : Contention (e),(f)&(g)

45. Regarding specific allegation of bias against the officiating Commanding Officer who conducted the SCM proceeding, as raised on behalf of the appellant is to be adjudged from the surrounding circumstances and other relevant materials on record. It has specifically been averred by the appellant in Paragraph 12 of the appeal that pursuant to the purported complaint in Annexure P2 lodged by Respondent No.7, Babu Mandal, C.O.I was held by the respondent No.5 against the petitioner. Such specific allegation has, however, not been categorically denied on behalf of the respondents in their affidavit-in-opposition. In paragraph 14 of their affidavit it is stated that the C.O.I proceeding was done as per rules and the same has been finalised by the competent authority. It has also not been specifically averred within the four corners of the A/O that the Respondent No.5, i.e. Officiating Commanding Officer who held the Court Martial proceeding did not conduct the C.O.I. Rather it has emphatically been averred that the C.O.I was conducted as per rules and regulations and there is sufficient evidence available to prove the

charge against the petitioner. It is also disturbing to note that in paragraphs 3 and 4 of their supplementary affidavit filed on 11-2-2014 they have sought to introduce a different story by merely saying : 'it appears that no Court of Inquiry was held. However, the Commandant of the Unit where the appellant was attached for the disciplinary proceeding resorted to recording of evidence.' In this connection, they have annexed a typed copy of message dated 6-11-1999 (Annexure R) sent by 341 LT REGT TO ALLAHABAD SUB AREA (LEGAL CELL) HQ RECRUITING ZONE CALCUTTA KANCHARAPARA HQ BENGAL AREA (DAAG LEGAL). It was informed to the East Command (DV) through this message that "REPORT OF INVESTIGATION CARRIED OUT BY HQ BENGAL AREA AS NO C O I WAS HELD". It is pertinent to mention here that no report of investigation reportedly carried out by HQ Bengal Area has ever been filed by the respondents either during SCM trial or before this Court. In paragraph 4 of the said supplementary affidavit it is also pointed out that the proceedings of Court of Inquiry is not admissible in evidence under Rule 182 of Army Rules. The appellant, however, in his supplementary affidavit reiterated that there was a C.O.I conducted by the officiating Commanding Officer who held the SCM trial. Be that as it may, the fact remains that there is tangible evidence on record before the SCM to unequivocally suggest that there was an enquiry for ascertaining the genuineness of allegation of payment of bribe levelled against

the appellant. A team comprising of Army Officers also visited the Village of the complainant and interrogated him, his father and other neighbours to identify sources wherefrom an amount of Rs15000/- allegedly collected and subsequently paid as a bribe was made available to the appellant for payment of illegal gratification. Rule 177 of the Army Rules stipulates that a C.O.I is directed to collect evidence, and if so required to report with regard to any matter which may be referred to them. Rule 177 (3), however, provides that 'a Court of inquiry may be assembled by the Officer in command of anybody of troops, whether belonging to one or more corps'.

46. In this context it is to be noted specifically that Rule 180 of Army Rules clearly stipulates that full opportunity must be afforded 'to a person' whenever any inquiry affects the character or military reputation of a person subject to the Act. The Rule under reference also confers the right 'of cross-examining any witness whose evidence in his opinion affects the character of military reputation.' He is to be afforded the opportunity for producing any witness in defence of his character or military reputation. It is mandated in the Rule that 'The Presiding Officer of the Court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule.' True, Section 182 of Army Rules provides that proceedings of C.O.I is not

admissible in evidence, but its proviso postulates that the prosecution or defence can very well use the proceedings for the purpose of cross-examining any witness. In such view of the matter, non-production of proceedings pertaining to the C.O.I on the plea of having no evidentiary value of the same speaks volume about the Respondent No.5, especially in the context of specific allegation by the appellant that such inquiry was conducted by the Commanding Officer himself. Therefore, for ascertainment of factual position as to whether the procedure laid down in 180 of Army Rules has meticulously been followed and he was afforded enough opportunity since his character and military reputation stood affected, this appellate court is required to critically examine C.O.I proceedings to arrive at a just decision in this regard. Non-production of the C.O.I proceeding during SCM trial as also before this Appellate Court could have belied the assertion of the appellant that the SCM was conducted by an officer who actively participated at the pre-trial stage of investigation. In fact, the production of the C.O.I proceeding is essentially required for subjecting the same to a judicial scrutiny in order to judge the veracity of the appellant's serious contention as to whether the officiating Commanding Officer, played any role at the stage of pre-trial investigation whatever form of enquiry might have been adopted by the Competent Authority. In that context of the matter the Respondents' plea that the C.O.I

proceeding has got no evidentiary value is of no consequence. Rather we find much substance in Mr Paul's argument that non-production of court of enquiry proceeding despite repeated directions from this Tribunal must lead the court to draw an adverse inference against the prosecution case since it is quite evident from the facts and circumstances unfolded before the tribunal that production of court of inquiry proceeding has been deliberately withheld on various pretexts only to camouflage the specific case of bias of the officiating commanding officer against the appellant as raised from the side of the defence. In such view of the matter irresistible adverse presumption would follow against the prosecution under section 114 illust (g) of the Indian Evidence Act 1872 that the C.O.I proceeding, if produced would not have supported the prosecution case that the C.O.I was conducted as per rules and officiating commanding officer had no role to play at that stage of C.O.I or for that matter any other form of preliminary enquiry.

47. It is further argued by Mr Paul, Ld. Counsel for the appellant that the presiding officer of the SCM proceeded in a very close mind against him during the trial and that is why he was not afforded any reasonable opportunity to defend his case adequately and has, in fact, been denied to represent his right by a friend of the accused during SCM trial as conferred under Rule 129 of Army Rules. On the other hand the presiding officer of the SCM appointed an

officer to defend him ostensibly without taking the appellant into confidence, for whose benefit such friend of the accused was appointed. There is nothing on record to indicate that a list of Competent Officers was ever sent to him to exercise his choice in this regard. Moreover, all the material witnesses who were intimately connected with the process of recruitment and were present in the office premises at the time of alleged monetary transaction and were well conversant with the ongoing process of recruitment were not examined despite his prayer for such examination during SCM. In fact, no plausible explanation has also been offered justifying their non-examination. The conduct of the presiding officer of SCM is thus assailable and his impartiality in conducting SCM trial has rightly been called in question by Mr. Paul, ld. Counsel for the appellant. In this connection he refers to a ruling of the Hon'ble Apex Court reported in **2007 (12) SCC 462 (Sheel Kr. Roy vs. Secretary, Ministry of Defence and Others)** wherein it is held that fairness and reasonableness in action and proportionality in imposition of punishment, can be covered by Art. 14 of the Constitution. He further refers to another ruling of the Apex Court reported in **2012 (1) SCC 561 (Narinder Singh Arora vs State (Government of NCT of Delhi) and others**. It is observed in paragraph 6 of the Judgement that : "…. a person who tries a cause should be able to deal with the matter placed before him objectively, fairly and impartially. No one can act

in judicial capacity, if his previous conduct gives ground for believing that he cannot act in open mind or impartially. The broad principle evolved in this case is that a person trying a cause must not only act fairly, but must be able to act above suspicion of unfairness and bias'. In this context we may also refer to another ruling of Hon'ble Apex Court reported in **1987 (4) SCC 611 (Ranjit Thakur vs. Union of India).** It is held therein that after due observance of Judicial process the Court or Tribunal is to adhere to at least the minimal requirement of natural justice' and such Court or Tribunal should be "composed of impartial persons acting fairly and without bias and in good faith'. A judgement which is the result of bias or want of impartiality is a nullity and the trial 'coram non judice".

