IN THE ARMED FORCES TRIBUNAL
(REGIONAL BENCH) KOLKATA

TA NO.46/2012

THIS 19TH DAY OF SEPTEMBER, 2014

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

Ex Hav/Skt. A.K. Maity, No.13958026W, C/o Prithi Raj Das
F.D. 420/1 Salt Lake, Kolkata

……Appellant/Petitioner

-Vs-

1. Union of India, Service through the Secretary, Defence, South Block, DHQ New Delhi - 110 011
2. Chief of Army Staff, Through Adjutant General Vigilance, AG's Branch, DHQ, New Delhi – 110 011
3. Officer-in-Charge, Record Office, Army Medical Corps, Lucknow-2
4. Col. P. Sindhe, Commanding Officer, 6 Maratha (LI) C/o 99 APO

……..Respondents

For the appellant : Mr.N.N. Adhikari, Senior Advocate
Mr. S.R. Kalkal, Advocate
Ms Ashima Roy Chowdhury, Advocate

For the respondents : Mr. Anand Bhandari, Advocate

O R D E R

Per Justice Raghunath Ray, Member (Judicial):

Preliminaries

Hav./SKT A. K. Maity originally filed a writ petition before the Hon'ble Delhi High Court being WP(C) No.7582/2007 challenging validity and legality of entire summary court martial proceedings held against him together with the order of conviction and sentence of 7th November, 2006 whereby he was awarded Rigorous Imprisonment for 8 months coupled with reduction in rank and dismissal from service. After enactment of AFT Act, 2007 , the said writ petition was transferred to the AFT, Principal Bench under operation of Sec. 34 of the Act and re-numbered as T. A. 398/2010. However, on the prayer of the petitioner, the Hon'ble Chairperson was pleased to transfer the said T.A. to this Bench since the applicant is a resident of a place falling within its territorial jurisdiction. Accordingly, T.A. 398/2010 has been registered and renumbered as T.A. 46/2012 in this Bench. Although the matter was originally filed as a writ petition under Article 226 of the Constitution, on transfer to this Bench, the same has been treated as an appeal u/s 15 of the AFT while the writ petitioner has been described as Appellant. This appeal has been heard accordingly on consent of both parties.

Factual Matrix

2. The appellant was enrolled in the Army in the year 1984 as Storekeeper Technical (SKT). At the material point of time he was posted as Havildar/SKT at 166 Military Hospital. On direction of the HQ 16 Corps, a surprise check was conducted by a Board of Officers on 18.06.2003 in the said hospital on an allegation having been received that there was misappropriation of goods belonging to the Hospital as also loss of FOL. The Board of Officers conducted the enquiry, detected certain irregularities and submitted a written report to the appropriate authority accordingly. Based on the said report of Board Of Inquiry, a Staff Court of Inquiry (in short C.O.I.) was ordered vide convening order dated 19.06.2003 (Annex.P1) with a specific direction to submit its report to HQ 16 Corps within 30th June, 2003. The report of C.O.I. was submitted as per direction.

3. Subsequently, hearing of charge under Army Rule 22 was held on 27.12.2004 by the Commanding Officer Col. V. K. H. Pingale (Annex. P3), who directed that evidence be reduced to writing. Summary of Evidence was accordingly recorded. Final charge-sheet was issued on 07.08.2006 by Col Pravin Shind, Commanding Officer 6 Maratha LI. There were in all five charges, out of which four charges are u/s.52 (f) of the Army Act (i.e. 1st, 2nd, 4th and 5th) whereas the 3rd charge was u/s 52(b) of Army Act.

4. It appears that the main charge was that while the appellant was posted to 166 MH attached to 6 Maratha Light Infantry at Jammu during the period April, 2002 to December, 2002, he being the Store Keeper Technical in-charge of Mechanical Transport Fuel, Oil and Lubricant Stores of the said hospital, with intent to defraud, generated surplus fuel by maintaining duplicate car diaries in respect of three vehicles and as in-charge of Dry Ration Stores prepared ration returns for the months of Jul to Oct 2002 based on fake vouchers showing lesser quantity of ration drawn from supply point, Satwari etc. etc.

5. The arraignment proceeding started on 17th August, 2006 and after several adjournments ultimately on 22nd August, 2006, the appellant pleaded not guilty. The proceedings, thereafter, started and witnesses were produced. There were in all seven prosecution witnesses and one defence witness. The Court found the appellant guilty of second, third, fourth and fifth charges and also of the first charge with certain variation in figures and words as originally incorporated in the said charge. Accordingly, by an order dated 07.11.2006, the accused appellant was sentenced to suffer RI for eight months in civil prison and also to be dismissed from service together with reduction in rank. An appeal under section 164(2) Army Act 1950 was preferred before the Chief of Army Staff on 17th November, 2005. Such

appeal was, however, rejected by the Chief of the Army Staff vide order dated 1st September 2007. The appellant was kept under arrest with effect from 30-6-2005 till finalization of trial by the SCM.

6. Being aggrieved and dissatisfied with the impugned order of conviction dated 7-11-2006, passed by the SCM, the appellant approached the Hon'ble Delhi High Court by filing a writ petition praying for setting asi the entire SCM proceedings as also punishment passed therein with further prayer for his reinstatement in service.

Appellant's contention

7. The appellant's main grievance is that during the COI the provision of Army Rule 180 was not complied with and the enquiry was conducted behind his back. He was asked to attend and cross-examine the witness at the fag end of proceedings which cannot be regarded as strict compliance of Rule 180.

8. His further grievance is that even though the competent authority had full knowledge of the offence allegedly committed by the appellant on 19th August, 2003, he was arraigned for SCM trial on 22nd August, 2006, i.e. beyond the period of three years. Therefore, SCM trial is barred by limitation. That apart, there was non-compliance of Rule 22 of Army Rule. It is further averred that some of the prosecution witnesses were examined

after closure of the evidence of defence witnesses. He has also alleged bias against the Commanding Officer Col P. Sindh who called such additional prosecution witnesses when he found that incriminating evidence could not be brought on record against the appellant. Such biased attitude of the Commanding Officer Col P. Sindh is further evident when the period of his military custody as per Section 169A of Army Act was not shown and set off in the SCM proceedings by the Commanding Officer, P. Sindh having full knowledge that as per Regulation for the Army 392 (k), the accused person had to be put under arrest at the time of his Court Martial. Further, he was tried by SCM by the Commanding Officer of the Unit where he was attached contravening relevant Sections 116 & 120 of Army Act read with Regulation 381 of Regulations for Army 1987.

Respondents' version :

9. The respondents have contested the appeal by filing a counter affidavit in which it is averred that he was posted at 166 Military Hospital with effect from September 2001. He was performing duties of Hav Skt in-charge of FOL in the said hospital from Aprl 2002 to Jan 2003 and was the custodian of the documents pertaining to all vehicles. It is evident from statements of PWs and other documentary evidence that he unauthorisedly and illegally maintained duplicate car diaries in respect of certain vehicles,

per details given in the charge-memo and generated surplus fuel to obtain wrongful financial gains.

10 It is also evident from the statements of PWs and other documentary evidence that while performing the duties of dry Ration NCO in-charge of 166 MH w.e.f. Aug 2002 to Jan 2003, the appellant with intention to defraud the respondents committed offences as indicated in the charge-sheet, which inter alia states that he prepared ration returns for the months of July to Oct 2002 based on fake vouchers showing lesser quantity of ration drawn from Supply point, Satwari, he omitted to take charge of certain items of rations after collecting the same himself, he also violated the established rules by not taking charge of 4000 kg of charcoal issued to the said hospital. Even assuming that he did not demand and collect the said charcoal which was done by Hav/SKT Jagdish Chander, but both were working in the same branch and, therefore, the involvement of the appellant in the misappropriation for financial gains was amply proved.

11. The summary court martial proceedings have been conducted in a fair and legal manner in which it was conclusively proved that the appellant committed the offences charged with. Therefore, retention of the appellant in service was thought to be detrimental to the discipline of the Army as a

whole and he was accordingly awarded appropriate punishments on 7.11.2006.

12. The respondents have denied all the allegations of the appellant and have submitted that the SCM proceeding was conducted fairly and according to rules. It is denied that rule 180 was not adhered to during court of inquiry. It is further stated that the CO of 6 Martha LI was competent to conduct the SCM as the appellant was attached to that unit. It is also submitted that rules regarding calling or recalling of witness vide army rule 143 and 135 were complied with. It is vehemently denied that the SCM proceeding was time barred.

13. On consideration of pleadings and respective argument advanced by both sides with reference to materials and circumstances on record in the light of relevant provisions of Army Act & Army Rules as also judicial pronouncements of the Hon'ble Apex Court and other High Courts the points for determination are formulated as under :

POINTS FOR DETERMINATION

(I) Whether the provisions contained in Rule 180 of Army Rule have been violated?

(II) Whether the provisions of Rule 22 read with Army Order 70/84 were complied with strictly at the pretrial stage of investigation?

(III) Whether tentative charges framed against the appellant were properly investigated as per requirement of Rule 22, 23 & 24 of Army Rules?

(IV) Whether plea of bias is entertainable against the Commanding Officer holding SCM for non-compliance of provisions of 169A of Army Act and Rule 135 & 143 of Army Rule?

(V) Whether the SCM in question can legally be held by the Commanding Officer of a different Unit where the appellant was ordered to be temporarily attached for disciplinary purpose?

(VI) Whether third count of charge framed against the appellant is valid in terms of Rule 42 of Army Rules?

(VII) Whether the SCM proceeding impugned is barred by limitation under Section 122 of Army Act?

(VIII) Whether 1st count of charge framed under 52(f) of the Army Act has been proved by cogent and corroborative evidence and circumstances on record against the appellant beyond all reasonable doubt?

(IX) Whether impugned findings of SCM as promulgated & reviewed by the appropriate authorities are legally sustainable?

(X) Whether 2nd, 4th and 5th charge under section 52(f) of Army Act as levelled against the appellant have been established beyond reasonable doubt?

(XI) Whether impugned order of conviction and sentence passed in SCM against the appellant are liable to be set aside and he is entitled to get an order of acquittal?

(XII) Whether the appellant is entitled to any relief consequent to this appeal Court's findings in the facts and circumstances of the present case?

Non-compliance of Rule 22 to 24 as also 180 of Army Rule

14. Point Nos I,II & III have been taken up together for the sake of convenience and discussion and brevity in treatment since the same are interlinked with each other.

15. We have very carefully taken into consideration lengthy argument advanced by Col Kalkal (Retd), learned counsel for the appellant on all these three issues with reference to materials and circumstances on record as have been made available to us in the Court of Inquiry proceedings (three volumes) placed before us in original. We have also considered forceful submission of Mr. Bhandari, Ld Counsel for the Respondents that every opportunity under Army Rule was provided to the appellant to participate in

the trial and to prove his innocence and further that the SCM was proceeded with, in strict compliance and consonance with the relevant rules of Army Rules and Army Orders etc. In this context he has referred to the ruling of the Hon'ble Apex Court reported in **(1998) 1 SCC 537 Union of India and others vs Maj A. Hussain**, wherein it is observed that proceedings before a COI are not adversarial proceedings and is also not a part of pretrial investigation. It has further been observed by the Hon'ble Apex Court that Rule 177 does not mandate that the COI must invariably be set up in each and every case prior to recording of summary of evidence or convening of Court Martial. In this context his specific contention is that there was a strict compliance of Army Rule 180 and it would be quite evident on the face of the records pertaining to COI proceedings. Provisions of 22 & 24 of Army Rule have thus duly been complied with by the respective officers at all the relevant stages which include pretrial inquiry/investigation proceedings. It is further pointed out by him that the Commanding Officer had dispensed with the calling and hearing of witnesses in terms of Rule 22(1) since the provisions of Rule 180 had duly been complied with at the Court of Inquiry.

16. Before proceeding to deal with Col Kalkal's (Retd) contention that the appellant was not afforded sufficient opportunity to cross-examine the

witnesses during COI proceedings, it would be appropriate to quote Rule 180 of Army Rule which reads as under:

> "180. Procedure when character of a person subject to the Act is involved –
>
> Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule"

17. A plain reading of the afore-quoted rule clearly indicates that COI constituted under Rule 177, although it is in the nature of a fact finding inquiry committee, the said rule gives adequate protection to the person affected at the stage of COI whenever his character or military reputation is likely to be called in question. It is obligatory on the part of COI to afford full opportunity so that nothing is done at his back and without opportunity of participation the Court Martial proceeding may suffer from serious procedural defect which may even vitiate Court Martial proceeding. In this context it would be relevant to refer to **Lt Col Prithi Pal Singh Bedi's case** reported in **AIR 1982 SC 1413** wherein it is ruled as under:

> "Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the courts of enquiry. Rule 180 cannot be construed to mean that whenever or wherever in any enquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up of a court of enquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a court of enquiry is set up and in the course of enquiry by the court of enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of court of enquiry. Court of enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons.

(Emphasis supplied)

18. It is further ruled in the afore-quoted judgement that the participation of the Army Personnel whose character or military reputation is likely to be affected by the COI, is to be ensured and he "should be afforded full opportunity so that nothing is done at his back and without opportunity of participation". It has, however, been made clear by the Hon'ble Apex Court that Rule 180 merely makes an enabling provision to ensure such participation. It has accordingly been observed as under :

> "But it cannot be used to say that whenever in any other inquiry or an inquiry before a Commanding Officer under R. 22 or a convening officer under Rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior inquiry by the Court of Inquiry is a sine qua non."

