(SEE RULE 102(1))

ARMED FORCES TRIBUNAL , KOLKATA BENCH

APPLICATION NO : O. A NO. 54 OF 2012

ON THIS 5TH DAY OF FEBRUARY, 2014

CORAM : HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)
HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Birendra Sharma, No. 6476234W
(Sepoy/Animal Transport)
S/o Ram Gulam Sharma,
R/o Vill : Mank, PO Mank, Tehsil Gaya (Sadar)
District Gaya, Bihar ……Applicant

-VS-

1. Union of India service through
The Secretary, M/o Defence,
South Block, New Delhi-1100011

2. The Chief of the army Staff,
Integrated HQ of MoD (Army, DHQ,
Under the Ministry of Defence, Govt. of India,
PO New Delhi-110 011

3. Adjutant General, Integrated HQ of MoD (Army),
DHQ PO, New Delhi – 110011

4. The Army Service corps (Records)
Animal transport, Paharpur, Gaya
PIN Code-823 005

…. …. Respondents.

For the Applicant : Mr. Suman Basu, Advocate

For the respondents : Mr. Mintu Kumar Goswami, Advocate

O R D E R

PER Justice Raghunath Ray, MEMBER (Judicial)

In this Appeal filed under Section 15 of the Armed Forces Tribunal Act, 2007, the appellant, Birendra Sharma, Ex-Sepoy/Animal Transport (ASC) has sought to challenge the legality and/or validity of the punishment of dismissal from service coupled with R.I. for one year as has been imposed by the Summary Court Martial held against him. He has prayed inter alia for quashing of the punishment order dated 2-4-2005 and also for his reinstatement in service with all consequential monetary and service benefits.

Back ground facts

2. The appellant was recruited in the Army Service Corps (ASC) on 25-4-1984. While he was in service with 'BRAVO' Company of 874 Animal Transport Battalion he was detailed to perform Advance Winter Stocking (AWS) duty at 11 MAHAR Regiment location. On 8-10-1992 he was dispatched to 'BRAVO' Company location and further sent to Headquarters Company location on 10th October, 1992. A Carbine (Registered No.8566, Butt No.129) and 35 rounds of 9 mm Ball were issued to him. He proceeded to HQ Company 874 Animal Transport Battalion as scheduled. However, he did not reach the destination. Therefore apprehension roll was issued on 6-12-1992. A staff Court of Inquiry

was ordered on 10-2-1993 under the Authority of Commander, Headquarters 71 Sub Area and after the Court of Inquiry the appellant was declared as deserter with Arms and Ammunition with effect from 10-10-92.

3. On receipt of intelligence information regarding the presence of a member of "Ranveer Sena" (unauthorized private army of rich land owners) along with Arms and Ammunitions, the Police had been to Village Mank within Bihar on 26-4-1997 and he was apprehended along with the weapon and 20 rounds of ammunitions in course of a raid conducted by Konch Police at above mentioned Village Mank. The police seized the said weapon and 20 rounds of ammunitions from the possession of the appellant and the same was kept in their custody. The appellant remained absent from the unit on and from 10-10-1992 with the aforesaid Arms and Ammunitions. However, at the time of his arrest 15 rounds of ammunitions were found to be deficient since he was issued with 35 rounds of ammunitions. The appellant was subsequently tried in a Criminal Court for commission of offences under Section 25(1)(a-b) & Section 26(1) of the Arms Act, 1959 and subsequent amendments thereunder (in short Arms Act). He was, however, acquitted of all the charges so framed against him by the Ld. Judicial Magistrate, 1st Class, Gaya vide judgement and order dated 29-9-2000 for lack of evidence in G.R. No.661/97.

4. On his acquittal of the charges under Section 25(1)(a-b)/26(1) of Arms Act, the appellant approached the 874, Animal Transport Battalion for his reinstatement. The Commanding Officer, 874, Animal Transport Battalion vide his letter dated 29-3-2001 asked him to submit the acquittal order as also receipt of handing over of arms and ammunitions to the Civil Police. On his surrender on 29-6-2001 at ASC Centre (North), Gaya voluntarily in compliance with the direction from the ASC Centre vide letter dated 29-3-2001, he was, issued a surrender certificate under section 142 (5) of Army Act. He was attached to No.1 Training Battalion ASC Centre (North) vide attachment order dated 9-4-2002 for disciplinary action. A separate Court of Inquiry was held since he again left the unit without intimation with effect from 5-6-2004 to 9-7-2004 on the eve of commencement of S.C.M. trial. Finally, a charge sheet was issued on 16th March 2005 wherein he was charged with two counts of charges under section 38(1) and under section 39(a) of Army Act. On conclusion of trial by SCM on 2-4-2005 the appellant was found guilty of both counts of charges under section 38(1) and section 39(a) of Army Act, 1950 (in short, Army Act) and convicted thereunder. He was sentenced to undergo RI for one year and to be dismissed from service.