48. It is settled position of law that bias is one of the limbs of natural justice and the plea of bias is to be scrutinized on the basis of circumstances and materials on record which would show that it can create an impression in the mind of a reasonable man that there is "real likelihood of bias". It cannot be a product of one's imagination. In this context we may refer to two other recent rulings of the Hon'ble Apex Court reported in (i) (2012) 6 SCC 369 (**Chandra Kumar Choptra –vs- UOI & Ors)** and (ii) (2013) 3 SCC 1 (**State of Gujarat & Anr –vs- Justice R.N.Mehta (Retd.) & Ors**). Judging the factual scenario in the instant case in terms of the yardstick enunciated in the afore-cited judicial

pronouncements, we find that there are sufficiently strong and unrebuttable circumstances to create a reasonable apprehension in the mind of a prudent man that there is "likelihood of bias" affecting the decision in the SCM. We, therefore, feel satisfied to opine that allegations of bias as raised in this case are neither wild nor irrelevant and further that the same have not been raised to frustrate the trial. In such view of the matter, we are to opine that the test of "real likelihood of bias" has been satisfied and as such, the plea of bias against the appellant is entertainable in the facts and circumstances of the present case as analyzed hereinbefore.

Re : Contention (l)

49. Mr. Paul has also invited our attention to the mode of recording of evidence of witnesses during SCM trial which is not in conformity with the provisions of Rule 141 (2)(3) & (4) of Army Rules. It is pointed out by him that the date of recording of evidence by the Presiding Officer has not been noted after the signature of the Presiding Officer who recorded the ocular evidence of Witnesses. There is also no endorsement to the effect that the contents of the deposition sheet were read over and explained to the deponent who admitted the same to be correct. Even the signature of the deponent was also not obtained on completion of recording of evidence. According to him, such serious lapses in recording of evidence of witnesses cannot be overlooked for

the simple reason that the entire edifice of the prosecution case is structured on the testimony of the witnesses and in such a situation failure to record evidence of witness with utmost objectivity by following procedural rule would cause serious prejudice to the defence by demonstrating lack of fair play towards the defence.

50 Before considering Mr. Paul's submission regarding serious irregularities in recording of evidence during SCM trial with reference to the provisions of Army Rules it would be useful to examine the relevant sections of Cr.P.C. which makes it imperative to follow certain procedure at the time of recording of evidence during enquiries and/or criminal trial either by the Magistrate or by a Session Court. In this context we may also refer to Section 273 to 279 of Cr.PC wherein procedure for recording of evidence is laid down. It is mandated therein that evidence is to be recorded in the presence of the accused or his counsel and further that evidence of each witness as and when completed shall be read over and explained to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. Evidence so taken down shall be signed by the presiding Judge and shall form part of the record. These minimal requirements are imperative for recording of evidence in a criminal trial. The object of Section 278 Cr.PC is

to ensure that the evidence of the witness as recorded is accurate and secondly to give the witness opportunity to point out mistake if any.

51 Now, adverting to the relevant provisions of Army Rule we find that the mode of recording evidence during court martial trial in an identical manner has also been mandated in Rule 106, 107 as also in rule 141(1)(2)(3) & (4) of Army Rules. In order to appreciate the true scope and content of Rule 141(2) & (4) it would be appropriate to quote the same as under :

> "141. Mode of questioning witness – (1) ……
>
> (2) The evidence of a witness as taken down shall be read to him if he so requests before he leaves the court, and shall, if necessary, be corrected. If he makes any explanation or correction, the prosecutor and accused or counsel or the defending officer may respectively examine him respecting the same.
>
> (3)……..
>
> (4) If the evidence is not given in English and the witness does not understand that language, the evidence as recorded, shall be interpreted to him in the language in which it was given, or in a language which he understands if he so requests before he leaves the court.
>
> (5)……."

It is also contextually relevant to reproduce appropriate Notes appended to the aforequoted Rules as under :

"NOTES

1. **********

2. A witness is first examined by the person calling him, then cross-examined by the opposite party, after which he may be re-examined by the party calling him on matters raised in the cross-examination. The court should, if requested by either party, allow the cross-examination of a witness by that party to be postponed, especially, if his evidence comes as a surprise, see also AR 135 where a witness is called whose evidence is not contained in the summary of evidence. A request for postponement should not be acceded to, if, in the opinion of the court, it is made for purposes of obstruction. (Emphasis supplied)

3. When the evidence of a witness has been read to him, he should be asked whether it is correct. Any material alteration or explanation should be inserted at the end of the record of his evidence, and not by way of interlineation or erasure.

4. If the witness makes any explanation or correction, the prosecutor and accused or counsel or defending officer may respectively examine him respecting the same.

5. Under sub-rules (2) and (4) evidence of a witness is required to be read over or translated to him if he so wishes. The fact that the witness was informed of his right under the said sub-rules should be recorded in the proceedings. If he declines to have his statement read over or translated to him, the same should be recorded accordingly.

(Emphasis is ours)

6. After a witness has given his evidence every effort should be made to keep him separate from other witnesses who have not given their evidence before the Court."

Needless to mention that the object of reading over a deposition to a witness is for maintenance of an accurate record of the testimony of a witness and

accordingly he is given an opportunity of correcting the words which the Magistrate or his Stenographer may have taken down. However, there is nothing in the Section to indicate that the evidence should be read by the Court itself. At any rate, the contents of such deposition, must be made known to the deponent before he signs the same. The veracity/sanctity of deposition can invariably be called in question if the deposition sheet does not bear the signature of the witness examined by the court. In our considered opinion the failure to read over the statement of witnesses as also to obtain his signature on the deposition sheet is to vitiate in proper cases, the whole proceeding **(vide Ujagar Singh (1945)(2) Cal 198).**

52. The importance and significance of Rule 141(2)&(4) together with Notes appended thereunder in recording of evidence during court martial trial cannot be undermined in any manner whatsoever. It is contextually relevant to point out that it is held uniformly in different Rulings of the Hon'ble Apex Court that "Notes" which are inserted to supplement the relevant provisions of the Act and Rule can be acted upon provided the same are not inconsistent with and/or repugnant to the provisions of Act and Rule [vide (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)**]. In fact, the crux of the said rule read with clarificatory

Notes 3,4 & 5 appended thereunder is that the evidence of a witness as taken down is to be read over to him and, if necessary, it is to be corrected. Rule 141(3) prescribes that if the evidence is not given in English and the witness does not understand that language the evidence as recorded shall be interpreted to him in the language understood by him. Such being the essence of these two sub rules 141(2) & (4) read with relevant notes inserted thereunder we are of the considered opinion that in order to ensure their substantial compliance, there must be an endorsement, on completion of recording of evidence, at the bottom of deposition sheet to the effect that evidence so recorded is read over and explained to the deponent who admits the same to be correct as is being done in case of recording of evidence by a trial court in a criminal proceeding of the country as mandated in relevant sections of both old and new Cr.PC. Similarly, in respect of Rule 141(4) of Army Rules it is to be endorsed, at the end of deposition sheet, on completion of recording of evidence, that the evidence recorded in English is interpreted to the deponent in the language understood by him, if such interpretation to a witness is required during a criminal trial. Such endorsement under 141(2) & (4) are to be made either by the presiding officer or the designated officer/interpreter as the case may be. The provisions of afore-quoted Army Rules are intended to safeguard the interest of the accused who should know

the contents of his evidence so recorded and further the object of reading over a deposition to a witness to obtain an accurate record from the witness of what he really means to say and to give him the opportunity of correcting the words which have been recorded and, thereafter, to obtain his signature on the deposition sheet.

53. It is well settled position of law that a criminal trial is to be conducted in a fair and objective manner without giving any scope of raising any bias against the Trial Judge. In this context we may refer to a ruling of the Andhra Pradesh High Court reported in **2004 CrL.J.136 AP (Rupani Laxman & Etc. Vs State of AP).** It is observed inter alia therein as under :

> "…….The procedure to be adopted regarding the conduction of trial and recording of evidence is mentioned under section 276 Cr.P.C. The procedure that has to be followed and the method of recording that has to be adopted in session's cases has also been adumbrated in section 276 and 277 Cr.P.C. It is also stated under Section 278 of Cr.P.C. that when the evidence of each witness under Section 275 or 276 is completed it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears through pleader, and shall, if necessary, be corrected."

It is further observed – 'The Court hastily proceeded with the examination of the witnesses and the recording of the evidence also affects the trial'.

54. It is also contextually relevant to observe that after taking down evidence of each witness, as is evident from the deposition sheets of original SCM proceedings, it is parroted by the Presiding Judge as under :

" The provisions of Army Rule 141(2) and (4) are complied with".