19. The next question crops up for consideration is whether the appellant is entitled to copies of statements and documents which have been

made/filed in the COI as are relevant to his prosecution or defence during SCM trial especially when the appellant's character or military reputation is affected by evidence in a Court of Inquiry as claimed on behalf of the appellant's counsel. To appreciate the issue in question in its proper perspective it would be apt to reproduce Rule 184 of Army Rules as under :

"184. **Right of certain persons to copies of statements and documents –** (1)

> Any person subject to the Act who is tried by a court-martial shall be entitled to copies of such statements and documents contained in the proceedings of a court of inquiry, as are relevant to his prosecution or defence at his trial.
>
> (2) Any person subject to the Act whose character or military reputation is affected by the evidence before a court of inquiry shall be entitled to copies of such statements and documents as have a bearing on his character or military reputation as aforesaid unless the Chief of the Army Staff for reasons recorded by him in writing, orders otherwise."

20. A close look to Sub Rule (1) of the afore-quoted rule reveals that copies of statements and documents pertaining to COI proceedings which would be found relevant to the appellant's prosecution or defence during trial are to be furnished to the appellant. It is further stipulated in Rule 184(2) that whenever character or military reputation is affected by the evidence before a court of inquiry he shall be entitled to copies of such statements and documents which have a bearing on his character and

military reputation. His entitlement can be denied only on the strength of a reasoned order recorded in writing by the Chief of the Army Staff. It is, however, argued by Mr. Ananda Bhandari, learned counsel for the respondents that the allegation of non-compliance of Army Rule 180 is misplaced as the same would be crystal clear while perusing the records of the Court of Inquiry. In the case of **Maj Gen Inderjit Kumar vs Union of India** reported in **(1997) 9 SCC 1**, the Hon'ble Apex Court is pleased to hold that there was no provision for supplying the accused with a copy of the report of Court of Inquiry. It was also held earlier in Major G.S. Sodhi's case reported in **(1991) 2 SCC** 382 that the supply of a copy of the report of Inquiry to the accused was not necessary because proceedings of the court of inquiry were in the nature of preliminary inquiry and further that rules of natural justice were not applicable during the proceedings of the court of inquiry, though adequate protection was given under Rule 180.

21. In the light of the principles of law as laid down by the Hon'ble Apex Court in the afore-mentioned rulings, we are now required to scrutinize meticulously as to whether the COI had ensured participation of the appellant in the proceeding since the character and military reputation was likely to be affected in the said proceeding and thereby affording the appellant full opportunity of cross-examining the witnesses, who were

examined during COI and also further opportunity to examine his own witnesses, if any with reference to the original COI proceedings as have been made available to us.

22. The Court of Inquiry (Volume I) evinces that as many as 33 witnesses were examined, while 23 documents (From page No.309 to 814) were exhibited. It further appears that the appellant has been examined as PW 3 while the rest 4 co-accused have also been examined as PWs 2, 4, 5 & 6. On a meticulous scrutiny of the statement of witnesses as recorded by Sree kumar S, Capt. Company Commander for Commandant it appears that the appellant has cross-examined all the witnesses examined during COI. He has also been given the opportunity to cross examine co-accused who have also been examined and cross-examined by the rest 4 co-accused. As many as 11 questions were put to him by the Court and he had replied to those queries of Court in a very detailed and straight-forward manner (pages 11 to 16). On a close scrutiny of the 1st volume (pages 1 to 276) reveals that the appellant has cross-examined PWs 1 ,2 & 4 to 33 in a very effective and meaningful manner. The appellant has even answered to additional questions put forward by the court to him as witness No.3 in a very candid manner. It is also evident from page 22 of Court of Inquiry proceeding Volume I that provisions of Rule 180 of Army Rule have also been duly invoked by the

COI. Action taken by the Court has properly been recorded in page No.22 and 23 of COI Vol.I as under :

"Action by the Court – Invoking of AR 180

62. After examination of documents produced and consideration of the statements of all the witnesses examined so far the court feels that the military character and reputation of some of the witnesses is likely to be affected. The Court therefore decides to invoke AR 180 in respect of the following –

a) Hav/SKT Jagdish Chander
b) Hav/SKT AK Maity
c) Hav/SKT C R Jagannath
d) Sep/Dvr Sanjeev Kumar
e) Maj AR Malhotra

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63. The court calls all witnesses examined so far, in turn and remind them that they are still under oath. The statements of the witnesses above were thereafter read out and each one of them was given an opportunity to cross examine all witnesses.

64. **Cross Examination of Witness No.1 : Col Sunil Mehta, SM**

65. Col. Sunil Mehta, SM was called by the court and his statement read out again in presence of all the other witnesses No.2 Hav/SKT Jagdish Chander, Witness No.3 Hav/SKT AK Maity, Witness No.4 Sep/Dvr Sanjeev Kumar and Witness No.5 Hav/SKT CR Jagannath.

66. Witness No.2 Hav/SKT Jagdish Chander Witness No.3 Hav/SKT AK Maity, Witness No.4 Sep/Dvr Sanjeev Kumar and Witness No.5 Hav/SKT CR Jagannath declined to cross examine Col Sunil Mehta, SM

Sd/-	Sd/-	Sd/-	Sd/-
No.13959731F	No.3958026W	No.13994263L	No.13968191P
Hav/SKT	Hav/SKT	Sep/Dvr	Hav/SKT
Jagdish Chander	AK Maity	Sanjeev Kuar	CR Jagannath
14 Jul 03	14 Jul 03	14 Jul 03	14 Jul 03

Sd/- Sreekumar S
Capt Company Commandant
For Commandant"

23. Against such factual backdrop we are now to consider various judicial pronouncements cited on behalf of the appellant in support of his contention that the appellant was not afforded sufficient opportunity to cross examine witnesses who were examined during COI and further that provision of Army Rules 22, 23 and 24 were not complied with. He has referred to a ruling of the Division Bench of Delhi High Court reported in **Mil LJ 2007 Del 151 (Lt Gen S.K. Dahiya vs Union of India and Others)** wherein it is ruled that Rule 180 of Army Rule is mandatory in character due to the word "must" used in the rule. Further that the COI proceedings stood vitiated on account of violation of Rule 180. He has further referred to a decision of the single bench of Delhi High Court reported in **1993 JCC 12 (Lance Dafedar Laxman Singh, Petitioner v, Union of India and**

Others). It is ruled therein that due to non-compliance of Sub Rule 3 of Rule 22 of Army Rule which is mandatory in nature, entire proceedings stands vitiated since Commanding Officer being a quasi judicial authority has failed to form his opinion as per requirement of Rule 22(3) of Army Rule. It is held that a duty is cast upon the commanding officer to form an opinion which has to be recorded in writing by assigning reasons for forming that opinion. Non-compliance of mandatory provisions of Rule 22 and 23 of Army Rules indicates non-application of mind by Commanding Officer and such violation of Rule 22 would lead to even unfair trial. In fact, the investigation which is preliminary in nature is to be conducted under Army Rule 22 which is to be strictly adhered to. Ld Counsel for the appellant has also sought to rely upon a ruling of Division Bench of Delhi High Court reported in **2008(1)SCT 461 (Lt Gen Surendra Kumar Sahni, Petitioner vs Chief of Army Staff and Others, Respondents).** It is observed inter alia therein that the provision of Rule 180 is mandatory and it casts an obligation upon the authority, not an onus upon the delinquent to ask for the protection under the rule. It is further held therein that violation of right to opportunity under Rule 180 results into prejudice to the delinquent and vitiates the proceedings itself.

24. On the question of violation of mandatory provision of Rule 22(1) we have already observed that since Army Rule 180 has been complied with in the COI in respect of the accused, calling and hearing of witnesses in terms of Army Rule 22(1) have rightly been dispensed with. It further appears that tentative charge sheet contained as many as 13 charges and Commanding Officer directed that evidence was to be reduced in writing. Accordingly, on perusal of first volume of summary of evidence it appears that as many as 15 witnesses were examined and cross-examined by the accused appellant. He also gave his defence statement and submitted names of 18 defence witnesses. However, the statement of (1) Lt. Gen (Ms) P. Arora, DGMS Navy and (2) Brig S.S. Jog (Retd) Ex Commandant, 166, MH and rest 16 defence witnesses could not be recorded as allof them forwarded their unwillingness certificates which have been exhibited as XXXXXI to XXXXXVIII. The prosecution has also got 168 documents exhibited (Exhibits 1A to 358). The recording of summary of evidence was done by Shyam Bahadur Paudyal, Major. The recording of summary of evidence started on 24th January, 2005 and concluded on 28th February 2006.

25. On consideration of evidence recorded during summary of evidence together with relevant documents so exhibited during recording of summary of evidence only 5 counts of charges were framed and 8 counts of charges

were dropped against the accused. It is, therefore, palpably clear that after recording of summary of evidence as per procedure for taking down the summary of evidence as envisaged in Rule 23, the summary of evidence so recorded was duly considered by the commanding officer as mandated in Rule 24 of Army Rule and, thereafter, he assembled the summary court martial as required under Rule 24(2) of Army Act. A charge-sheet containing 5 counts of charges was also duly served upon the appellant. It is, therefore quite evident that Rule 22, 23 and 24 have strictly been complied with. In such view of the matter rulings cited on behalf of the appellant are neither relevant, nor applicable to the facts & circumstances of the present case.

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

Plea of bias –
Point No.IV

26. Col Kalkal (Retd), learned counsel for the appellant has strenuously assailed examination of Sub/SKT RKR Kushwasha of 526 ASC Bn (Supply point, Satwari) and Sub/SKT R.D. Jakhar of 166 MH as PWs 5 & 6 respectively after closure of prosecution case as also recording of defence statement of appellant on 26th October, 2006. It is forcefully argued by him

that when the prosecution did not find any evidence worth the name against the appellant it was decided by the prosecution to call fresh prosecution witness to depose against him ostensibly under Rule 143 of Army Rules. Such malafide steps were taken by the Commanding Officer who conducted the summary court martial trial and it displays patently biased and revengeful attitude of the commanding officer with a sinister design to secure conviction of the appellant through unlawful means. Mr. Kalkal invited our attention to the relevant averments made in Paragraph 9 of the appeal wherein such a serious allegation of patently biased and revengeful attitude of the Commanding Officer has specifically been raised by the appellant. It is further submitted by him that the Commanding Officer deliberately violated the provisions of 169 and 169A of Army Act with an ulterior motive to cause serious hardship to him vengefully. It is pointed out by him that the provision of Regulation 392(k) of Regulation for the Army provides that before the commencement of the Court Martial Trial the accused will be placed under close arrest and during the course of his trial he will remain under close arrest. According to him, he was under arrest, but the commanding officer who conducted the trial had shown the appellant under arrest as NIL days, which is totally a false statement made by him. In this context he refers to an affidavit of the friend of the appellant during trial

who attended the SCM proceedings and saw the appellant under arrest and an affidavit was affirmed by him to that effect accordingly (Annexure P4). Ld counsel has also drawn our attention to a copy of Guard Register (Annexure P7), wherefrom it appears that the appellant was under arrest with effect from 30th June 2005 till finalization of trial by summary court martial. According to him, the Commanding Officer deliberately withheld the specific information in respect of days spent by the appellant in the military custody during inquiry/trial of the case and passed an order directing appellant's lodgement to Civil prison unnecessarily to deprive him the benefit of set off against the imprisonment. According to the learned counsel for the appellant, the conduct of the commanding officer who held the court patently displayed a biased attitude towards the appellant, which caused serious prejudice to him. It is forcefully submitted by him that the appellant has thus been denied fair trial. According to Maj.Kalkal (Retd), such biased attitude of the commanding officer, in fact, has vitiated the entire SCM trial. In this context he has referred to a Ruling of the Hon'ble Apex Court reported in **1988(1)SLR 61(Ranjit Thakur v Union of India and Ors)** and also another recent Ruling of the Hon'ble Apex Court passed in **2014(1) SCT 281(Union of India and Others vs Sanjoy Jethi and another).** He further refers to another ruling of the Dvn Bench of Delhi

High Court reported in **2004(1) SCT 191(Deshraj Sanowal vs UOI and others).** Relying upon all these Judicial pronouncements it is vehemently argued by him that the circumstances depicted in the averments of the appeal clearly establish that the SCM trial, if considered in its proper perspective, would certainly indicate a likelihood of bias which has, in fact, vitiated the entire SCM proceedings since all these facts and circumstances as pointed out by him taken together demonstrate bias on the part of the commanding officer who conducted the SCM trial. By referring to another ruling of the Hon'ble Apex Court reported in **2008(15)**S**CC 306 (Rajiv Arora vs Union of India & Oths)** it is forcefully argued by him that no explanation whatsoever has ever been offered on behalf of the prosecution as to the circumstances which necessitated examination of prosecution witnesses even after closure of prosecution case and disclosure of defence case through the statement of accused. According to him, principles of natural justice have grossly been violated since basic principles of law that the prosecution should not be allowed to fill up the lacunae of its case after disclosure of defence case has strictly been flouted. In view of non-compliance of basic principles of law there has been a gross violation of principles of natural justice. Such examination of prosecution witnesses after closure of defence case has caused a serious prejudice to the defence.