Merely recording of the said sentence towards the end of deposition of each witness would not serve any fruitful purpose. Compliance with the mandate of the procedural rules prescribing the mode and manner of recording evidence as per Army Rule 142(2) & (4) does not necessarily mean a bald statement mechanically being repeated at the end of recording of such evidence of each witness. In our considered opinion, such faulty step would not be sufficient to ensure proper and complete compliance with the dictate and import of the procedural rules. In our considered view, without such distinct and specific endorsement as indicated in para 52 of this order there cannot be an effective and meaningful compliance as mandated in these sub rules of Rule 141 of Army Rules. If the procedural compliance is specifically indicated by making necessary endorsement thereto as per legal requirement there is hardly any scope for alleging any non-compliance in this regard. In that view of the matter, the recording officer is to endorse specifically the particular mode and manner by which the provisions of Rule 141(2)&(4) have been complied with. Merely repeating mechanically at the end of deposition of each witness in a very casual fashion that provisions of Army Rules under 141(2) & (4) have been complied with cannot and should not be treated as strict compliance with the mandates of rules under reference. In this context it is to be borne in mind that

in a criminal trial the prosecution must prove every step of its case. It is not proper and expedient to act on a presumption that requirements of law in this respect have been complied with (**vide ILR 18 CAL 129 Kachali Hari vs Queen Empress)**. Such being the settled position of law it would not be prudent and expedient to act on any presumption, if any by merely repeating that the relevant provisions of Army Rule are complied with at the end of deposition of every witness. The procedural requirements in recording of evidence in a court martial trial as per the relevant provisions of Army Rule cannot be satisfied by adopting such a dubious method.

55. In such view of the matter, we cannot but hold that such faulty recording of evidence of witnesses during SCM as pointed out earlier cannot be brushed aside lightly and serious doubt may also be cast on the reliability of evidence of PWs recorded in such a casual fashion without following the established norms of recording evidence during trial as envisaged in Rule 106, 107 & 141 of Army Rules which are, in fact based upon Section 353, 355, 356, 359 & 360 of old criminal procedure, 1898 (corresponding to section 273 to 278 of New Code of Criminal Procedure, 1973).

56. In our considered view, the procedure for recording evidence under the Heading **General Principle** is applicable in case of recording of evidence in all Court Martial proceedings which include Summary Court Martial trial, while

rules 106 and 107 of Army Rules are exclusively applicable to trial by SCM. It is well settled position of law that in a criminal trial the record of the deposition of each witness must be faithful record of what the witness states in that court. The statement of a witness should be taken in full as he deposes, otherwise the effectiveness of the cross-examination would be marred.

57. It is, therefore, mandatory and not directory to ensure compliance with the sets of rules as prescribed for recording of evidence in a Criminal Trial **(vide ILR 36 Cal.955 Jyotish Chandra Mukherjee vs. King Emperor).** In this context it is apt to refer to the observation of the Hon'ble High Court in Jyotish Chandra Mukherjee's case (supra) that the procedure in respect of the reading over of deposition as required by Section 360 of the Criminal Procedure Code cannot be disregarded and a departure in this respect "might lead to a considerable embarrassment and Place a serious impediment in the proper administration of justice…." (emphasis supplied)

It is further held by the Hon'ble High Court, Calcutta in **King Emperor vs Jogendranath Ghosh reported in 18 CWN 242** that omission to conform to the mandatory legal requirement in this respect may render the evidence inadmissible both against the accused as well as against the witness, if he prosecuted for giving false evidence. Such legal requirement in recording evidence in any criminal trial, and for that matter in a Court Martial trial cannot

be regarded as optional in defiance to the principles of criminal jurisprudence. In **Abdul Malik Vs Emperor** reported in **AIR 1926 cal 127** the Calcutta High Court held that the evidence of a witness must be read over to him, after it is completed and before the examination of another witness is started, otherwise the trial was held to be vitiated. It is importantly important to note that in view of established principles of criminal jurisprudence as enuntiated in various judicial pronouncements, the mode and manner for recording of evidence has been laid down both in criminal procedure code (old and new) as also Army Rules making it obligatory for the criminal court to adopt such procedure to ensure fair trail of the accused.

58. Against such legal backdrop we have very meticulously scrutinised the original record of SCM trial as also summary record of evidence and it appears that none of the aforementioned mandatorily required steps has been adopted at the time of recording of evidence during SCM trial. On the contrary during recording of summary of evidence at pre-trial stage the signature of the deponent together with date had duly been obtained after completion of evidence. In fact, the deponent had also signed every page of deposition sheet after putting the date of recording of summary of evidence. The recording officer has also signed the deposition sheet with all relevant particulars including his designation and the exact date of recording etc. Such

procedure, as required u/s 23 of Army Rules has, thus been complied with in toto during recording of summary of evidence in respect of all the five witnesses examined in the course of investigation. In this context we may refer to the details of Rule 23 of Army Rules as laid down in Chapter V under the Heading – **INVESTIGATION OF CHARGES AND TRIAL BY COURT MARTIAL**. Procedure for taking down the summary of evidence has been prescribed in Rule 23 of Army Rule and we have no hesitation in opining that during the recording of Summary of Evidence, the Recording Officer has strictly followed the procedure of taking down of Summary of Evidence as envisaged under Section 23(1)(2)(3) & (4) of Army Rules both in letter and spirit. Similar provisions under the heading **Section 3 in Summary Court Martial** as also **Section 4 General Provisions** have been laid down in 106 & 107 of Army Rules. It is beyond our comprehension as to why the recording of evidence during summary trial has not been done as per mandate enshrined in 141(2)&(4) of Army Rule, whereas the summary recording of evidence is quite in conformity with the legal requirement as stipulated under Rule 23 of Army Rules.

59. As a corollary to our foregoing discussion on **Contention (l)** in the light of various judicial pronouncements we find all the procedural rules of recording of witness as envisaged in Old and New Cr.PC as also Army Rules prescribe certain mandatory mode of recording of evidence during criminal/court

martial trial. Those procedural steps which are required to be followed mandatorily in terms of Rule 106, 107 & 141 as also Notes thereto are spelt out as under :-

(i) Evidence is to be recorded in the presence of accused or his counsel.

(ii) Such evidence is to be taken down usually in the form of a narrative but the presiding Judge may in his discretion, take down or cause to be taken down, the whole or any part of such evidence in the form of question answer.

(iii) The evidence so taken down shall be signed & dated by the presiding Judge and it shall form the part of the record.

(iv) On completion of recording of each witness it shall be read over and explained to the deponent who, after admitting the same to be correct, shall sign the deposition sheet and an endorsement to that effect is to be made therein.

(v) On denial of the correctness of any part of the evidence when the same is read over to him, the presiding judge may note down his objection instead of correcting the evidence with his comments.

(vi) If the record of evidence is in a language different from that in which it has been given and the witness does not understand that

language the record should be interpreted to him in the language which he understands.

Re : Contention (I) & (J)

60. Another glaring instance of violation of Rule 22 of Army Rules has been pointed out by Mr.Paul. In this context he has referred to page 80 of the SCM proceedings in original wherefrom it appears that in the relevant column 7 & 8 of the Reverse page of Appendix A to AO 24/94, order was passed as under :

"

Date of Order	Order
26-3-99	Evidence to be reduced to writing

"

61. The above proceedings under 22(1) of Army Rule were held by him in the presence of the following independent witnesses:

a) IC48639M Capt. H.S. Randhawa 1841 Light Regiment

b) 3C2573682 Sub Gain Chand 1841 Light Regiment"

A close look to the aforementioned order sheet maintained by the Commanding Officer-cum-Presiding Officer of SCM reveals that there was, in fact, no compliance with the provisions of Rule 22(1) of Army Rules, even

though it appears from Column 8 of the printed form that the above proceedings under Army Rule 22(1) were conducted by the officiating Commanding Officer, 1841 Light Regiment on 24th March, 1999. The filling up of printed form indicates sheer non-application of mind. There is no whisper within the four-corner of the printed form that the accused was heard on the question of framing of charge. In fact, there was no hearing of charge as required under rule 22(1) of Army Rules. There is no doubt that the charge against the petitioner was read out and explained to him without, however giving him any opportunity to make his submission on the question of framing of charge as mandated in rule 22(1) of Army Rules. It is palpably clear on the face of the record that the charge was framed against him without offering him reasonable opportunity of being heard. In fact, the appellant was not afforded full liberty to cross-examine any witness against him and call any witness for his defence. In Appendix A as referred to hereinabove, contents of Column 5 under the heading **"OR"** indicate that " the accused declines to make a statement", such printed version had been ticked only and in Column No.6 had simply been filled up by the Commanding Officer with the following words :

"Not produced by the accused"

In this context, we may refer to proviso to 22 – **Hearing of Charge** :

> "Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1)"

62. It is, therefore, quite evident from the afore quoted proviso that hearing on the question of charge as provided in sub-section (1) of Army Rule can only be dispensed with wherein the charge against the accused arises as a result of investigation by the Court of Inquiry wherein the provisions of rule 180 of Army Rules have been complied with in respect of the accused. It is contextually relevant to mention that regarding holding of C.O.I the respondents' attitude is ambivalent. Even though in affidavit-in-opposition the respondents categorically maintained by making averment to the effect that C.O.I was held strictly as per provisions of Army Rules, but while they were asked to cause production of C.O.I proceedings, they averred in supplementary affidavit that there was no C.O.I held in this case and also took the plea that since proceedings under C.O.I have no evidentiary value, its production before the Appellate Court is not warranted. At any rate, in the absence of compliance of Rule 180 of Army Rules during the holding of C.O.I, it is a mandatory requirement for the Commanding Officer to give a full-fledged hearing on the question of framing of charge against the accused. Appendix A at page 80 of the original SCM proceeding clearly indicates that the officiating Commanding Officer did not afford any opportunity of being heard on the

question of framing of charge. We therefore, cannot but hold that in view of withholding production of the C.O.I proceedings from judicial scrutiny, it cannot be ascertained at this stage as to whether provisions of Rule 180 of Army Rules have been complied with during the holding of C.O.I. In such view of the matter, it was incumbent on the part of the Commanding Officer to hear the accused on the question of framing of charge since there is no scope for him to dispense with the procedure as envisaged in sub Rule (1) of Rule 22 of Army Rules. We, therefore, find much substance in Mr. Paul's argument that non-compliance with Rule 22(1) of Army Rules has caused serious prejudice to the appellant and such procedural lapse also grossly violates the golden principle of natural justice.

63. It is importantly important to note that Rules 22 to 24 are mandatory in respect of every person subject to the act other than an officer. The opening words of Rule 22 clearly demonstrate the mandatory applicability of the provisions in Rule 22 and Rule 23 in case of persons subject to army act other than the officer. In this context we would like to refer Para 37 of the Judgement of the Hon'ble Apex Court reported in **(1982) 3 S.C.C. 140 (Lt. Col Prithi Pal Singh Bedi Petitioner vs. Union of India and others).** It is ruled therein as under :

> 37. "……..Now, in respect of such persons belonging to the lower category it is mandatory that Rules 22, 23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the enquiry. But when it comes to an officer, a person belonging to the upper bracket in the armed forces, the necessary presumption being that he is a highly educated, knowledgeable, intelligent person, compliance with Rules 22, 23 and 24 is not obligatory but would have to be complied with if the officer so requires it……"
>
> (Emphasis is ours)

Such being the factual and legal position, non-compliance with Rule 22 of Army Rule is fatal for the prosecution.

Re : Contention - m

64. A bare perusal of original SCM proceedings which include the proceedings pertaining to recording of summary of evidence reveals that five witnesses including Babu Mondal, the complainant, were examined at the stage of recording of summary of evidence whereas during SCM trial as many as nine witnesses were examined. There is, however, nothing on record to indicate that witnesses whose evidence was not recorded during recording of summary of evidence contained in summary trial were called for examination and cross-examination during SCM trial after serving notice upon the accused as required under Rule 135 of Army Rules which is quoted as under :

> "If the prosecutor, or, in the case of a summary court-martial, the court intends to call a witness whose evidence is not contained in any summary of evidence given to the accused, notice of the intention shall be given to the accused a reasonable time before the witness is called

> together with an abstract of his proposed evidence; and if such witness is called without such notice having been given the court shall, if the accused so desires it, either adjourn after taking the evidence of the witness, or allow the cross-examination of such witness to be postponed and the court shall inform the accused of his right to demand such adjournment or postponement." (Emphasis supplied)

It is, therefore, quite evident from the afore-quoted rule that in SCM, if the Court intends to call a witness whose evidence is not contained in any summary of evidence, notice of the intention shall be given to the accused together with an extract of his proposed evidence. The main purpose of introduction of such rule is that the accused should be given reasonable time and opportunity before the witness is called. It is stipulated further that if such witness is called without such notice having been given to him, the court shall, if the accused so desires, postpone cross-examination of such witness to ensure such reasonable time for cross-examination of the witness as may be required by the accused. After a careful scrutiny of SCM proceeding, we, however, do not find anything on record to indicate that the accused was given prior notice before examining those witnesses who were not examined at the time of recording of summary of evidence or their cross-examination was ever deferred to enable the accused to cross-examine them after a reasonable period of time. In such a situation, we are to opine that the principles of natural justice have again been blatantly violated in the SCM trial by examining those witnesses who were not examined during summary of

evidence since prior notice was not served upon the accused before such examination as per requirement of Rule 135 of Army Rule.

Re : Contention – n

65. The prosecution has sought to place much reliance on Exhibit K, wherefrom it would appear that the appellant has expressed his readiness to pay an amount of Rs14,500/- to the complainant Babu Mondal on 31st January, 1999, i.e. immediately after receiving his payment for the month of January. Pradip Srivastava, Lt. Col had endorsed that the statement in question was written by the appellant in his own hand out of his own will. Such statement was obtained from him on 29th January, 1999. According to the prosecution, Exhibit K should be treated as a confessional statement and it is sufficient to prove the guilt of the appellant. A close look to this Exhibit K reveals that the appellant wrote this exculpatory statement expressing his readiness to pay the amount in question so that his character or military reputation may not be affected. In this context the opening lines of the purported confessional statement may be reproduced as under :

> "I No.14913751M Hav Clk R K Mishra whereby write that I have wrongly blamed that I have taken a bribe of Rs14,500/- from a candidate named Babu Mandal on 03 Jan 99. But I have not taken the money from him. In order to save myself from the bad names. That might come on to me I am ready to pay an amount of Rs14,500/- to Babu Mondal, Son of Shri

> Nitya Gopal Mondal on 30 or 31 Jan 99. That is immediately after receiving my payment……..”

He has further proceeded to say that he wrote such statement out of his own volition. He also requested the DDG to get him posted out so that such blame does not come on to him again. He further added that he made that statement without any threat or pressure or inducement. It appears that such statement was given to the military officer voluntarily, but such voluntariness on the part of the appellant in giving exculpatory statement cannot, however, be a ground for treating such statement as confessional one. It is well settled position of law that a confession must either admit in terms of an offence or, at any rate, substantially all the facts which constitute the offence. In a ruling reported in **AIR 1966 SC 119 (A. Nagesia vs Bihar State)** it is ruled that “no statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed to.” There is no doubt that the appellant requested the Drawing and Disbursing Officer for draw of credit balance amounting to Rs15,000/- (Ex. L) and the receipt dated 2nd February, 1999 (Ex. M) taken from Babu Mandal, the complainant that the amount in question was received by the complainant. The contents of all these three exhibits taken together cannot be regarded as admission of guilt by the appellant, specially whenever in his written statement Exhibit K he has categorically denied acceptance of any amount of money from

the complainant and also explained the reason for paying the amount in question to Babu Mondal in a very unequivocal language that in order to save his personal reputation as also military reputation he agreed to make the payment with further request to arrange for his transfer so that he may not be blamed further unnecessarily in future. The tone and tenor of the written statement clearly suggests that out of desperation to keep his own reputation as also military reputation in tact he agreed to pay the amount. By no stretch of imagination it can be said that his readiness to pay certain amount to the complainant would conclusively prove the guilt of the appellant. Therefore, in our considered opinion the written statement of the accused indicating his commitment to pay the amount is of no consequence. These Exhibits cannot be considered as sufficiently strong document to prove the guilt of the appellant. More so, whenever such exculpatory statement cannot legally be regarded as confession to the guilt of the accused.