27. It is contended by him that it would be quite evident from the SCM proceedings itself that the appellant was never shown arrested at any point of time during SCM trial and as such his detention in Military custody could not be set off from the term of imprisonment as per requirement of Section 169A of Army Act. According to Mr. Bhandari, ld. Counsel for the Respondents, the individual was not kept under arrest and he was allowed to avail leave/AL/CL and was also allowed to draw pay and allowances during his attachment with 6 Maratha LI. He further contends that Col VKH Pingale conducted the hearing of charges in respect of the appellant while summary court martial trial was held by Col Pravin Sindh since he was handed over the command of the unit from Col VKH Pingale. The Commanding Officer has thus proceeded against the delinquent strictly in accordance with the relevant provisions of Army Act and Rules and further no biased attitude of the Commanding Officer has been established against the appellant.

28. Mr. Bhandari, learned counsel for the respondents relying upon affidavit-in-opposition, submits that SCM proceedings have been conducted in a fair and legal manner. It is further submitted by him that Witness Nos 5,6 & 7 were examined after invoking Rule 143 of Army Rule and after intimating the accused about examination of above prosecution of witnesses

in terms of Rule 143 of Army Rule. It is, therefore, incorrect to say that Col P. Sindh had in any manner misused his power to cause prejudice to the petitioner. Rather, after examining PWs 5,6 & 7, the Court granted an opportunity to the petitioner to make additional statement or to produce any witness in his defence. The petitioner, however, declined to make any additional statement or to produce any defence witness. It is, therefore, argued by him that in such a situation no prejudice has been caused to the petitioner in any manner.

29. In order to appreciate the rival contentions of the parties regarding recalling of one witness PW 5 who was examined during recording of summary of evidence and summoning of two other witnesses who were not examined earlier, it is necessary to reproduce Rule 143 of Army Rule which reads as under :

> "143. **Re-calling of witnesses and calling of witnesses in reply** – (1)At the request of the prosecutor or of the accused, witness may, by leave of the court, be recalled at any time before the closing address of or on behalf of the accused (or at a summary court-martial at any time before the finding of the court) for the purpose of having any question put to him through the presiding officer, the judge-advocate (if any), or the officer holding the trial.
> (2) The Court may, if it considers it expedient, in the interests of justice, so to do, allow a witness to be called or recalled by the prosecutor, before the closing address of or on behalf of the accused for the purpose of rebutting any material statement made by a witness for the defence or for the purpose of giving evidence on any new matter which the prosecutor could not reasonably have foreseen."

30. There is, however, a specific provision laid down in Rule 135 of Army Rule for calling a witness whose evidence is not contained in summary of evidence. It is specified therein that if the prosecutor or the court intends to call a witness whose evidence is not contained in the summary 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 the proposed evidence. Further, if such witness is called without notice, 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.

31. A close look to Rules 143 and 135 reveals that they are analogous to section 311 Cr.P.C read with 165 of Indian Evidence Act.The object underlying those sections of 311 of Cr. P.C and 165 of Indian Evidence Act and as also the afore-quoted rules 143 and 135 is that there may not be a failure of justice on account of mistake of either party in bringing the valuable evidence on record or clearing ambiguity in the statement of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case [vide **(2006) 3 SCC 374; Zahira H.S. & Anr, Appellant v State of Gujarat & Ors**].There is no doubt that

the right of re-examination of a witness as envisaged in Section 137 read with 138 of Evidence Act as also the relevant rules of the Army Rules arises only after conclusion of cross-examination and is directed to be explanatory on any point of his evidence during cross-examination which is capable of being construed unfavourably to the party applying for cross-examination. The object is to give an opportunity to reconcile the discrepancies of the statements in examination-in-chief and cross-examination or to explain any statement inadvertently made in cross-examination or to remove any ambiguity in the deposition. However, where there is no ambiguity or where there is nothing to explain, the question put in reexamination with the sole object of giving a chance to the witness to undo the effect of previous statement cannot be permitted.

32. The scope of recalling a witness for reexamination-in-chief is, however, distinct. Under ordinary circumstances, it is neither necessary nor permissible to allow a witness once examined and discharged by a party to be recalled. Unforseen situation may, however, develop and there may also be inadvertent omission. It is, however, settled position of law that in the absence of proper application by either of the parties witnesses cannot be examined either under Rule 143 or Rule 145 as the case may be after prosecution evidence is closed. It is obvious that the prosecution having

failed to give proper explanation for non-production of as many as three witnesses prior to closure of prosecution case, the court cannot and should call or recall any witness as per Rule 135 or Rule 143 and such move by the SCM is highly irregular and as such, because of such unwarranted summoning of witnesses by the SCM, the appellant has sought to raise bias against the Commanding Officer. More so, whenever none of them has been examined as a Court witness. In this context it would be useful to scrutinize the content and import of sub rule 2 of Rule 143 which empowers the court to exercise its discretion only in a case where the court would consider it to be expedient to examine/reexamine any witness as summoned or recalled in the interest of justice and that too before closing address on behalf of the accused for the purpose of rebutting a material statement made by a witness for the defence or for the purpose of giving evidence on any new matter which the prosecutor would not reasonably have foreseen. It is, however, well settled position of law that the prosecution cannot be allowed to fill up the lacunae of its case as to cause injustice to the accused.

33. On a meticulous scrutiny of the entire SCM proceedings in original as have been produced before us on behalf of the respondents we feel disappointed to observe that there is nothing on record to indicate that the prosecution has ever at least filed any petition justifying

examination/reexamination of witnesses even after closure of prosecution case and recording of accused statement. It is, therefore, palpably clear from the materials on record that the SCM which constitutes the commanding officer as the sole judge has never considered as to whether calling or recalling of three witnesses and examining them as prosecution witnesses is essentially required in the interest of justice as stipulated in Rule 143(2) of Army Rule. We, therefore, find sufficient justification in the appellant's apprehension that witnesses have been examined/reexamined after closure of prosecution case and disclosure of defence case so that serious lacunae in the prosecution case can be filled up and the conviction of the appellant is secured by demolishing his defence in such a crude manner. We are, therefore, of the considered view that the SCM has committed a grave error in allowing the prosecution to examine/reexamine prosecution witness despite protest from the defence in order to prove certain facts and circumstances which should have been established by the prosecution prior to closure of its case. There is no doubt that Rule 143 confers wide discretionary power upon the courts for calling and recalling of witnesses even after close of the prosecution case. It is, however, to be borne in mind that such wide discretionary power conferred upon the court is to be exercised judiciously as the wider is the power the greater is the necessity

for application of judicial mind vide (**2008) 3 SCC 602 Himangshu Singh Sabarwal – Petitioner vs State of MP & Ors).**

34. In the instant case we feel constrained to opine that the Commanding Officer has exercised his discretion in a routine and cavalier manner without assigning any reason or considering the relevant materials on record justifying calling or recalling of witnesses. The Commanding Officer has miserably failed to apply his judicious mind as to whether calling or recalling three witnesses after closure of the prosecution case is absolutely justified in arriving at a just decision in the case before him but the same cannot be a ground to form reasonable apprehension of personal bias on the part of the commanding officer against the appellant.

35. As already indicated earlier, the prosecution has not even cared to file any petition before the SCM indicating justifiability of examining those three witnesses after close of the prosecution case. These witnesses have, however, not been examined as court witnesses. They have simply been examined as prosecution witnesses. There is also nothing on record to suggest that any order indicating exercise of power under 143 either suo motu by the court or at the instance of the prosecution has even been passed during the SCM trial. In such a disturbing situation, it would be dangerous to allow SCM to exercise its power to fill up lacunae in the prosecution case

instead of securing justice in exceptional cases where calling or recalling of witnesses becomes an absolute necessity to arrive at a just decision of the case. True, Section 143 is couched in such a language that in a summary court martial such power of calling/recalling of witness can be exercised at any time before the finding of the court. In fact, post argument and pre judgement stage forms part of trial and trial would stand terminated only on pronouncement of judgement either acquitting accused or awarding sentence after conviction. In such view of the matter in a SCM trial witnesses can be summoned or recalled by the Presiding Judge of SCM even prior to recording of its finding.

36. In fact, the question whether the prosecution was sustainable or the conviction was rightly made has to be examined eschewing all together the evidence furnished by those three witnesses who were also examined by the prosecution after close of prosecution case as also recording of accused statement. Importantly, the right of accused to give statement or evidence to prove his innocence not only flows from the principles of natural justice which are now held to be a part of Articles 14 and 21 of Constitution of India, but also made the part and parcel of the relevant provisions of Army Act and Army Rules which equally guaranteed or safeguarded the right of the accused to defend himself properly and adequately in an unhindered

manner during a criminal trial. In fact, to deprive the accused of such a right would be tantamount to violation of his fundamental rights.

37. Keeping that important aspect in view we are now to judge the allegation of bias against the Commanding Officer, who presided over the SCM as raised on behalf of the appellant. We have already observed in preceding paragraphs that the commanding officer as presiding judge of SCM has exercised his power of calling and recalling witnesses arbitrarily without adhering to the mandate of Rule 143 (2) of Army Rule and such move by the commanding officer in contravention to such prescribed rule is likely to cause a serious prejudice to the appellant in defending his case effectively.

38. Despite all these, it is also equally important to note that it is a settled position of law that the Criminal Court is empowered to summon any person as a witness or recall any witness even after the close of the prosecution evidence provided the accused is afforded reasonable opportunity to rebut such evidence. Judging by the same yardstick it can safely be said that even if the evidence on both sides is closed, the SCM has ample power in terms of Rule 143 of Army Rule to summon any person as a witness or recall and re-examine any person. However, the jurisdiction of the court must be dictated by the exigencies of the situation and fair play would be the only

safeguards to satisfy the requirements of justice. The examination/re-examination of such persons as witnesses would, in fact, depend upon the facts and circumstances of each case. It is to be borne in mind that whenever any additional evidence is brought on record and fresh evidence is admitted against the accused it is absolutely necessary in the interest of justice that the accused should be afforded a fair and reasonable opportunity to confront such evidence. Reference can be made to a ruling of the Hon'ble Apex Court reported in **(2006) 7 SCC 529 (UT of Dadra & Nagar Haveli and another v Fatehsinh Mohansinh Chauhan)** wherein it is ruled that summoning a witness after defence evidence has been recorded cannot be dubbed as filling in a lacunae in the prosecution case unless serious prejudice is shown to have been caused to the accused. It is undoubtedly duty of the prosecution to lay before the court all material evidence available to it which is necessary for unfolding its case but it would be unsound to lay down a general rule that prosecution would be permitted to call or recall witnesses even after closure of prosecution and defence case. In the case of **Tahir vs State of UP** reported in **2000 All LJ 416** it is held that witnesses should be recalled for further cross-examination under 311 of the Cr. P.C. on the facts stated by them in affidavit filed subsequent to their statements recorded in court at the request of the accused. Be that as it may,

the fact remains that the court/SCM has plenary power to summon or recall any witness at any stage under Rule 143 Army Rule, if there exists of justifiable reasons to do so in the interest of justice. It is, however, settled position of law that the court should act with circumspection and exercise such powers sparingly.

39. In the present case despite all these constraints suffered by the appellant during SCM trial, he has, however, been afforded an opportunity to cross examine all the three witnesses who were summoned/examined on recall after close of the prosecution case and recording of the defence statement. PW 5 has been cross examined while the cross examination of PW 6 has been declined. PW 7 has, however, been cross examined on behalf of the accused. In such view of the matter it can safely be concluded that examination of these witnesses even after close of prosecution case and recording of accused statement has not caused any serious prejudice to the appellant and as such we are unable to accept Mr Kalkal's contention that the Commanding Officer being biased allowed recalling of PW 6 and summoning of other two witnesses who were not examined during summary of evidence and such unwarranted action on his part has vitiated the entire SCM proceedings.

Competence of Commanding Officer to conduct SCM – Point No.V

40. It is contended by Mr. Bhandari that the appellant was attached to 6 Maratha LI vide HQ 16 Core letter No.2701/26/DA3 dated 20-11-2004, Hq 29 Infantry Dn. Signal No.0A1460 dated 20-11-2004 and Hq 9 Core letter No.2702/3/DV dated 3-5-2006 for disciplinary grounds/purpose. In this context he also draws this Court's attention to para 11(d) of Affidavit-in-Opposition wherein it is averred that the petitioner's attachment with 6 Maratha LI for disciplinary purpose cannot now be challenged since Note 5 to Section 120 of Army Act stands deleted vide GOI Ministry of Defence letter No.B/80328/Jag/1965/200-D(AG) dated 28-8-2001. Mr Bhandari further seeks to rely upon Army Order No.7/2000. It is further argued by him that the trial of the appellant who was attached to 6 Maratha LI commenced on 17-8-2006 and was concluded after awarding sentence of imprisonment and dismissal from service together with reduction in rank against the appellant on 7-11-2006 which was promulgated on the same day. In this context we may refer to a recent ruling of Hon'ble Apex Court reported in **2012 (10) Scale 583 = 2012 (10) JT 578 (Union of India and Others, Appellants vs Dinesh Prasad, Respondent)** wherein in paragraph 17 of the said judgement it is observed as under:

> "17……Section 116 of the Army Act rather provides that a summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army and he shall alone constitute the court (summary court-martial). If the provision contained in Section 116 of the Army Act is read with Rules 31 and 39 of the Army Rules, there remains no manner of doubt that Col.A.S. Sehrawat, who was commanding officer of the respondent, did not suffer from any disability, ineligibility or disqualification to serve on the summary court-martial to try the respondent despite the fact that he signed and issued the charge sheet against the respondent."
>
> (Emphasis supplied)

Such being the legal position, we are of the considered view that the SCM in question in the instant case has legally been held by the Commanding Officer of a different unit where the appellant was ordered to be temporarily attached for disciplinary purpose in terms of Army Order No.7/2000.