Point No.I is answered in the negative, while Point No.II & III are answered in the affirmative.

66. Now Point No.IV is taken up for consideration. We have observed earlier that the charge against the appellant was not heard by the officiating commanding officer as per legal requirement mandated in Rule 22 of Army Rules. The question, therefore, crops up whether statement of the particulars

of the act together with circumstances as described in the charge sheet itself constituting the offence under section 64 (e) of Army Act can be considered sufficient to enable the appellant to know the nature and character of this specific offence for which he has been charged.

67. At the outset it is to be taken into account that a charge is a written statement notifying to the accused the offence which he has allegedly committed and which he is required to meet. Therefore, the charge should be clear and specific even though it should not contain useless details. However, the charge is to be described specifically with reasonable degree of certainty and sufficient clearness what the prosecution intends to prove against him and of which he will have to clear himself. It is well settled that at the time of framing of charge, the court is not required to screen evidence or to apply the standard whether the prosecution will be able to prove the case against the accused at the trial. It has, however, been uniformly held in various judicial pronouncements that the framing of a proper charge is vital to a criminal trial and this is a matter on which the judge is to bestow the most careful attention.

68. Now keeping in mind the provisions of Rule 30 of the Army Rules, we are to examine whether the relevant particulars as described in the charge-sheet itself are sufficient for the appellant to know the exact nature of charge brought against him and further any serious errors, omissions or vagueness is

there causing serious prejudice to him or failure of justice. A close look to the charge-sheet tends to show that the statement of offence and other relevant particulars of the act constituting the offence has adequately been described in the charge-sheet. Further, it appears that certain relevant particulars as to the date, and the place of alleged offence have been properly noted and the person against whom it was committed has also been named. In fact, all material particulars have been set out together with the specific provision of law which is alleged to have been contravened has also been clearly spelt out in the charge itself. It, therefore, cannot be said that the charge is vague and it lacks relevant particulars which are essentially required for the appellant to set up his defence effectively during trial. We are, therefore, to opine that the requirements of Rule 30 of Army Rules have been satisfied. In fact, the charge under section 64(e) has been drawn up in the words of relevant section of the Army Act defining the offence. In such view of the matter we do not subscribe to the view of Mr. Paul that particulars of charge in the charge-sheet constituting the offence as alleged have not been adequately described to enable the appellant to know precisely and concisely with the matter with which he is charged. In our considered view, requirements of 30(2),(3) & (4) of Army Rules have been complied with and as such the charge framed against the appellant cannot be held to be defective or he had no idea about the exact

nature of charge brought against him or serious errors/omissions or vagueness in the charge would cause serious prejudice to him, even though as already held earlier, charge was framed against the appellant without giving him reasonable opportunity of being heard as per legal requirement as envisaged in Rule 22 of Army Rules.

Point No.IV is thus disposed of.

69. Point No.V & VI are taken up together since they are interwoven with each other.

In view of our findings on point Nos I, II & III it may appear prima facie that there is no need to proceed further and to take up point No.V for adjudication. We are, however, of the opinion that a duty is cast upon the appellate court to dissect, analyse and evaluate with utmost circumspection the evidence and other circumstances on record to arrive at a just decision in respect of sentence of RI for one year coupled with reduction in rank and dismissal of service inflicted upon the appellant. For examining the justifiability of the sentence impugned imposed upon him, this appellate court is, therefore, duty bound to record its finding on each and every point formulated for adjudication as also the merit of the appeal as a whole. In such view of the matter, we are now to take up Point No.IV for its adjudication.

Appreciation of Evidence

70. Now turning to ocular evidence on record, we find that as many as nine witnesses have been examined on behalf of the prosecution during SCM trial and three documents have been exhibited as Ex. K, L and M. It would be useful to broadly categorise the witnesses examined by the Prosecution together with their respective profile under two heads :

I **Civilians**

i) Complainant recruit, his father, the friend of the father and the father of Arun Singh, another recruit.

ii) Babu Mondal – Complainant recruit, his father viz. Nitya Gopal Mondal and his father's friend viz. Ex. Serviceman (Nk) K.C. Mondal and Bijoy Bahadur Singh – Primary School Teacher, father of another recruit Arun Singh from whom Rs25000/- was allegedly taken, have been examined as PW1, 4,3 & 5 respectively.

II **Army Officers**

The official witnesses namely Col G.K.S. Reddy of HQ Zonal Recruitment Office, Kolkata, Sub Clk Satyawan Singh, Maj. A.S. Parmar of HQ Zonal Recruitment Office, Hav. Clk Mahabir Singh of Branch Recruitment Office, Kanchrapara and Hav. Clerk

Radhakrishnan, Branch Recruiting Office, Kancharapara have been examined as PW2, 6, 7, 8 & 9 respectively.

71. The appellant's commitment to pay an amount of Rs14,500/- to Babu Mandal, the complainant Recruit dated 27-1-99 has been proved by PW2 and marked as Ex.K, while the request for draw of credit balance made by appellant has been proved by PW6 and marked as Ex. L. The receipt acknowledging acceptance of a sum of Rs14,500/- from Sub Clerk Satyawan Singh signed by Babu Mandal, PW 1 was proved by PW7 and marked as Ex M. None has been examined and no document has also been filed from the side of the defence in order to substantiate its case of denial and innocence. Before dissection of evidence and circumstances on record it is to be borne in mind that not a single eye witness has been produced to prove monetary transaction between the appellant and the complainant recruit, PW 1. The appellant had been charged under Section 64(e) of Army Act and charge sheet is reproduced below :

"The accused No.14913751M Hav/Clk RK Mishra of BRO, BRO Kachrapara att to 1841 Light Regiment, is charged with :-

Army Act Sec 64 (e) — OBTAINING FOR HIMSELF A GRATIFICATION AS A MOTIVE FOR PROCURING THE ENROLMENT OF A PERSON

In that he,

at Kachrapara, on 03 Jan 99, while working as a Clerk in the Branch Recruiting Office, Kachrapara obtained a sum of Rs14500.00 (Rupees

> Fourteen thousand and five hundred only) by demanding from Shri Babu Mondal son of Shri Nitya Gopal Mondal, a gratification as a motive for procuring enrolment of the said individual."

The onus lies upon the prosecution to prove acceptance of gratification for himself to the tune of Rs14,500/- from Babu Mandal, Complainant Recruit as a motive for procuring his enrolment.

72. It is also not disputed that there is no documentary evidence to prove that the petitioner demanded a sum as alleged by PW 1, Babu Mandal. There is also no iota of evidence to prove that the complainant lodged any written complaint either before the Police or before the competent authority alleging demand of illegal gratification amounting to Rs14,500/- from him by the appellant when he approached him for the despatch certificate immediately after such demand even though Zonal Recruitment Officer was informed by PW3 about such demand. It is importantly important to note that the petitioner was incharge of Recruitment Section dealing with the affairs of recruitment of candidates in the Army. There is also nothing on record to distinctly suggest as to how the applicant was involved in the process of enrolment of PW1 Babu Mondal in the Army.Another equally important aspect in the matter is that if the charge is accepted on its face value, the criminal culpability of respondent No.7, i.e. Babu Mondal can also naturally be established and he can be charge-sheeted for abetment and for that, the

matter was to be referred to Criminal Court as submitted by Mr.Paul. In fact, evidence on record indicates that the alleged demand of illegal gratification arises after obtaining appointment letter by the complainant. The specific grievance of the complainant is that the despatch letter was not being issued by the appellant for joining the Recruitment training. There is nothing on the face of evidence and circumstances on record to show that the appellant had any scope/authority to exercise discretion to refuse/withhold issuance of a despatch letter in question to a recruit who had already been selected through a common entrance test and appointed by the appropriate authority. Rather, it is an admitted position that Babu Mondal, the alleged bribe giver got the appointment letter and admittedly, there was no demand for illegal gratification prior to the receipt of appointment letter. Even the allegation of not obtaining despatch letter has also not been clearly proved from the evidence and circumstances on record.

73. That apart, the moot question arises as to whether the appellant in any way can be connected with the non-issuance of despatch letter as he was not the officer-in-charge of such section since he is to handle the recruitment file as a Clerk. In such a situation, the charge of procuring the enrolment of Babu Mondal after obtaining gratification of Rs14,500/- appears to be not convincing. The prosecution case is to be proved by cogent, consistent and

corroborative evidence adduced during SCM. The particulars of statement given at the time of framing of charge are to be put to a strict proof. It strains our reason to accept the contention of the Respondents that even after coming out successful in common entrance examination for enrolment in the Army and also after being duly selected and appointed as a recruit, the complainant would agree to pay illegal gratification to a mere clerk who is not the ultimate authority to withhold the issuance of despatch letter.

74. Babu Mondal, PW1 has categorically stated in his evidence that he received his appointment letter on 11th November, 1998 for his enrolment in Army asking him to report to BRO Kanchrapara. He further deposes as under :

> " On 19/20 Dec 98, I again went to BRO, Kanchrapara to request for the despatch letter. As I reached there, I saw one 'Colonel sahab' standing in front of the Verandah in uniform (later I come to know that he was Colonel P. Ramachandran, Recruiting Officer, BRO Kanchrapara). I went straight to the Colonel sahib and showed my appointment letter to him. I told him that I had come to collect my despatch certificate."

It is, therefore, abundantly clear that he approached a responsible officer, i.e. Col P. Ramachandran, BRO, Kanchrapara to get the despatch letter and we failed to understand as to how he could be misled by the appellant who is a mere clerk in the recruitment section. It further transpires that on 29th January 1998 he met his uncle K.C. Mandal, Ex-Serviceman, PW 3 at Tallygunge and told him about demand of Rs15000/- for enrolment. He also advised him not to

make any payment. It is also available from his testimony that one more candidate Arun Kumar Singh also came with his father to the Zonal Office of the DDG Recruitment to collect his despatch letter. He further deposes that the despatch letter was handed over to him on 15th February, 1999 at 2-30 p.m. by Col P. Ramachandran of Branch Recruiting Office, Kanchrapara. It appears from the testimony of Col G.K.S. Reddy, PW2 that he had come to the complainant's village on 24th January, 1999 and enquired from his father how he had managed to give Rs14,500/-. It transpires from his testimony that he had been to the village along with his team to conduct an on-the-spot inquiry. His team endeavoured to ascertain the correctness of the statement whether Babu Mandal had actually paid Rs14,500/- to the accused. Nitya Gopal Mondal, PW 4, father of Babu Mondal gave a detailed account as to how he arranged the amount in question from various sources in the last week of December, 1998. It is available from the testimony of PW2 that Nitya Gopal Mondal, arranged the amount from various sources in the last week of December, 1998 and he furnished the account statement giving the details of the exact amount obtained from different sources which can be mentioned as per following break-up :

i)Sale proceeds from 11 Kathas of land to Ananda Mondal	=	Rs2500/-
ii)Sale of 2 goats	=	Rs3500/-
iii)Loan from Ananda Mandal's wife Saraswati Biswas	=	Rs2000/-
iv)Loan from Moina Mondal	=	Rs1000/-
Total		Rs9000/-

Admittedly, the entire amount of Rs14,500/- was alleged to have been paid by Nitya Gopal Mondal to his son for payment to the appellant. Such claim of Babu Mondal stands absolutely demolished when his father gave a complete account furnishing details of the sources wherefrom such amount was collected. It is, therefore, beyond our comprehension as to how Babu Mondal can pay Rs14,500/- to the appellant as alleged whenever his father succeeded in collecting Rs9,000/- in total only. This contradiction does not appear to be a minor one which conveniently can be ignored. Rather in our considered view, it is a major contradiction which goes to the root of the prosecution case and, in fact, it has considerably shaken substratum of the prosecution case. However, Nitya Gopal Mondal, the father of the complainant has endeavoured to add one more source in his evidence as PW4 during SCM in order to

improve his version given before PW2 at the time of inquiry by adding "Household saving of Rs5500/- and thus to make the total amount to Rs14,500/-" Apart from addition of household savings by way of afterthought, he has also sought to enhance the sale proceeds received from Ananda Mandal from 2000/- to 2500/-. Thus he has attempted to show that total amount of Rs14,500/- was, in fact, collected from different sources. By doing so, he has also contradicted his son, PW1 who deposed that his father gave him Rs15,000/- and out of that amount he spent Rs500/- for purchase of his personal items. At any rate, the fact remains that his statement before the investigation team headed by PW2 stands contradicted by him in his evidence during SCM trial and that being so, PW4 does not inspire confidence in the mind of the Court. That apart, the claim of household savings by PW4 also appears to be a myth for the simple reason that on being asked by the Court PW4 stated his monthly income is Re300-400/- and it depends upon crops. In such view of the matter, we fail to comprehend as to how such household savings can be shown as Rs5500/- after maintaining a family consisting of a good number of members. In such a situation we are to opine that the credibility of both PW I, the complainant and his father PW4 has seriously been impeached.

75. The testimony of Bijoy Bahadur Singh, PW5, a School Teacher tends to show that he along with his son Arun Kumar, another recruit went to BRO. He was not allowed entry in the office of BRO as none except the candidate was allowed to enter into the premises. It is his categorical evidence that the payment demanded was Rs20,000/- for despatch to Nasik. The witness further stated that Sub Maj Gurnam Singh and the appellant were found talking in a room where his son Arun was asked to go. It was further stated by him that the appellant asked his son (Arun) to write that he had paid Rs70,000/- to Mr. Tewari for enrolment in the Army which he did not and the statement was handed over to Sub Maj Gurnam Singh. It is also interesting to note that Arun, another recruit from whom Rs20,000/- was demanded for issuance of despatch letter for his journey to Nasik was, however not examined either at the trial stage or during holding of SCM. At any rate, it is distressing to note that neither Sub Maj Gurnam Singh, nor Tewari and Arun has ever been either interrogated during recording of summary of evidence or was summoned to depose during SCM trial. No plausible explanation is also forthcoming as to why those personnel whose involvement has been suggested by several witnesses had been let off.

76. Another official witness Sub. Satyawan Singh, PW 6 deposes that PW2 and 7 visited the office for investigation and enquired something from Sub Maj

Gurnam Singh as also the appellant but other witnesses were not aware of the inquiry. The said deponent (PW6), however, further confirmed that on 28-1-99 the DDG Rectt., Calcutta came to the office and on completion of his investigation the respondent No.6 told the witnesses to prepare movement order of Sub Maj. Gurnam Singh and the appellant with 15 Rajput Regiment and 1841 Light Regiment respectively . Both of them left, but for some mysterious/oblique reason despatch attachment of Sub Maj Gurnam Singh, with 15 Rajput Regiment was withdrawn. Further, there is nothing on record to indicate as to what disciplinary action was taken against Sub Maj Gurnam Singh. Major A.S. Parmar, PW7 was asked by the appellant during cross-examination about his pay for the month of January 1999 which ought to have been handed over to him instead of giving it to PW1 Babu Mondal and further query as to whether it is the correct way to disburse his pay in this fashion. The deponent sought to prevaricate such unpleasant question during cross-examination merely feigning ignorance about the procedure to be followed for pay disbursement and passed the buck to the BRO Paying Office.

77. There are also other major discrepancies which have considerably eroded reliability of the testimony of the complainant,PW1, his father, PW4 and their co-villager, PW3 regarding monetary transaction between the appellant and the complainant. It appears from the testimony of PW1 Babu

Mondal that he along with PW3 K.C. Mondal had been to the office to pay the amount demanded by the appellant. PW3 K.C. Mandal made it clear in his deposition that he did not see the alleged amount of Rs15,000/- or Rs14,500/- which was being carried by PW1 and he had no occasion to witness the payment allegedly made to the appellant. Furthermore, strangely enough PW3 K.C. Mondal, Ex Serviceman did not even advise PW1 Babu Mondal or his father to lodge any complaint to the police as stated during cross-examination.