Limitation –
Point No.VII.

41. It is vehemently argued by Mr. Kalkal, learned counsel for the appellant that the instant SCM trial is barred by limitation. It is pointed out by him that the findings of Court of Inquiry were placed on 19-08-2003 before GOC, 16 Core, the competent authority who is authorized to take disciplinary action against the delinquent officer. In this connection he has referred to Annexure P1 to the appeal wherefrom it appears that GOC endorsed the minutes sheet by putting his initial on 19-8-2003 when the gist of Court of Inquiry was placed by the Commanding Officer before him

through COS for their perusal. According to him, since the gist of Court of Inquiry was placed before the GOC, 16 Core on 19th August 2003, the date of knowledge of the disciplinary authority should be legally presumed to be 19th August, 2003 in terms of section 122(b) of Army Act. It is further pointed out by him that the SCM reassembled on 22nd August 2006 and explained the charges to the appellant who was asked to plead guilty or not guilty of each charge separately after overruling all his objections including lack of jurisdiction to try the alleged offender on the ground of limitation. It is therefore, forcefully argued by him that GOC 16 Core (authority competent to initiate disciplinary action) had the knowledge of commission of alleged offences by the appellant on 19th August 2003 and the trial of SCM commenced on 22nd August 2006 when all the five counts of charges were explained to the appellant who pleaded not guilty to all the five counts of charges separately after his arraignment. In this connection Mr. Kalkal has referred to a ruling of the Hon'ble Apex Court reported in **Mil LJ 2012 SC 40 = AIR 2012 SC 935 (Rajvir Singh, Appellant vs Secretary Ministry of Defence and others**) and another ruling of Madhya Pradesh High Court reported in **Mil LJ 2004 MP 179 (Union of India and Others vs Maj P.V. Panduram)** in support of his contention.

42. Such submission of Mr.Kalkal is strongly disputed by Mr.Bhandari, the learned counsel for the respondents. By referring to the charge sheet (Ext B-2) which was served upon the appellant well in advance he submits that it is clearly recited at the outset of every count of charge that commission of alleged offences came to the knowledge of Authority competent to initiate action on 29th August, 2003. Further, it would be quite evident from the directions of GOC, 16 Core passed on the findings of Court of Inquiry (Exhibit 10 series) that GOC, the disciplinary authority became fully aware of various irregularities taking place in QM Department allegedly committed by the appellant and other accused. The GOC directed to take disciplinary action against the appellant and 5 others on 29th August 2003. Mr, Bhandari further submits that the SCM assembled on 17th August 2006 for arraignment of the appellant and charge sheet was explained to the appellant. Therefore, it is submitted by him that the trial commences within 3 years from the date of knowledge of the competent authority and as such trial is not barred by limitation. It is further submitted by him that Annexure P1 referred to by the appellant does not evince that the disciplinary authority had knowledge about the commission of alleged offence since the same was not final and had been returned for certain corrections and it was only after receipt of the corrected COI that the same could be treated as

coming within the knowledge of the competent authority. According to him, the receipt of erroneous COI report, before the same was set at right, could not lead to knowledge of the same by the authority concerned.

43. We have very carefully taken into consideration rival contentions of the parties with reference to the record of pretrial investigation/inquiry proceedings together with SCM proceedings in original to find out as to what was the exact date of knowledge of the disciplinary authority, i.e. GOC of 16 Core as also the date of commencement of trial. Ld counsel for the appellant has sought to rely upon Rajbir Singh's case (supra) to substantiate his submission that the instant SCM trial is barred by limitation. On perusal of the afore-cited decision of the Apex Court we find that the Hon'ble Apex Court has been pleased to hold that commencement of the period of limitation for trial before court martial, starts from the date of knowledge of commission of the alleged offence and the identity of the offender. As per Section 122 of Army Act when the disciplinary authority directed that the disciplinary action against the delinquent officer be initiated for the misdemeanor as mentioned in the written order of the GOC-in-C in the case before the Hon'ble Apex Court. It is accordingly observed in para 22 of the afore-cited judgement by the Hon'ble Apex Court as under :

> "22. ……..So far as the culpability of the appellant is concerned, he had already formed the opinion on the basis of the report of the Court of inquiry and the recommendations of the GOC MB……"

Here, 'he' refers to GOC-in-C, the Disciplinary Authority. It is, therefore, abundantly clear that the disciplinary authority is to form an opinion about the culpability of the delinquent officer and to pass a written order on the basis of report of COI and recommendation of the Commanding Officer. The date of passing such order by the disciplinary authority would, therefore, be the date of knowledge of commission of alleged offence by the wrongdoer and the identity of the alleged offender is also to be established simultaneously . It is further held therein that the starting point of limitation would be from the date of order of the disciplinary authority. Such being the legal position enunciated in the aforecited ruling of the Hon'ble Apex Court sought to be relied upon by Mr. Kalkal, appellant's contention that as soon as the report of COI together with its recommendation is put up before the GOC 16 Core for his perusal, his knowledge about commission of alleged offence as also identity of alleged offender would accrue does not find any support from the aforecited decision of the Hon'ble Apex Court. It is also importantly important to note that a duty is cast upon the disciplinary authority to satisfy himself that the case is a proper one for initiation of disciplinary proceeding against the

delinquent officer whose culpability has been established prima facie and further the identity of the offender has also been established. Such order directing initiation of disciplinary proceeding against the delinquent officer cannot be passed mechanically without application of mind. It cannot, therefore, be said that simply on the basis of information, which may be general in nature, the authority is supposed to jump into the conclusion and decide the justification of disciplinary action. The decision of the Division Bench of the Madhya Pradesh High Court reported in Mil LJ 2004 MP 179 as referred to by him is also of no help to him since it was held therein that the competent authority on receipt of COI report got the GCM assembled within the span of 3 years from the date of knowledge and, therefore, it was within the period of limitation. It has further been made clear therein in unequivocal term that the period of limitation commences from the date of direction given on the findings of COI on perusal of investigation report and as such the date of knowledge and date of identification was absolutely patent. Now turning to other important rulings on the point at issue, we are to refer to a ruling of the Hon'ble Apex Court reported in **AIR 2010 SC 3116 (Union of India and Others vs V.N. Singh)**. In the afore-mentioned Judgement while analyzing scope and purview Section 122 of Army Act 1950 which prescribes period of limitation for trial by court martial of any person subject

to the provisions of Army Act for any offence committed by him, it is held by the Hon'ble Apex Court in para 6 of the judgement as under:

> "6. ……..A fair reading of the abovementioned Section makes it clear that after the expiry of the period of limitation, the Court-Martial will ordinarily have no jurisdiction to try the case. The purpose of section 122 is that in a civilized society a person should not live, for the rest of his natural life, under a Sword of Damocles and the prosecution be allowed to rake up any skeleton from any cupboard at any time when the accused may have no further materials, oral or documentary, to prove that the skeleton is not from his cupboard. If the device is left open to the prosecution to convene a Court-Martial at its leisure and convenience, Section 122 will lose all significance. Section 122 is a complete Code in itself so far as the period of limitation is concerned for not only it provides in sub-section (1) the period of limitation for such trials but specifies in sub-section (2) thereof, the offences in respect of which the limitation clause would not apply. Since the Section is in absolute terms and no provision has been made under the Act for extension of time, it is obvious that any trial commenced after the period of limitation will be patently illegal. The question of limitation to be determined under Section 122 of the Act is not purely a question of law. It is a mixed question of fact and law and, therefore, in exercise of Writ Jurisdiction under Article 226 of the Constitution, ordinarily the High Court will not interfere with the findings of Court-Martial on question of limitation decided under Section 122 of the Army Act."
>
> (Emphasis supplied)

It is further held in concluding lines of para 7 of the aforequoted ruling as under:

> "7……On the facts and circumstances of the case this Court finds that the period of limitation for the purpose of trial of the respondent commenced on December 3, 1994 when the GOC-in-C Western Command, being the competent authority directed disciplinary action against the respondent in terms of Section 122(1)(b) of the Army Act. The period of three years from the direction dated December 3, 1994 would expire on December 2, 1997, whereas the GCM commenced

> the trial against the respondent on December 17, 1996 which was well within the period of limitation of three years. Therefore, the impugned Judgement is legally unsustainable and will have to be set aside."

(Emphasis is ours)

It is held therein that as per section 122 of Army Act starting point of limitation in Court Martial is the date of knowledge of authority competent to initiate disciplinary action. On facts it appears that, as disciplinary action against delinquent was directed on 3-12-1994 and court martial started in December 1996, it was held by the Hon'ble Apex Court in the case before the Hon'ble Apex Court that it is within limitation. It is contended by the ld counsel for the appellant that the date of knowledge would accrue as soon as the court of inquiry report would be placed before the Competent Authority and as such it would be presumed in the instant case that the disciplinary authority had knowledge of commission of alleged offence by the appellant. Such contention, however, does not find any support from the afore-cited ruling. Rather it has clearly been held therein that the starting point of limitation would be the direction of the competent authority to take disciplinary action against the delinquent and the commencement of trial would be the date court martial started and not obviously the date. When the accused would plead guilty or not guilty as submitted on behalf of the appellant. We may also refer to another Ruling of the Hon'ble Apex Court

passed in Maj Gen Madan Lal Yadav's case reported in **(1996) 4 SCC 127** wherein it is held that trial commences when GCM assembles and examination of charge is undertaken and not the oath is administered to the members etc. In that context of the matter it would be apt to quote para 19 of the aforementioned judgement which reads as under:

> "19. It would, therefore, be clear that trial means act of proving of judicial examination or determination of the issues including its *own* jurisdiction or authority in accordance with law or adjudging guilt or innocence of the accused including all steps necessary thereto. The trial commences with the performance of the first act or steps necessary or essential to proceed with the trial."

44. The Hon'ble Apex Court further observed that under the Army Act constitution of Court Martial for trial of an offence under the Act is a precondition for commencement of trial. The relevant provisions of Army Act and Army Rule has been interpreted in para 20 of the said judgement as under:

> "20. It would be seen from the scheme of the Act and the Rules that constitution of court martial for trial of an offence under the Act is a precondition for commencement of trial. Members of the court martial and the presiding officer on nomination get jurisdiction to try the person for offence under the Act. On their assembly, the accused has the right to object to the nomination of any or some of the members of the court martial or even the presiding officer. On the objection(s) so raised, it is to be dealt with and thereafter the preliminary report recorded after summary trial and the charge framed would be considered. The charge is required, if need be or asked by the *accused to be read over* and could be objected by the accused and

> found tenable, to be amended. Thereafter, the accused would be arraigned and his presence the trial would begin. The accused may plead guilty or not guilty. If he pleads guilty, the procedure prescribed under Rule 54 should be followed and if he pleads not guilty, procedure prescribed under Rule 56 is to be followed……..The broader view is that the trial commences the moment the GCM assembles for proceeding with the trial, consideration of the charge and arraignment of the accused to proceed further with the trial including all preliminaries like objections to the inclusion of the members of the court martial, reading out the charge/charges, amendment thereof etc. The narrow view is that trial commences with the actual administration of oath to the members etc. and to the prosecution to examine the witnesses when the accused pleads not guilty. The question then emerges; which of the two views would be consistent with and conducive to a fair trial in accordance with the Act and the Rules?"
>
> (Emphasis supplied)

45. Having considered the scheme of the Act and Rules as above, it is observed by the Hon'ble Apex Court that two views are possible while dealing with the issue of commencement of trial as to when trial commences. The broader view as spelt out by the Hon'ble Apex Court is that the trial commences the moment when court martial assembles for proceeding with the trial, consideration of the charge and arraignment of the accused to proceed further with the trial including all preliminaries like objections to the inclusion of the members of the court martial reading out the charge/charges, amendment thereof etc. On the other hand, the narrow view is that trial commences with the actual administration of oaths to the

members etc. and to the prosecution to examine the witnesses when the accused pleads not guilty. The controversy as to when the trial by court martial commences under the Army Act/Rules is no longer res-integra and it has already been set at rest. It is laid down by the Hon'ble Apex Court that the broader view is the correct view and accordingly in para 21 it is summed up as under:

> "21. ……..We are of the considered view that from a conspectus of the scheme of the Act and the Rules, the broader view appears to be more conducive to and consistent with the scheme of the Act and the Rules. As soon as GCM assembles the members are charged with the duty to examine the charge/charges framed in summary trial, to give an opportunity to the accused to exercise his right to object to the empanelment of member/members of the GCM, to amend the charge and the right to plead guilty or not guilty. These procedural steps are integral and inseparable parts of the trial…….Therefore, the occasion to take oath as per the procedure for GCM and the right of the members of the GCM arises with their empanelment as GCM and they get power to try the accused the moment they assemble and commence examination of the case, i.e. charge-sheet and the record. The trial, therefore, must be deemed to have commenced the moment the GCM assembles and examination of the charge is undertaken."
>
> (Emphasis supplied)

It is further held therein that if accused himself becomes responsible for delay he cannot take advantage of his own wrong. Accordingly in para 28 of the said judgement it is observed as under:

> "28……In this behalf, the *maxim nullus commodium capere potest de injuria sua propria* – meaning no man can take advantage of his own wrong – squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2)."