78. It transpires from the testimony of K.C. Mondal, Ex-Serviceman PW3 that he rang up the DDG (Rectt), Zonal Recruitment Office on 30-12-1998 to inform him about the incident relating to the demand of gratification from PW1, but the wife of DDG, picked up the phone and after being apprised of the incident, she asked him to call up on 01-01-1999 which he did and was asked by the wife of the respondent No.4 to visit the office on 4-1-1999 along with PW1 Babu Mondal. Such evidence was, however, not corroborated by PW1 Babu Mondal in his evidence at all. Strangely enough, the prosecution also did not ask the respondent No.4 and his wife to give evidence in the context of the testimony of PW4 during trial. In the absence of any contrary statement to such deposition, the unchallenged testimony of K.C. Mondal, PW3 clearly demonstrates that the said respondent No.4 had a direct link with PW3 in the matter of recruitment of candidates in the army. The respondent No.5,

however, conveniently overlooked all these aspects and as a result , the interest of justice and fair play has thus been jeopardised.

79. Regarding applicability of Sections 20, 21, 22, 25 & 28 of the Corruption Act to the SCM trial in question, as vehemently argued by Mr. Bhattacharyya, we are to opine that the relevant provisions of Corruption Act can be attracted only in such cases wherein charge is framed u/s 69 of the Army Act contrary to Sec. 7 of Corruption Act. In the present case, the appellant has been charged u/s 64(e) of the Army Act only. We fail to understand as to how and why presumption u/s 20 of Corruption Act can be drawn against the appellant at the first instance and the appellant had to rebut the sole count of charge u/s 64(e) of the Army Act brought against him whenever he is not tried u/s 7 of the Corruption Act. It is not disputed that there is no legal bar to bring the charge u/s 7 of the Corruption Act in addition to the charge framed under any other relevant and suitable section of Army Act in view of Sections 25 and 28 of the Corruption Act, as submitted by Mr. Bhattacharyya. We, however, feel constrained to opine that since the appellant was charged u/s 64(e) of Army Act only and no charge u/s 7 of Corruption Act was framed, the relevant provision of Corruption Act cannot be invoked against him during SCM trial as canvassed by Mr. Bhattacharyya. We are, therefore, unable to accept Mr. Bhattacharyya's submission on that score.

Sequence of events

80. From the sequence of events as depicted in the testimony of as many as nine witnesses and 3 Exhibits it is established and firmly established that the army authorities resorted to a very differential treatment for the appellant. While Sub Maj Gurnam Singh as also Tewari and others whose involvement also transpires in the case of another recruit Arun Singh were allowed to go scot free even though the allegations against the appellant Sub Maj Gurnam Singh and Tewari are almost identical. In fact, the course adopted by the respondent 3, 4 and 6 to impeach the appellant with the help of Col G.K.S. Reddy, PW2, as per submission of Mr. Paul appears to be unprecedented and wholly unjust, illegal, malafide and against the principles of natural justice. It is astonishing to note that there is nothing on record to indicate that Sub Major Gurnam Singh and Tewari were given clean chit during any sort of enquiry and as such they were let off. In fact, no enquiry was ever instituted against them in respect of allegation of payment of gratification as raised by another recruit Arun Singh.

81. Another most disturbing feature is that the prosecution has sought to place much reliance upon the purported commitment dated 27-1-1999 (Exhibit K) whereby he agreed to pay Rs14,500/- to the complainant. The prosecution has, however, conveniently ignored the complainant's culpability in abetting the

alleged offence in this regard. Ex. K appears to have been written by the appellant in his own handwriting and, therefore, the prosecution has taken the Exhibit K as appellant's confessional statement.

82. As already discussed earlier purported commitment (Exhibit K) expressing willingness to surrender part of his salary amounting to Rs14,500 in favour of the Respondent No.7 cannot be legally accepted as confessional statement. More so, whenever he has made it clear in his written exculpatory statement that only to save himself from bad name he intended to surrender his salary for the month of January 1999. His mental agony also reflected wherein he requested the DDG to get him posted out immediately so that such blame does not come on to him again. Rather, the appellant's sensitivity to respond to the recruit's cause comes to the fore and he appears to have been surcharged with emotive feelings because of such baseless accusation impairing his reputation in service and perhaps that is why to get rid of unfounded accusations he put forward a request for transfer to some other station. A close analysis of this commitment (Ext K) in its proper perspective leads us to opine that this documentary evidence, in fact, does not help the prosecution to establish the guilt of the appellant in any manner whatsoever. His request for draw up credit balance to Recruiting Officer, BRO, Kanchrapara,

WB (Ex. L) also is not sufficient to establish his involvement in demanding illegal gratification from Babu Mondal.

83. Having regard to evidence on record both oral and documentary coupled with surrounding circumstances and weighing them in the scale of probabilities we cannot but hold that the prosecution has failed and miserably failed to substantiate the charge of obtaining a sum of Rs14,500/- for himself as illegal gratification as a motive for procuring enrolment of Babu Mondal levelled against the appellant. The charge has thus not been proved beyond reasonable doubt and the appellant is to be acquitted of the charge u/s 64(e) of Army Act.

84. As a matter of fact, as already discussed in the foregoing paragraphs there are several procedural lapses whereby several provisions of relevant rules of Army Rules have been grossly flouted leading to violation of principles of natural justice which have undoubtedly caused serious prejudice to the appellant in making an effective defence against the charge.

85. In view of these procedural lapses of serious nature, which have caused gross violation of mandatory requirement of rules, we are to opine that, in fact, such violation of mandatory rules have made entire SCM proceeding void ab initio and such non-compliance of rules can no way be protected under

Rule 149 of Army Rules for the simple reason that such irregular procedure has caused grave and serious injustice to the appellant. We are, of the further view that the evidence in the instant case has not been properly recorded during the SCM by strictly adhering to the prescribed mode of recording of evidence as envisaged in Rule 106, 107 & 141(2)&(4) of Army Rules.

Findings

86. Viewed in the light of foregoing discussions, we cannot but hold that the procedural safeguards contemplated in Army Act and Army Rule which are required to be followed mandatorily by the Presiding Officer of Court Martial Trial in exercise of his summary jurisdiction at the Court Martial have been rudely denied to the appellant. It is abundantly clear from the materials and circumstances on record that provisions of relevant Army Rule during SCM trial have not been complied with. In this context we may refer to paragraph 11 of a Ruling of the Hon'ble Apex Court reported in **(1987) 4 SCC 611 (Ranjit Thakur – Appellant vs Union of India & Others)** which is quoted as under :

> "11. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguard envisaged by the Statute……"

It is further held in paragraph 13 of the said judgement :

> "13. We are afraid, the non-compliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings….."

87. What emerges in the instant case is that a good number of procedural rules which are mandatory in nature have not been complied with during SCM trial. We feel satisfied to hold on the basis of materials and circumstances on record which have been made available to us from the SCM proceedings produced before us in original that there was a serious non-compliance with Rule 34(1) of Army Rules and such failure to ensure strict compliance with mandatory provisions of rule has rendered the summary court martial proceeding void ab initio as has been held by the Hon'ble Apex Court in A.K. Pandey's case (supra). In our considered view such non-compliance with this mandatory requirement has caused serious prejudice to the case of the appellant. In fact, utter failure to furnish information to the appellant about his arraignment without affording 96 hours' interval has thus grossly violated the golden principles of natural justice.

88. A close scrutiny of SCM records in original reveals that the procedure as laid down in Rule 22 of Army Rules has also not been strictly followed. As per Rule 22(1) a duty is cast upon the commanding officer to hear the accused in respect of every charge which he contemplates to frame against the delinquent giving full liberty to cross examine any witness against him and call

any witness as may be necessary for his defence. Such mandatory requirement may, however, be dispensed with wherein the provisions of Rule 180 have been complied with. In the instant case there is no endorsement to the effect in the SCM case record that provisions of Rule 180 have been complied with. In the absence of any such endorsement it is obligatory on the part of the commanding officer to give an opportunity to the accused to cross-examine any witness against him or to call any witness and make such statement as necessary for his defence. As per Rule 22(1), on perusal of evidence which may be brought on record, if he was of the opinion that the evidence does not show that an offence under the Act has been committed, he shall dismiss a charge brought before him, if he is satisfied that the charge ought not to be proceeded with. In Note 4 appended to Rule 22 it has also been clarified that a commanding officer may dismiss the charge if he considers that the evidence is doubtful or the case is trivial or in the exercise of his discretion for any reason, e.g. the character of the accused. It is further clarified therein that the CO must discharge the charge, if there is no evidence of any offence under the Army Act having been committed. It is disturbing to note that the CO has proceeded to frame charge mechanically without exercising his discretionary power vested upon him under Rule 22 of Army Rule. In such view of the matter we feel constrained to hold that non-compliance of Rule 22 of Army Rule has caused a

serious prejudice to the appellant and has also cast serious doubt in respect of fairness of SCM trial.