46. In the present case a close scrutiny of original SCM records we find that SCM assembled on 17-8-2006 for arraignment of the appellant. On that date the charge sheet (Exhibit B2) was read over and explained to the accused. However, it was the appellant who objected to the charge vide provision of Army Rule 112 and hence written submission titled "objection to charge No.1 under AR 112" was submitted to the Court. On receipt of such objection (Ext 1) the Court explained to the accused appellant that he was already handed over the copy of charge sheet and summary of evidence to prepare his defence on 8th August 2006 and as such he had sufficient opportunity to prepare his defence until 17th August 2006. However, the Court granted further adjournment on his prayer in the interest of justice till 18th August 2006. Again when Court reassembled on 18th August the appellant submitted written objection to the rest 4 counts of charges separately [Exhibits .2, 2(a), 3, 3(a),4, 4(a), 5 & 5 (a)]. And the appellant again prayed for adjournment to submit further written submission. The SCM granted further adjournment till 19th August, 2006. Ultimately, when the SCM reassembled on 19th August, 2006, again the accused raised objection on several grounds and prayed for further time to submit a detailed objection on charge sheet. However, the Court overruled all such objections and the accused was then asked to plead guilty or not guilty to each charge

separately and the accused pleaded not guilty to all the five charges separately. It is, therefore, quite evident from the SCM records that the appellant wanted to cause delay by raising various types of objections in order to withhold the plea of guilty or not guilty in order to get the SCM trial barred by limitation. In view of rulings cited above, the appellant cannot be allowed to take advantage of his own wrong by saying that trial of SCM commenced on expiry of three years from the date of knowledge of the disciplinary authority about the commission of the alleged offence. In this context it would be relevant to place reliance upon a ruling of the Hon'ble Apex Court reported in **(2001) 7 SCC 113 (Union of India and Others - Appellant –vs- Rajbir Singh Khanna and another – Respondent).** In paragraph 8 of the aforementioned ruling it is held as under:

> "8. …….The position of law insofar as the interpretation of Section 122 of the Army Act, 1950 is concerned stands resolved and settled by a three-Judge Bench decision of this Court in *Union of India v. Harjeet Singh Sandhu* wherein it has been held that the delinquent officer having himself created a situation withholding commencement of trial, he would be estopped from pleading the bar of limitation and the trial commenced on vacating of the judicial order of restraint on court martial shall be a valid trial, relying on the principle that no man can take advantage of his own wrong……"

Be that as it may, the fact remains that the starting point of limitation in the present case is 29th August, 2003 when GOC 10 Corps directed initiation of disciplinary proceedings against the appellant and four others vide order

dated 29th August 2006 and the trial by SCM in this case commences when SCM assembles and examination of charge was undertaken, i.e. on 17th August, 2006, i.e. well within the period of limitation.

47. We, therefore, do not find much substance in Col.Kalkal's (Retd) argument that mere submission of court of inquiry report pointing out various irregularities committed by the delinquent officer is sufficient to bring the same to the knowledge of GOC, since the culpability of the delinquent officer and his identity have also to be established. On the contrary, we find that directions of GOC dated 29th August 2003 (Ext. 10 series) to investigate alleged irregularities and malpractices have satisfied those two criteria. Fortified with the plethora of rulings of the Hon'ble Apex Court as referred to herein-before we are of the considered view that the SCM trial of the appellant commenced within the period of limitation and as such SCM trial is not barred by limitation. Point No VII is thus decided against the appellant.

VALIDITY OF CHARGE –
Point No.VI

48. The appellant was arraigned on five charges. Out of these five charges the validity of third charge is being tested with reference to the relevant statement of facts as indicated in the charge itself wherein words like 'dishonestly misappropriating property belonging to the Government' has

been used to constitute an offence under Section 52(b) of Army Act. It is necessary for better appreciation of import and purview of alleged offence under section 52(b) of Army Act to reproduce the contents of charge as under:

Third Charge DISHONESTLY MISAPPROPRIATING PROPERTY BELONGING TO THE GOVERNMENT

Army Act
Section 52(b)

in that he,

at Jammu, on 16 Jan 2003, which came to the knowledge of the authority competent to initiate action on 29 Aug 2003 while being the Store Keeper Technical In Charge of Dry Ration Stores of 166 Military Hospital and having received following items of ration, the property belonging to the Government, issued to said 166 Military Hospital by FSD BD Bari. vide indent No.1227/Q/04/03 dated 10 Jan 2003, dishonestly misappropriated the same :-

(underlining is ours)

Ser No.	Items	A/U	Qty.
1.	Atta	Kg.	510
2.	Rice	Kg.	3500
3.	Sugar	Kg.	1200
4.	Dal	Kg.	950
5.	R. Oil	Kg.	900

A plain reading of Section 52(b) of Army Act clearly establishes that the mode of dishonest misappropriation is to be clearly spelt out in the statement of facts appended to the third count of charge. In this context it is to be noted that for constitution of an offence under 52(b) of Army Act either there would be dishonest misappropriation or conversion of any such property to the delinquent's own use. The third charge against the appellant

is, however restricted to misappropriation of as many as five items of Ration commodities alleged to have been requisitioned vide Indent No.1227/Q/04/03 dated 10th January, 2003. In order to ascertain the meaning of ' misappropriation' it would be relevant to refer to Note 11(a) to Section 52 of Army Act which reads as under :

> "11(a) '*To misappropriate'* means to set apart for or to assign to the wrong person or a wrong use."

A duty is, therefore, cast upon the Prosecution to specify categorically in the Statement of facts appended to the charge as to how Ration Commodities were set apart for or whether the same were assigned to a wrong person disclosing the name of such person or to throw light on wrong use of all those ration commodities. In absence of all these relevant particulars, the validity of charge of misappropriation of such ration commodities is to be called in question. Now, for analyzing the essential ingredients of dishonest misappropriation, it would be apt to look into Note 19(d) to Section 52 of Army Act. 'Dishonestly' has been defined in Section 24 IPC as under :

> "S.24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing, "dishonestly".

49. For the purpose of examining the term 'wrongful loss' and 'wrongful gain' it would be relevant to quote Section 23 of IPC as under :

> "S.23. "Wrongful gain" is the gain by unlawful means of property to which the person gaining is not legally entitled.
>
> Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

50. Note 14 appended to Section 52 of Army Act stipulates that each instance of misappropriation should be in a separate charge unless they all form part of the same transaction while Note 15 lays down that the value of the property alleged to have been misappropriated should be entered in the particulars of charge and proved in evidence. It is, therefore, quite evident that to constitute an offence under clause (b) of Section 52 of Army Act it is to be clearly mentioned in the particulars of charge that there was an intention to cause wrongful gain or wrongful loss. A close look to the particulars of charge as appended to third count of charge reveals that there is no specific mention as to how wrongful gain was caused to the appellant since the particulars of charge do not mention anything about retention/sale of such Ration commodities to anyone.

51. Having regard to explanatory Notes which have been appended by way of clarification and on meticulous consideration of the matter with

reference to the particulars of charge, we find from the language with which the third count of charge is couched it appears to be defective and not in conformity with the relevant statement of facts as narrated in the charge itself. On the face of such anomalous situation it is quite evident that the relevant recitals to the effect that the accused 'dishonestly misappropriated' ration commodities have not been sufficiently explained in the particulars of charge enabling him to meet the charge especially when the specific mode of dishonest misappropriation of Ration Commodities have not been clearly spelt out therein. In that perspective of the matter the statements made in the particular of charge are quite vague and indefinite and nothing has been said as to how dishonest misappropriation was caused by the delinquent store keeper in respect of those Ration Commodities which were allegedly received by him in the capacity of Store Keeper Technical In-charge of Dry Ration Stores of 166 Military Hospital. In our considered view, the statement of facts as incorporated in third count of charge lacks sufficient details which are required to be described adequately in the statement of charge to enable the delinquent N.C.O. to meet the said count of charge since the manner and mode of dishonest misappropriation in respect of five items of Ration Commodities have not been enumerated in details in the charge sheet. Inasmuch as formulation of charge No.3 lacks clarity and it

has not been disclosed as to whether wrongful gain was caused to the delinquent by retaining/selling those ration Commodities or by any other means, constitute of an offence of dishonest misappropriation of properties belonging to the Government could not be made out. He has thus been deprived of his valuable right to confront the said charge meaningfully and effectively. In our considered view particulars of third charge do not support the constitution of an offence under section 52(b) of Army Act.

52. It is settled position of law that the charges framed to be more explicit. Where the accused is charged with an offence of dishonest misappropriate, it is incumbent upon the prosecution to specify the manner and mode in which such misappropriation had been done otherwise such charge as framed would be vague and indefinite. It was, therefore, held that the charges should have been more explicit and should have set out the particulars of his acts or conduct which were being relied upon and ultimately led to such dishonest misappropriation of ration commodities. In this context reliance can be placed upon a ruling of the Hon'ble Apex Court reported in **AIR 1953 SC 462 (K. Damodaran vs State of Travancore – Cochin).** The principles relating to framing of charge have also been enunciated in para 9 of a recent ruling of the Hon'ble Apex Court reported in **AIR 2010 SC 3292 (Main Pal vs State of Haryana)** and those principles are as under :

"9……

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

53. In such view of the matter the third count of charge as sought to have been formulated against the accused appears to be tainted with vagueness and such lack of clarity is bound to cause prejudice to him in dealing with the contents of the charge effectively in order to build up his case in defence. As a matter of fact, the statement of facts which are required to be appended to the charge itself should not be vague and indefinite and it

should sufficiently describe the nature of act complained of and the mode and manner of commission of such act which can be regarded as willful and deliberate especially when grave and serious charge of dishonest misappropriation of ration commodities sought to have been framed against him. The statement of fact as appended to third charge do not disclose the nature of dishonest misappropriation alleged to have been committed by him. The statement of facts has thus not sufficiently described as to how the purported act of dishonest misappropriation as clarified in Note 11 (a) and 13(b) & (c) as also 14 & 15 to 52 of Army Act read with Section 23 & 24 of IPC was allegedly committed by the appellant. The specific ingredients for constituting an offence under 52(b) of the Army Act indicating the culpability of the delinquent store keeper have not been clearly enumerated in the particulars of charge. We are, therefore, of the considered opinion that an act of omission or commission especially an act of dishonest misappropriation can not be brought within the scope and purview of Section 52(b) of Army Act by merely applying the statutory language to the particulars of charge without, however, elaborating the necessary and relevant details pertaining to commission of dishonest misappropriation as per legal requirement which has unfortunately been not done in the instant case while formulating charge No.3 against the delinquent NCO.

54. As a matter of fact, omission of relevant particulars in the statement of facts appended to the 3rd charge as analysed herein-before has misled the accused and it, in our considered opinion, has caused prejudice to the accused which occasioned failure of justice. Considering all these we are of the definite view that third charge so framed against the appellant cannot be held to be legally valid one in terms of Rule 42 of Army Rules.

Point No.VI is thus answered in the negative.

Re-appreciation of Evidence

55. Turning to evidence on record it appears that prosecution has examined seven witnesses which include three witnesses who were summoned/examined on recall after close of prosecution case and recording of statement of accused. It has also sought to rely upon a huge numbers of exhibits (1 to 58), which were produced during SCM, while the defence has examined only one witness in order to substantiate its plea of innocence. That apart, 40 documents which include series of documents annexed to a good number of exhibits during recording of summary of evidence have also been relied upon by the prosecution. The entire summary of evidence has been made a part and parcel of SCM trial proceedings.

PROFILE OF THE PROSECUTION WITNESSES AND THE SOLE DEFENCE WITNESS

56. A close look to the profile of witnesses reveals that PW1 is the Lt. Col Manoj Thakur HQ 16 Core (D&V) who proved the direction of GOC HQ 16 Core on the Court of Inquiry proceedings which have been marked as Ext 10, 10A and 10B by which GOC ordered to investigate irregularities/malpractices if any, in drawal, accounting & issuing of ration, FOL, Coal and other store materials held on the charge of 166 Military Hospital. He also proved certified true copies of minute sheets pertaining to the order of Court of Inquiry (Ext 12). Another Lt. Col M.S. Sarmal of 224 ABOD who was detailed as the Member of Board of Officers from HQ 26 Infantry Division has been examined as PW2. Sub/SKT K.S. Kathith of 406 FD Amb who performed the duties of JCO Incharge Hospital, Clothing Stores, Arms and Ammunition Stores in addition to JQM Duties of 166 MH has been examined as PW3. Maj SB Paudyel of 6 Maratha Light Infantry who recorded summary of evidence in respect of the appellant and produced the statement of the accused has been examined as PW4. PW 5 Sub/SKT RKR Kushwasha of 526 ASC Battalion (supply point) Satwari who was examined in the summary of evidence as PW 7 has been examined as PW 5 after close of the prosecution case. He produced certain vouchers

and indents etc. which were also exhibited during SCM trial. The cross examination of PW 5 has, however, purportedly been declined by accused. Sub/SKT R.D. Jakhar of 166 MH who performed the duties of Jr Quarter Master of 166 MH has been examined as PW 6. He has been examined as a prosecution witness under Army Rule 143, even though he was not examined during summary of evidence. He has produced car diary of several vehicles, ration return of several months and certain other vouchers pertaining to drawal of other ration commodities. He has, however, been cross examined on behalf of the appellant. Sub/SKT S.P. Singh of Field Supply Depot, BD Bari who performed the duties of JCO In-charge, Basic Group FHD has been examined as PW 7 under Army Rule 143, even though he was not examined during summary of evidence. He has been cross examined by accused and also questioned by the court under Army Rule 118. Maj (Retd) A.R. Malhotra has been examined as Defence Witness No.1. He was also cross-examined by the Court and re-examined by the accused.