89. Another most significantly important failure on the part of the Presiding Officer during SCM trial relates to serious procedural lapse which has undoubtedly caused irreparable damage to the prosecution case. In our considered view the mandatory provisions of Army Rule 106,107, 141(2) and (4) could not be complied with in the absence of distinct and specific endorsement to the effect that evidence so recorded is read over and explained to the deponent who admits the same to be correct. Such non-compliance with the requirement under Rule 141(2) of Army Rule is sufficient to render the evidence of all seven witnesses inadmissible and vitiate the trial. We are, therefore, to hold that mandatory legal requirement as stipulated in Army Rule 141 cannot be held to be optional in defiance to the principles of law enunciated in various judicial pronouncements and referred to in preceding paragraphs. It is highly irregular and against the rudimentary principles of criminal jurisprudence as also Army Rules framed for holding SCM trial objectively if contents of deposition are not read over and explained to the deponent and his signature is not obtained thereupon. Even common sense dictates us to hold that the reliability of evidence in a criminal trial can safely be called in question if deposition sheet does not bear the

signature of the deponent. We have already referred to the relevant provisions pertaining to recording of evidence in a criminal trial as envisaged in old and new criminal procedure code together with the appropriate provisions of Army Rules which were perhaps framed on the basis of procedural law laid down in Criminal Procedure Code 1898. In our considered view non-compliance with the mandatory provisions of Army Rule 141 has invariably dealt a severe blow to the prosecution case. In fact, non-compliance with mandatory procedure of recording evidence in terms of Rule 141 of Army Rules read with Notes 2,3 & 4 appended thereunder has caused serious prejudices to the defence and also impeded fair trial in the SCM proceeding.

90. We, therefore, cannot but hold that the essential requirements for recording of evidence as outlined in paragraph 58 of this judgement, must be followed mandatorily in a criminal trial held by court martial on the pain of trial being invalidated and/or evidence so recorded being inadmissible. More so, whenever procedural imperatives of rules 106, 107 and 141 framed under Army Act having statutory force, has the binding effect on the validity of court martial trial and admissibility of evidence.

91. On the attractibility of bias in respect of the case at hand against its factual and legal backdrop, we are to hold further that there has been “real likelihood of bias” for the simple reason that he was deliberately denied full

and reasonable opportunity of being heard. His legal right as guaranteed through several safeguards embodied in Army Act & Rules framed thereunder had thus grossly been violated at different stages of SCM proceedings and trial. It is, therefore, to be held in the present situation that the appellant was bound to be prejudiced and sufficient injustice had been caused to him. Having regard to all these relevant aspects, we cannot but accept the plea of bias.

92. It is further evident in the original SCM proceedings that at least four witnesses who were not examined during the investigation pertaining to summary of evidence at pre-trial stage were examined as PW4,5,8 & 9 during SCM trial without serving any notice upon the appellant as required under Section 135 of Army Rule. Appellant was thus taken by surprise during trial and there is no note to the effect in the original SCM proceeding that the court informed the accused of his right to demand an adjournment or postponement for cross-examination of those witnesses. It has, however, simply been endorsed mechanically in the deposition sheet of those witnesses who were examined for the first time during SCM that provisions under Rule 135 of Army Rules have been complied with. In our considered view, such recording of compliance in casual fashion is not sufficient to ensure proper compliance of the provisions of Rule 135 of the Army Rules. Rather, the Presiding officer is required to make a specific endorsement to the effect that the notice together

with an abstract of his proposed evidence was given to the accused notifying his intention to examine those witnesses whose evidence was not contained in summary of evidence. Such notice was required to be served after giving a reasonable time before the witness is called as a witness during SCM. It is accordingly held that the provisions of Rule 135 of Army Rule have also not been complied with in the present case.

93. On a close dissection of evidence both oral and documentary together with relevant circumstances on record we feel inclined to hold that the charge under section 64(e) of Army Act stands unsubstantiated against the appellant in the absence of convincing and clinching evidence during SCM trial. Accordingly, we are to hold that the prosecution has not succeeded in proving the charge under section 64(e) of Army Act against the appellant beyond reasonable doubt.

94. As a sequel to foregoing discussions and observations we are to hold that the appeal must succeed on the ground of non-compliance of mandatory provisions of Army Act and Rules since such non-compliance is violative of principles of natural justice which in the ultimate analysis renders the SCM proceeding itself void ab initio. It is further held that the evidence and circumstances on record as meticulously dissected with utmost circumspection in preceding paragraphs are also not found sufficiently strong to prove the

charge under section 64(e) of Army Act against the appellant beyond all reasonable doubt. In such view of the matter we cannot but hold that conviction and sentence impugned passed in the SCM Trial against the appellant are not legally sustainable and as such the same are liable to be set aside.

Point No.V & VI are answered in the negative accordingly.

Decision

95. In the premises, we find cogent ground to interfere with the order of conviction and sentence of reduction to rank, rigorous imprisonment for one year and dismissal from service awarded against the appellant since such conviction and sentence thereto are found to be based on improper finding without considering admissible evidence on record in its proper perspective as also factum of non-compliance with statutory rules of Army Rules. In such circumstances, we are of the considered view that there are cogent and compelling reasons to quash such perverse findings. We, therefore, cannot but hold that there is merit in the Appeal and as such S.C.M. perse needs to be set aside as also conviction and sentence impugned is liable to be set aside.

96. Before parting with this order we hope and trust that the appropriate authorities would impress upon the Presiding Officers of the Court Martial

Trial to follow the procedural rules prescribing the mode of recording of evidence during court martial trial as summarised in paragraph 59 of this order based upon the relevant rules of recording evidence enumerated in Army Rules and clarificatory 'Notes' appended thereunder, in order to ensure fair trial and to avoid disastrous consequence of trial being held void ab initio or evidence so recorded in such trial being inadmissible in future. The C.O.A.S. shall, therefore, issue suitable instructions in terms of paragraph 59 of this order to all concerned so that such violation of laid down legal procedures and rules in recording evidence during Court Martial Trial is not repeated.

97. In the result, impugned conviction holding the appellant guilty of the charge under section 64(e) of the Army Act and sentence awarding punishment of (a) reduction to the ranks (b) Rigorous imprisonment for one year and (c) dismissal from the service passed by Officiating Commanding Officer, 1841 Light Regiment in the SCM trial under challenge and promulgated on 15th April 1999 be set aside. Consequently, the appellant is found not guilty of the charge under section 64(e) of Army Act and acquitted of the said charge accordingly.

98. In view of his acquittal of the charge under Section 64(e) of Army Act, the appellant is entitled to all his service benefits as admissible under rules.

99. However, considering the long gap from the time he was convicted by the SCM, which is now set aside, physical reinstatement in service will not be practicable in a disciplined organization like the Army. At any rate, since the SCM has been set aside, the appellant would be deemed to have retired on completion of his deemed service in the rank of Havildar Clerk as entitled in that rank which he was last holding. It is, therefore, made clear that he will be entitled to all consequential retiral pensionery benefits even though no arrears of salary shall be paid to him for such notionally extended period of service.

100. In the wake of above observations in paragraph 99 of this order, necessary directions are passed as under :-

(i) The Pension sanctioning authority shall proceed to sanction pension from the date when he was due to retire in the rank of Havilder Clerk that he was last holding.

ii) Accordingly, PCDA (P) Allahabad shall issue PPO in favour of the appellant and thus ensure release of monthly pension and allied pensionery benefits as admissible under rules within 90 days from the date of communication of this order to the appropriate pension disbursing authority.

iii) The arrears of pension if any, 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 within the stipulated period of time.

iv) Direction passed in paragraph 96 shall be complied with within a period of 60 days from the date of communication of this order.

101. T.A. No.211 of 2010 thus stands allowed in part on contest with the observations and directions passed in paragraphs 96, 99 & 100 but in the facts and circumstances of the case without costs.

102. Let the Departmental files pertaining to SCM proceedings in original be returned to the respondents proper receipt.

103. 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