Point No.VIII

57. The 1st count of charge relates to generation of surplus fuel by maintaining duplicate car diaries in respect of three vehicles for the period as mentioned in the charge sheet itself. The quantum of surplus fuel generated in respect of each vehicle/ambulance is noted. The specific allegation against

the appellant is that while he was performing his duties as Store Keeper Technical in charge of Mechanical Transport-Fuel, Oil and Lubricant Stores of 166 Military Hospital, these irregularities/malpractices were committed by him with intent to defraud. The relevant 1st charge as set out in the charge sheet is as under :

"CHARGE SHEET

The accused No.13958026W Havildar/Store Keeper Technical Anjan Kumar Maity of 166 Military Hospital attched to 6 MRATHA LIGHT INFANTRY is charged with :-

First Charge SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD.

Army Act Section 52(f)

in that he,

at Jammu, between Apr 2002 and Dec 2002, which came to the knowledge of the authority competent to initiate action on 29 Aug 2003, while being the Store Keeper Technical In Charge of Mechanical Transport Fuel, Oil and Lubricant Stores of 166 Military Hospital, with intent to defraud, generated surplus fuel by maintaining duplicate car diaries in respect of following vehicles for the period indicated against them :-

Ser No.	Veh BA No & Make	Period	Surplus fuel generated
1.	88K-5640M Truck 1 Ton Ambulance	01 Apr 2002 to 30 Jun 2002	2198 Ltrs of 87 MT Gas
2.	00K-006788E Truck 2.5 Ton Ambulance	01 Jul 2002 to 30 Sep 2002	773 Ltrs of DHPP (N)
3.	00K-006794N Truck 2.5 Ton Ambulance	01 Jul 2002 to 30 Sep 2002	1042 Ltrs of DHPP (N)

58. Adverting to Oral and documentary evidence on record which have been made available to us by the prosecution to establish the 1st count of charge, we find it important to evaluate critically evidence tendered by Sub/SKT KS Kathaith of 406 FD Amb who was posted in 166 MH in Feb 2001. He deposes as PW 3 that as JQM of 166 MH he was totally helpless because all the detailments were being directly controlled by Maj A.R Malhotra, then QM of 166 MH. He used to pass directions upon him as O/C of Department. He was fully responsible for anything in the Department. He further testifies that Maj Malhotra also ordered him to focus on the tasks assigned to him otherwise he will send him to Coy or place his chair outside the Department. Against such factual scenario pertaining to ambience of functioning of JQM, in response to questions by Court, it is admitted by him that two car diaries were maintained in respect of one ton ambulance Vehicle BA No.88 K 5640 M with effect from 1st Apr 2002 to 30th June 2002. The certified audited car diary in respect of the said vehicle is exhibited as Ext 17 to 17E, while the certified copy of unaudited car diary is marked as Ext 18 to 18B. Similarly, two car diaries (1st and 2nd) were maintained in respect of Vehicle BA No.00K006788E Truck 2.5 ton ambulance w.e.f. 1st July 2002 to 30th Sept 2002 . However, the certified copy of audited car diary in respect of the said vehicle is marked as 19 to

19F. The unaudited car diary of the said vehicle is marked as Ext 20 to 20B. PW 3 further deposes that audited car diary in respect of Vehicle No.BA No.00K-006794N Truck 2.5 ton ambulance from the period 1st July 2002 to 30th September 2002 has been marked as Ext. 21 to 21E. The duplicate unaudited car diary maintained by the appellant has been marked as Ext 22 & 22A.

59. While responding to a specific query by the Court under Question & Answer No.144, the deponent makes it clear that SKT NCO, in-charge of FOL is the custodian and is responsible for preparation of car diaries. During cross-examination by the accused the deponent, however, admits that FOL is issued by SKT NCO I/C FOL Stores to the driver of vehicles based on total KM already run as per KPL and Kilometer tallied with car diary and signature of driver is obtained on CIV. It is, however, extracted from him during cross-examination that the driver of Vehicles is the custodian of car diaries of respective vehicle during duty period. It is also admitted by him that car diaries were audited and found correct. It is further elicited from him that he did not notice any surplus or deficiency for the periods he performed the duties of FOL stores. It is, however, astonishing to note that the deponent has not at all been cross examined by the accused on the specific point of maintenance of duplicate car diaries which went unaudited.

There is nothing on record even in the form of a suggestion that duplicate car diaries as alleged against the appellant were not maintained by him at the relevant point of time. In the absence of any such specific denial especially when sufficient evidence has been led by exhibiting the duplicate car diaries in question during SCM trial, the prosecution case gains ground. In fact, both oral and documentary evidence on that vital aspect of the matter goes unchallenged during cross-examination. In such view of the matter, having considered the corroborative evidence adduced through production of relevant duplicate car diaries as also the relevant ocular evidence adduced by the Sub M.O.T PW3 with pinpoint accuracy and straightforwardness we are unable to discard such unchallenged evidence on record on the question of maintenance of duplicate car diaries in respect of three ambulances of different capacities as specified in the charge sheet. More so, whenever PW3 has very successfully stood the test of cross-examination.

60. PW 6 Sub/SKT RD Jakhar of 166 MH has also corroborated PW3 by deposing to the effect that two car diaries were maintained for each of three ambulances while duplicate car diary remains unaudited. Referring to Ext 17 to 17 E he deposes that two sets of car diaries have been prepared for 1st Vehicle for the period from 1st April 2002 to 30th June 2002. One car diary was subjected to audit wherefrom it is found that 2578 Lts of 87 MT Gas

had been issued for the 1st vehicle (BA No.88K 5640M). While the unaudited duplicate car diary indicates that 474 Lts of 87 MT Gas has been issued for the said vehicle (vide Exts 18 to 18B). He further testifies that on comparing these two car diaries prepared for the afore-mentioned vehicle there is a difference of 2104 lts of 87 MT gas which he seems to have generated surplus. It is further testified that on comparing two car diaries maintained in respect of 2nd vehicle, (BA No.00K 006788E Truck, 2.5 ton ambulance) for the period from 1st July to 30th Sept 2002, it is found that there is a difference of 773 lts. DHPP(N) which he seems to have generated surplus. His further evidence is that in respect of 3rd vehicle, (006794N Truck, i.e. Ambulance 2.5 ton) for the period from 1st July to 30th Sept 2002, two sets of car diaries have been prepared. One audited car diary reveals that 1142 lts of DHPP(N) has been issued for this vehicle while unaudited car diary (vide Ext 22 & 22A) tends to show 100 Lts of DHPP (N) has been issued for this vehicle. On comparing these two car diaries for this vehicle it is noticed that there is a difference of 1042 DHPP(N) which, according to him, seems to have generated surplus.

61. It, however, appears that when the appellant was questioned by the Court under Army Rule 118 specifically placing before him incriminating documents, materials and circumstances on record regarding generation of

surplus fuel in respect of each vehicle through preparation and maintenance of duplicate car diaries, he declined to comment instead of explaining any circumstances appearing in his statement or in the evidence against him. Even DW1 has simply stated that as Quarter Master of 166 MH w.e.f. 18th June 2001 to 22nd June 2003 he signed the opening certificate and balance brought forward (BBF) of FOL and Kilometers of three vehicles in question. He also made a general statement to the effect that all the entries of the car diary pertaining to issue of FOL and KM was reflected in the KM card and the same tallied with the vehicle log book. It is further stated by him that FOL CIV and Ledger have been audited by the Test Auditor and Auditor has certified that they are correct. He also maintained sturdy silence on the serious issue of preparation and maintenance of duplicate Car diaries in respect of three ambulance in question as specified in the charge-sheet itself. During cross examination by the Court, he is to admit unhesitatingly that it is not correct to maintain two car diaries. In response to Question No.214 asked by the court he had to admit further as under :

> "Q.214 – Question to the witness : Who is responsible for maintenance car diary?
>
> A 214 – Answer by the witness : Driver for filling of duties and SKT NCO I/C of FOL for issue of FOL and Hav/SKT AK Maity was SKT NCO I/c of FOL".

Really it is very surprising to note that the sole DW has also specifically not controverted the factum of maintenance of duplicate car diaries by the appellant in his capacity as Store Keeper of 166 MH within the four-corners of his testimony at any point of time. Rather, the sole defence witness simply focussed his evidence on maintenance of audited car diary which, according to him, was maintained properly. Be that as it may, the fact remains that there are ample corroborative, cogent, consistent and reliable evidence both oral and documentary on record to prove 1st charge against the appellant.

62. On wholesome re-appreciation of entire evidence and circumstances on record adduced by both sides and weighing the same in the scale of probabilities we feel convinced to opine without any hesitation that the prosecution has succeeded and fairly succeeded in clearly proving the 1st count of charge against the appellant beyond any shadow of doubt.

Point No.VIII is thus answered in the affirmative.

2nd count of charge
Point No.X

63. The 2nd charge also relates to an offence under clause (f) of section 52 of Army Act. It is evident from statement particulars as annexed to the charge that ration returns in respect of the month of July, August,

September & October 2002 based on fake issue vouchers showing lesser quantity of ration drawn from supply point Satwari were prepared by him with intent to defraud.

64. In order to substantiate the charge against the appellant, Col Vijay Babu Rao Deshpande, Commanding Officer, Military Hospital, Saugar was examined as PW 10 during summary of evidence and he admits in cross-examination that he visited the Qr Master Complex a large number of times during day and night. He, however, never noticed any unauthorized sale of any Dry ration and Fuel Oil and Lubricants from stores of 166 Military Hospital during his visits to Qr Masters complex. In response to query by the accused during cross examination he answered in the affirmative that monthly Stock Taking Board of Dry Ration and FOL carried out regularly in 166 Military Hospital. On the vital issue of surplus drawal of Dry Ration and FOL and also its audit, the specific query made by the accused during cross examination and also its answer by the Commanding Officer of the Military Hospital is reproduced as under:

> "Question No.4 : Did Board of Officer of Monthly Stock Taking Board ever report to you about any surplus and deficiency in Dry Ration and FOL stores of 166 Military Hospital?
>
> Answer No.4 : No
>
> Question No.5 : Was Audit/Test Audit carried out regularly in 166 Military Hospital?

Answer No.5 : Yes, as per the Schedule of Local Audit Office.

Question No.6 : Did the Audit authorities bring to your notice about discrepancies in Dry ration and FOL stores of 166 Military Hospital?

Answer No.6 : No

Question No.7: Did the Audit authorities ever report to you about the genuineness of Fresh Vouchers in 166 Military Hospital?

Answer No.7 : No."

65. In response to a query by the accused during cross-examination PW 10 states unequivocally that when the vouchers for the period from July 2002 to October 2002 were put up for checking of Ration return they seemed genuine and hence were accepted by him. It is further stated by him that there were two sentries at quarter master complex (one at post on perimeter wall and next one at FOL store). It is also admitted by him that in view of large number of Security and Duty persons on duty at the gate it will be very difficult for any person to carry large quantity of unauthorized rations from the stores of 166 Military Hospital. He further makes it clear that none ever complained to him that they were not getting ration as per their entitlement.

66. It is an admitted position that the appellant and other junior supervisory staff had to work in the Quarter Master's Office and Stores under the direct supervision and control of Quarter Master of 166 Military

Hospital. The pen picture of day to day functioning of Quarter Master's Office and Stores has been depicted in its exact reality by PW 7 during S.O.E. He deposed as under :

> "4. As Junior Quarter Master I was totally helpless because all the detailments were directly controlled by Non-Technical Regular-16539N Major Atma Ram Malhotra, Quarter Master of 166 Military Hospital. Maj AR Malhotra clearly directed me that as an Officer In-Charge Commanding it is his responsibility to run the department as per his choice and also ordered me to focus on the task assigned to me otherwise he will send me to coy for Administrative duties.
>
> 5. No.13958026W Havilder Store Keeper Technical Anjan Kumar Maity performed the duties of Store Keeper Technical Non Commissioned Officer In-Charge of Retail Stores, MT FOL Store and Dry ration store in 166 Military Hospital. During his tenure in 166 Military Hospital neither any one ever reported nor did I notice that he had misappropriated Government property.
>
> 6. As regards RR I have just signed few Ration Return to complete the checked by column under pressure since no supporting documents were ever put up to me for check up. But during the recording of Summary of Evidence in respect of Maj AR Malhotra when I was given the opportunity to check the RRs I found that Dry ration have been correctly accounted for as per the available documents. But fresh ration have been drawn/consumed more than the authorization."

During cross-examination by accused in response to his Question No.23, it is stated by PW 7 : 'As per statement of Hav/SKT Jagdish Chander, he is responsible for preparation of fake fresh ration vouchers'.

It appears that Major Malhotra had to face GCM trial and had also been cashiered and sentenced to suffer RI for three years. He however, challenged such order of conviction by filing a Writ Petition before the J&K High Court as submitted by both sides. Be that as it may, the fact remains that the appellant and other co-accused had to perform their duties and responsibilities under the direct control and supervision of the then Major Malhotra, Quarter Master of 166 Military Hospital under a severe stress and strain in such a pitiable situation.

67. Sub/SKT K.S. Kathaith, PW3 also admits during cross examination by the accused that Hav/SKT Jagdish Chander, who was the fresh Ration SKT NCO IC is responsible for collection of fresh item vouchers from supply point, Satwari and handed over the same for preparation of Ration Return. Hav/SKT Jagdish Chander was also indicted in COI. He was tried by SCM and punished accordingly. It is also extracted from his cross examination that it is correct to suggest that Hav/SKT Jagdish Chander put the demand, collection, account and distribution of fresh ration and as such as per the procedure whatever the fresh SKT NCO IC bring the issue vouchers of fresh items from supply point for the complete month and hands over the same for preparation of Ration Return. It is also admitted by him that monthly Ration Return was prepared on the order of Major A.R.

Malhotra, the then Qr Master of 166 MH. It is further admitted by PW 3 that he stated in his summary of evidence that on 16th July 2005 as PW 7 that Dry Ration have been correctly accounted for as per available documents. In this context it is also relevant to refer to Appendix H (Ext 15 H &15J) wherefrom it appears that details of transaction effected for the year 2002 & 2003 were that the reduced/excess quantity of Ration Commodities were collected by Hav Jagdish Chander. It has also been admitted by PW 3 during cross examination made by the appellant which was recorded in Question/Answer form vide Question and Answer Nos 175,176 and 178 as under:

> "Q.175 – Question to the Witness : I want to draw your attention to Question No.23 of my S of E at page No.43 and Question No.21 of C of 1 at page No.8 wherein clearly accepted by Hav/SKT Jagdish Chander that all those fake fresh issue vouchers were prepared by him. Could you now say that who all are responsible for this?
>
> A 175 – Answer by the witness : Being a Fresh NCO, he was responsible.
>
> Q. 176 Question to the witness : Is it correct to suggest that the Ration Returns for the months of Jul, Aug, Sep and Oct 2002 have been audited by the auditor and test auditor with no observation/objection?
>
> A. 176 – Answer by the witness : Yes, it is correct.
>
> Q. 178 – Question to the witness : Is it correct to suggest that items can only be taken on charge after the collection of store from the Supply Depot?
>
> A. 178 – Answer by the witness : Yes."

It transpires from the testimony of PW 8, Sub Pushpender Singh that on his posting to 166 MH on 13th June 2001 initially he was ordered to take over the charge of MT (Mechanical Transport) and FOL (Fuel Oil Lubricant) stores, he found discrepancies. He deposes as under :

> "3……..I found discrepancies such as MT (Mechanical Transport) tool vouchers which were not taken on charge of ledger. I found some irregularities in accounting of FOL (Fuel Oil Lubricant) store as well. I reported the matter to Maj AR Malhotra, Quarter Master, 166 MH. Thereafter, Maj AR Malhotra Quarter Master changed the order and told me to take over Ordnance stores and LP (Local Purchase) stores.
> 4. I saw an anonymous letter, stating that Milk Powder was being sold outside 87 MT Gas (Petrol) was being given to Maj AR Malhotra for his car and other hospital staff of 166 MH for their Scooters and Motorcycles."

He further makes it clear in his cross-examination by the accused that he never found any unauthorized sale of Dry Ration and FOL from the Stores of 166, MH (Question and Answer No.18). It is, however, elicited from his cross examination that he reported that 87 MT (Petrol) was being given to Hospital Staff of 166 MH to Maj AR Malhotra, Quarter Master of 166 MH, but Maj Malhotra did not take any action on issue of 87 MT Gas (Petrol) to Hospital Staff of 166 MH.

68. A close analysis of evidence both oral and documentary tends to show that the appellant cannot be held responsible for checking and putting signature on Ration returns for the relevant periods and, in fact, Ration

Returns and requisitions were prepared by him for the relevant months on the basis of supporting documents provided to him by Hav/SKT Jagdish Chander, who has been named by most of the PWs examined during recording of summary of evidence and SCM trial. It is available from evidence and circumstance on record that the appellant had been given fake fresh vouches for preparation of Ration return to Hav/SKT Surya Prakash and many other SKTs for preparation of ration returns for the periods from July 2001 to June 2002 and such ration returns were also audited by LAO staff with no objection. Further Ration Returns for the periods from Nov 2002 to April 2003 were prepared and produced to Jr. Quarter Master in time for checking and onward submission to Qr Master and Sr Registrar and Officers Commanding Troops for their signatures and counter signatures.

69. After taking all these facts and circumstances as also evidence on record together into account, we are of the considered opinion that the prosecution has failed and miserably failed to prove the Charge No.2 that with the intent to defraud Ration Returns for the months of July, August, Sept and Oct 2002 were prepared on fake issue vouchers showing less quality of ration drawn from Supply Point against the appellant beyond any reasonable doubt.

Fourth and Fifth Charge
Point No.X

70. Fourth charge relates to not taking on charge of 4000 Kgs of Charcoal Issued by Supply Point, Satwari to 166 Military Hospital vide Indent No.1223/Q/2703 dated 12-3-2003 and IR No.372 dated 15-3-2003 in the Ration Return for March 2003. PW 6 who was examined under Army Rule 143 deposes during cross-examination that Supply Point Satwari issued 4000 Kgs of Charcoal to 166 MH vide IR No.315 dated 30th April 2003 has not been taken on charge on Ration Return for the month of April 2003 as per signature put on in 'collected by' column of issue voucher, Charcoal has been collected by SKT Jagdish Chander. Similarly 4000 Kgs of Charcoal issued by Supply Point Satwari has not been taken on charge in the Ration return for the month of March, 2003 and as per signature put on 'in collected by' column of issue voucher charcoal has been collected by Skt Jagdish Chander. PW 14, Bhupendra Paul Singh, O/C Supply Point, Satwari has deposed in summary of evidence as under :

> "Cross Examination by the Accused
>
> Question No. 02 : Who has collected Charcoal from Supply Point Satwari, ex 526 ASC Bn since 2001?
>
> Answer No.02 : As per HQ 168 Inf Bde letter No.4015/3/AKM/A(PC) dt 05 Jan 2006 I was told to verify/authenticate Charcoal Indents for the month of Mar 2003 and Apr 2003. Therefore, as per the record held with Supply Point Satwari ex 526 ASC Bn Charcoals for the

month of Mar 2003 to Apr 2003 have been collected by No.13959731F Hav/SKT Jagdish Chander of 166 Military Hospital.

Question No.03 : I have never submitted indents for Charcoal nor I have collected the same. Kindly tell me who is responsible for the above Charcoals?

Answer No.03 : The person who collected the items is responsible for the same."

During cross examination of PW3 by the appellant in SCM trial it is being admitted by him that alleged quantity of Charcoal was demanded and collected from 166 MH by Hav/SKT Jagdish Chander from Supply Point Satwari since 2001. In this connection Question and Answer No.186, 187 and 188 is reproduced hereunder :

"Q 186 – Question to the witness : Is is correct that you come to know during the Summary of Evidence in respect of Maj AR Malhotra that Charcoal was being demanded and collected for 166 MH by Hav/SKT Jagdish Chandere from Supply Point Satwari since 2001?

A 186 – Answer by the witness : Yes while perusing the documents at the time of S of E of Maj AR Malhotra. I found the column of charcoal vouhers signed as Hav/SKT Jagdish Chander's signatures on.

Q 187 -Question to the witness : Is it fact that neither you nor me have ever received or seen the issue vouchers of charcoal till the Summary of Evidence in r/o Maj AR Malhotra?

A.187 – Answer by the witness : Since I was not a receiving agency, but during the Summary of Evidence of Maj AR Malhotra charcoal has been demanded by 166 MH and the same has not been taken on charge the relevant Ration Returns.

Q.188- Question to the witness : Is it correct that we came to know that of indents and collection of charcoal for 166 MH was exclusively made by Hav/SKT Jagdish Chander who has conceded the same having done in the Court of Inquiry at Question No.30 at page No.9 and your answer to Question No.28 at page No.44 of my Summary of Evidence?

A.188 – Answer by the witness : Since Hav/SKT Jagdish Chander had taken the responsibility, I cannot comment on it."

71. In this context it would also be relevant to refer to the testimony of Maj (Retd) AR Malhotra, DW1, which runs as under :

"*******

All the fake Ration Returns were prepared by Hav/SKT Jagdish Chander and he has forged the signatures of QM, Sr. Registrar and OC Troops. He has also forged the signatures of QM. Sr. Registrar OC Troops on the issue of vouchers. Ration Returns and also forged the signature of audit staff on the fake Ration Returns. But unfortunately it is not issued with the charge sheet.

****

I never authorized Hav/SKT Jagdish Chander, after that and I nor signed any indent fwd the charcoal & fire wood. Since charcoal vouchers were never handed over to Hav/SKT AK Maity, he could not reflect the same in Ration Returns. For all the misappropriation of FOL have been 100 percent forged and the same has been approved by Forensic Lab. Hav/SKT Jagdish Chander was indulged in fraud since 1999 as accepted by him in the Court of Inquiry."

72. During re-examination of DW1 by the accused it is clarified vide Question and Answer Nos 230, 231 and 233 as under:

"Q 230 – Question to the witness : Did you sign as indenting officer on charcoal indents No.1223/Q/34/3 dated 20 Apr 2003 and 1223/Q/27/2003 dated 12 Mar 2003 which were collected by Hav/SKT Jagdish Chander? Did you authorize or issue any authority

letter in the name of Hav/SKT Jagdish Chander for collection of charcoal?

A.230 – Answer by the witness : I have already brought out that my signatures on both the indents have been forged by Hav/SKT Jagdish Chander and no auth letter was issued to him. This charcoal has been collected by Hav/SKT Jagdish Chander.

Q. 231 – Question to the witness : Since Hav/SKT Jagdish Chander was fresh SKT NCO I/C of 166 MH and he has accepted that he had prepared the fake fresh voucher and prepared fake (forged) Ration Returns with effect from Mar 2002 to Mar 2003. Meat and Fresh issue vouchers for the month of Sep and Oct 2002 are missing and the original fresh issue vouchers are attached with these Ration Returns. Who could replace since the Ration Returns which were in the custody of Hav/SKT Jagdish Chander and also himself was In-charge of fresh ration store of 166 MH?

A.231 – Answer by the witness : When I signed Ration Returns prepared by Hav/SKT AK Maity these issue vouchers were not part of these Ration Returns. The Ration Returns prepared by Hav/SKT AK Maity is not here. My signature on this Ration Returns is forged and it can be confirmed by Forensic report.

Q.233 – Question to the witness : Is it correct to suggest that the Ration Returns for the period from Jul 2002 to Oct 2002 prepared by me correctly based on fresh and meat issue vouchers which were handed over to me by Hav/SKT Jagdish Chander fresh SKT NCO I/C of 166 MH?

A.233- Answer by the witness : The Ration Returns were checked by JQM, by me and audited. No observation was raised. Hence, it is correct."

73. It is, therefore, palpably clear from the evidence of PWs examined and cross-examined during SOE as also evidence both documentary and oral adduced by PWs and the sole DW during SCM trial as extensively quoted

hereinbefore that the appellant cannot be held guilty of 4th and 5th charge under Section 52(f) of Army Act inasmuch as the prosecution has failed and miserably failed to bring home the 4th and 5th charges against the appellant beyond all reasonable doubt.

Point No.IX is thus answered in the negative.

FINDINGS

74. Viewed in the light of our foregoing discussions, we cannot but hold that pretrial procedural requirements under Rules 22 to 24 of Army Rules have strictly been observed in consonance with golden principles of natural justice. It is also established and firmly established from the original records of pretrial proceedings of inquiry/investigation that in view of strict compliance with the provisions of Rule 180 of Army Rule, the Commanding Officer is absolutely justified in dispensing with the mandatory requirement of hearing of charge as mandated in Rule 22(1) of Army Rules. On consideration of materials as have been made available to us in original pertaining to pretrial investigation/inquiry etc., we feel convinced to hold that the appellant was afforded full opportunity to cross examine witnesses or to call such witnesses and to make such statement as would have been essentially required for his defence in course of C.O.I. proceedings under 180 of Army Rules. We are to hold further that on proper application of

mind and due consideration of evidence the commanding officer formed his opinion that the charge ought to be proceeded with the matter in terms of Rule 22(3) of Army Rules. As already discussed earlier, the appellant was given full opportunity to be present and he was present throughout the Court of Inquiry proceedings accordingly. He also made statement and led evidence as he wished. He also cross examined witnesses whenever his character or his military reputation was likely to be seriously affected. It is, therefore, held that the provisions of 22, 23 and 24 as also 180 of Army Rules read with Army Order 74/84 have fully been complied with at the pretrial stage of investigation/inquiry.

75. It is settled position of law that the plea of bias is to be scrutinized on the basis of materials brought on record. It is also to be ascertained as to whether irrelevant and imaginary allegations have been concocted to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. There is no doubt that 'bias is an inseparable facet of the concept of natural justice as genus'. It is uniformly held by the Hon'ble Apex Court in various judicial pronouncements that when free from bias is mentioned it means there should be 'absence of conscious or unconscious prejudice' to either of the parties. Applying aforementioned yardsticks, we are now to consider as to

whether presiding judge of the SCM in the present case had any conscious or unconscious prejudice to the appellant while holding SCM trial. In this context it would be relevant to take into consideration the recent ruling of the Hon'ble Apex Court reported in **2014(1) SCT 281 (Union of India & Others v Sanjoy Jethi and another)** as relied upon by Col Kalkal (Retd). As a sequel to our discussions in paragraphs 29 to 39, we are unable to accept the argument of Col Kalkal (Retd) on that score. Even if the benefit of set off in terms of 169A of Army Act is denied to the appellant without taking into account his detention in military custody, such denial of his legal right by the Commanding Officer cannot be a sufficiently strong ground to draw any inference about his biased attitude. More so, whenever Regulation 392(k) of Army Regulation confers discretion upon the commanding officer or any authority superior to him as to whether the accused would be placed under close arrest or not before the commencement of the court material and would remain so during the course of his trial. In such circumstances we are unable to hold that the real likelihood of bias has come into play on that score in this case.

76. It has also been specifically alleged on behalf of the appellant that the commanding officer being biased examined at least two witnesses who were not examined earlier during summary of evidence and another witness who

was examined and cross examined during summary of evidence, has again been examined on recall in arbitrary exercise of power vested upon him as per Rule 135 or 145 of Army Rules. It has, however, already been opined by us that no serious prejudice has been caused to the appellant because of such examination of these witnesses on recall for the simple reason that the appellant was given ample opportunity to cross examine those witnesses and, in fact, two of them have been examined while cross examining of one witness has been declined. Having regard to the legal and factual aspects as involved and discussed in foregoing paragraphs, we are to hold that the appellant was not denied natural justice in both the cases on the basis of which the plea of bias has been raised against the commanding officer. The parameters for testing a plea of bias on the acceptable touch stone have not been satisfied, even applying rigorous test as to whether prejudice have come into play in the present case. The Learned Counsel for the appellant has also referred to a recent ruling of the Hon'ble Apex Court **2014(1) SCT 281 (Union of India and Others- Appellant v Sanjoy Jethi and Another - Respondent)** wherein it is held that the plea of bias is to be tested on the touch stone of factual matrix of each case. In **Chandra Kumar Chopra v Union of India and Others** reported in **(2012) 6 SCC 369** it is ruled in paragraph 25 of the said judgement by the Hon'ble Apex Court as under:

> "25.……..mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record should show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias……"

Fortified with the aforementioned rulings of the Hon'ble Apex Court it is held that actual proof of prejudice is not available in the instant case and no sufficient materials have been brought on record which may lead to any reasonable apprehension of 'real likelihood of bias' in the mind of a prudent man against the commanding officer. In such view of the matter, we are unable to hold that the SCM proceeding as also trial vitiates for want of impartiality simply because of wild and imaginary allegation raised against the commanding officer. It is, therefore, held that the plea of bias cannot be entertained in the factual matrix of the present case.

77. The issue of limitation has been dealt with in paragraph 43 to 47 of this Judgement. Based upon foregoing discussions and views expressed therein we must hold that the SCM trial is not barred by limitation. Having regard to rule position as also the relevant Army Order coupled with judicial pronouncements discussed in paragraph 40 of this judgement, we cannot but hold that the Commanding Officer of a different unit where the appellant

was ordered to be temporarily attached for disciplinary purpose is quite competent to hold the impugned SCM trial legally.

78. On re-appreciation and critical evaluation of evidence both oral and documentary in its proper perspective made in preceding paragraphs, we cannot but hold that the prosecution has fairly succeeded in proving the 1st count of charge against the appellant beyond any reasonable doubt. It is, therefore, further held that the verdict of conviction on 1st count of charge passed by the SCM against the appellant is to be upheld. On a meticulous dissection of entire evidence and circumstances on record as per foregoing discussion we are to hold that 2nd, 4th and 5th charge could not be established against the appellant beyond any shadow of doubt and as such conviction in respect of all these three counts of charges cannot be maintained and as such conviction on that score is liable to be set aside. Further, conviction on 3rd count of charge which is found not legally valid in terms of Rule 42 of Army Rules cannot be legally sustainable and is liable to be quashed. Consequently, the appellant is found not guilty of 2nd, 3rd, 4th and 5th charge and as such he is entitled to be acquitted of all these four counts of charges.

79. In view of foregoing findings, we are to hold that impugned findings of SCM on all counts of charges barring 1st count of charge are not legally sustainable and as such impugned order of conviction is liable to be set aside

to that extent only. The appellant is entitled to get an order of acquittal of 2nd, 3rd, 4th and 5th count of charges on being found not guilty of those counts of charges. The appellant is, however found guilty of the 1st count of charge and his conviction on 1st count of charge is to be upheld. The sentence impugned, is also to be modified accordingly.

Point No.IX & XI are thus disposed of.

DECISION

80. As a corollary to our ultimate findings, the appellant's conviction under 52(f) of Army Act in respect of 1st count of charge has been maintained only. In such view of the matter, the relevant question crops up as to whether it would be prudent, judicious and also in conformity with the golden principles of equity to maintain three sets of punishment in toto so inflicted upon him in respect of five count of charges vide order of conviction and sentence passed on 7th November, 2006 by the SCM. It is well settled position of law that the punishment imposed upon the delinquent should commensurate the nature and gravity of offence. It is a requirement of fairness, objectivity and non discriminatory treatment. It has uniformly been held by the Hon'ble Apex Court in various judicial pronouncements that the doctrine of proportionality should strictly be followed in awarding punishment to the delinquents. In a recent decision of the Hon'ble Apex

Court reported in **2012(1) AFLJ 147 (Union of India and Others appellant v Bodupalli Gopalaswami)** it is held that the question of choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial but the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It is further held therein that the punishment should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. In the said case before the Hon'ble Apex Court it was found that shockingly disproportionate punishment was meted out to the commandant for the lapses of his supervisory officer and for the breach committed by the contractor. Consequently the punishment of dismissal was set aside and substituted by a lesser punishment. In another case reported in **2012(1) AFLJ 72 (Charanjit Lamba v Commanding Officer, Southern Command and Others)** it is held that while judicially reviewing an order of punishment imposed upon a delinquent employee the writ court would not assume the role of an appellate authority. In that context of the matter it is further held that the High Court in its writ jurisdiction would not impose a lesser punishment merely because it considers the same to be more reasonable than what the disciplinary authority has imposed. In Major A. Hussain's case (supra) as relied upon by the learned counsel for the

respondents it is observed inter alia that the proceedings of a properly constituted and properly convened court martial, if conducted in accordance with the rules are beyond the scope of judicial review. It is further observed that where evidence was sufficient, subject matter was within its jurisdiction, prescribed procedure was followed and the punishment awarded is within its power, the conviction and sentence passed by court martial should not have been interfered with by High Court. It has, therefore uniformly been held that punishment imposed in court martial trial should not be interfered with by a writ court in exercise of its power of judicial review. But it has also been made quite clear in Charanjit Lamba's case (supra) that the writ court would not assume the role of appellate authority while judicially reviewing an order of punishment imposed upon a delinquent employee. In this context it would be apt to refer to the relevant portion of paragraph 15 of the said judgment which reads as under :

> "15. …….It is also evident from the long time of decisions referred to above that the courts in India have recognized the doctrine of proportionality as one of the ground for judicial review. Having said that we need to remember that the quantum of punishment in disciplinary matters is something that rests primarily with the disciplinary authority. The jurisdiction of a Writ Court or the Administrative Tribunal for that matter is limited to finding out whether the punishment is so outrageously disproportionate as to be suggestive of lack of good faith. <u>What is clear is that while judicially reviewing an order of punishment imposed upon a delinquent employee the Writ Court would not assume the role of an appellate authority. It would not impose a lesser punishment merely because it</u>

> considers the same to be more reasonable than what the disciplinary authority has imposed. It is only in cases where the punishment is so disproportionate to the gravity of charge that no reasonable person placed in the position of the disciplinary authority could have imposed such a punishment that a Writ Court may step in to interfere with the same."
>
> (Emphasis supplied)

81. In another oft-quoted ruling of the Hon'ble Apex Court reported in **(1987) 4 SCC 611 (Ranjit Thakur v Union of India)** it is held in paragraph 25 of the said judgment as under :

> "25. ……..The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the same would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review…."
>
> (Emphasis is ours)

82. The Division Bench of Delhi High Court in a ruling reported in **2004(1) SCT 191 (Deshraj Shanwal, Lt Col v Union of India and Others)** has reiterated the same principles of law on the question of proportionality of punishment that the court will not interfere unless punishment shocks the conscience of court and in such a situation punishment awarded can be substituted by court in rare cases

83. Having regard to the principles of law as enunciated in afore-cited judicial pronouncements on the question of judicial interference by the appropriate authority, in respect of punishment imposed in Court Martial, in

the event of such punishment being disproportionate to the offence or unduly harsh, we being the appellate authority are to critically examine the reasonableness and adequacy/inadequacy of punishment inflicted upon the appellant in SCM trial wherein five counts of charges were held to be proved against him. In the instant appeal he is, however, found guilty of the 1st count of charge only, while he was found not guilty and acquitted of 2nd, 4th and 5th count of charges. The 3rd count of charge is, however, held to be not valid.

84. It appears that three sets of punishment were, perhaps considered to be justified since the appellant was found guilty of 5 count of charges and was convicted under Section 52(f) and (b) of Army Act in SCM trial on 7-11-2006. In such a situation he was also reduced to the ranks and dismissed from the service and was also sentenced to suffer R.I. for 8 months vide order of conviction and sentence dated 7-11-2006. But in the changed scenario the doctrine of proportionality in awarding appropriate sentence upon the appellant would come into play to suit the nature of offence conclusively proved against him as also to avoid discriminatory treatment. Such being the settled position of law, a duty is cast upon the appellate court to take mitigating circumstances, if any together with the service profile of the appellant into account for a just decision on the question of sentence in

the instant case. He rendered extremely useful and dedicated service to the Army for more than two decades in a devoted and efficient manner. On perusal of his service dossier it is found that he served for 22 years and 8 months in total and held the rank of Substantive Havilder at the age of 40 years and 10 months when he was convicted and sentenced on completion of SCM trial. He was not convicted by Court Martial or Criminal Court earlier. He is thus out of service for about 8 years and he had to suffer ordeal of SCM trial including pretrial investigation and inquiry etc. since 2003. He has, in fact, rendered more than qualifying minimum pensionable service. In view of order of dismissal passed in SCM trial, he has been disentitled to get any pensionary benefit, even though he had put in more than 22 years of service for which he is legally entitled to get pension had he not been dismissed from service. It further appears that out of 8 months R.I. he has already suffered about 4 months and further that he was found to be detained in military custody for a considerable period of time. Be that as it may, the fact remains that in view of his acquittal of three counts of charges and one count of charge being found to be not legally valid, the punishment imposed upon him for being found guilty of all five counts of charges, now appears to be quite disproportionate and unduly harsh since he is found guilty in respect of 1st count of charge with appropriate variation in respect of quantum of

excess fuel generated by the delinquent N.C.O. In such view of the matter, we are of considered opinion that the ends of justice would be adequately met if sentence of 8 months' imprisonment and dismissal from service is suitably modified to certain extent to make the appellant eligible for the pensionary benefits having regard to his pensionable service rendered to the Army for long 22 years and 8 months. It is also quite evident, that after his dismissal in the year 2006, 8 long years have silently elapsed. Even though he has prayed for reinstatement in service with all consequential benefits, it would neither be feasible nor practicable since he has not been acquitted of all the charges and has been found guilty of 1st count of charge. In such circumstances, we are unable to consider his prayer for reinstatement in its proper perspective. In that context of the matter, such prayer for physical reinstatement in service does not deserve any consideration since he was found guilty of 1st count of charge and his conviction on that score has also been maintained. In such circumstances, the ends of justice would be sufficiently served if he is not sent to prison to undergo remainder portion of sentence in the facts and circumstances of the case and his order of dismissal stands converted to discharge from service to enable him to get his pension and other pensionary benefit as per his entitlement.

Point No.XII is thus disposed of.

DIRECTION :

85. In the premises, the appeal (TA No.46 of 2012) stands allowed in part on contest with appropriate directions as under :- :

I) Let the impugned order of conviction and sentence dated 7-11-2006 which was promulgated on the same day and countersigned by the Reviewing Officer on 7-12-2006 be modified to the extent as indicated below:

a) The impugned finding of SCM holding appellant guilty of 1st count of charge and conviction under Section 52(f) of the Army Act be upheld.
b) The impugned finding of SCM holding the appellant guilty of 2nd, 4th and 5th count of charges under Section 52(f) of the Army Act be set aside.
c) The impugned finding of SCM holding the appellant guilty of 3rd count of charge framed under Section 52(b) of Army Act be set aside since 3rd count of charge under Section 52(b) framed against the appellant is found invalid.

II) Sentence impugned awarded by the SCM against the appellant vide order dated 7-11-2006 also stands modified as under :

a) The impugned sentence of R.I. for 8 months' vide order dated 7-11-2006 be hereby set aside.
b) The impugned sentence of dismissal from service as ordered vide order dated 7-11-2006 be converted to discharge from service in order to make him eligible for the pensionery benefits.
c) The impugned sentence dated 7-11-2006 directing reduction in rank against the appellant be quashed.

III) The impugned order dated 1-9-2007 passed by the Appellate Authority rejecting the Appeal under section 164(2) of Army Act (Annexure P6) preferred by the appellant before the Chief of Army Staff, Respondent No.2 be set aside.

IV) The applicant shall be entitled to all retiral/ pensionary benefits as admissible under Pension Regulations w.e.f. 7-11-2006, i.e. the date of conversion of dismissal to discharge from service.

V) The Pension Sanctioning Authority be directed through Respondent No.2 to sanction pension w.e.f. 7-11-2006 within 60 days from the date of receipt of this order.

VI) Respondent No.2 is to pass necessary direction upon PCDA(P) Allahabad for issuance of PPO in favour of the appellant in order to ensure release of monthly pension and other allied pensionary benefits as admissible under Pension Regulations within 90 days from the date of communication of this order to the appropriate Pension Sanctioning Authority.

VII) The arrears of pension shall be worked out and paid to the appellant within 120 days from the date of order in default whereof the arrears of pension would carry interest @8% per annum till the date of actual payment to the appellant.

VIII) There will be no order as to costs.

86. Let the relevant summary trial proceedings in original be returned to the respondents on proper receipt.

87. 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