5. Being aggrieved and dissatisfied with the impugned order of conviction and sentence the appellant moved the Hon'ble High Court at Patna in its Civil

Writ Jurisdiction seeking redressal of his grievances in the year 2006. During pendency of the said petition C.W.J.C. No.11576 of 2006, Armed Forces Tribunal Act, 2007 came into force and accordingly after hearing both sides the Hon'ble Single Bench of Patna High Court allowed the petitioner to withdraw the writ petition in question with a liberty to file an application challenging the impugned order before the Armed Forces Tribunal within 4 weeks along with the interlocutory application for condoning the delay and the Tribunal was asked to consider the delay caused due to the pendency of the writ petition and also to decide the case on merit in accordance with law expeditiously. Accordingly this application under section 15 of the AFT Act was filed before this Tribunal on 7-5-2012 together with a petition seeking condonation of delay which was registered as MA 28 of 2012. Subsequently, the said MA was allowed vide our order dated 29/8/2012.

Appellant's version

6. It is averred in the appeal that on 10th Oct 1992 while he went to fetch drinking water from a local stream he was abducted at gun point by JKLF (Jammu & Kashmir Liberation Force) militants, a terrorist/extremist organization operating in that State. He was taken to Nandigram and held in captivity and subsequently "sold like cattle" along with his arms and ammunitions to SWARN Liberation Army, Aurangabad, Bihar. However, on 18th

April, 1997 the appellant escaped from captivity with his arm and ammunitions. Thereafter on 23rd April, 1997 he reported to the Adjutant, ASC Centre (North), Gaya, who after taking his identity card handed over him to the local police on 25-4-1997. The local police registered a case being Konch P.S. Case No. 37 of 1997 dated 26-4-1997 (GR 661 of 1997) under Section 414 of IPC 1860 and Section 25(1)(a-b) & 26(1) of Arms Act against the appellant. After remaining in police custody for about 8 months he was released on bail on 25-12-1997 and subsequently on 29-9-2000 he was acquitted of the charges in the said criminal case by the ld. Judicial Magistrate 1st Class, Gaya as the prosecution failed to produce even a single witness against him to prove the charges framed against him.

7. According to the appellant, he was not allowed to rejoin at unit on 4-10-2000. Being aggrieved he made a representation before the President of India. He, thereafter, received a letter from the Commanding Officer 874 Animal Transport Bn. on 29-3-2001 wherein he was asked to submit the order of acquittal as also receipt of handing over of Arms and Ammunition to Civil Police. On his surrender, a certificate of surrender under 142(5) of the Army Act was issued to him. He was attached and confined by the respondent authorities to No.1 Training Bn. and disciplinary proceeding was started. He was tentatively charged under section 38(1) for deserting the service from

Field area from 10-10-1992 till 29-6-2001 and also under section 54(b) for losing by neglect clothing and equipment of Government property amounting to Rs3596.15 issued to him for his use which were found deficient on his surrender on 29-6-2011.

Respondent's contention

8. By filing an affidavit in opposition the respondents have controverted all the material allegations of the petition contending inter alia that on 8-10-1992 he was dispatched to Bravo Company Location and further sent to Hqrs Company location on 10th October 1992. He got himself issued with a Carbine (Registered No.8566, Butt No.129) and 35 rounds of 9 mm Balls and proceeded to Hqrs company 874 Animal Transport Bn as scheduled but instead of reaching the destination he absconded with the arms. Apprehension roll was, therefore, issued against him on 6-12-1992. He was also declared as deserter with arms and ammunition with effect from 10-10-1992. He thus remained unauthorisedly absent from the unit on and from 10-10-1992 with the aforesaid arms and ammunition. On receipt of intelligence information regarding presence of a member of Ranveer Sena (unauthorized private army of rich land owners) , he was subsequently apprehended along with weapon and 20 rounds of ammunitions during a raid carried out by Konch Police at village Mank (Bihar) on 26-4-1997. Since he was found with the possession of

fire arms and ammunitions, the police recovered the said weapon and 20 rounds of ammunitions from the possession of the applicant under a proper seizure list and the same were kept in their custody. However, at the time of his arrest 15 rounds of ammunitions were found to be deficient since he was issued with 35 rounds of ammunitions. On his surrender voluntarily on 29-6-2001 after the lapse of about 8 year and a half he was issued with a surrender certificate under section 145 of Army Act. He was charged under section 38(1) and under section 39(a) of Army Act. On conclusion of Summary Court Martial he was found guilty and sentenced to suffer RI for one year coupled with an order of dismissal from service.

9. It is further contended on behalf of the respondents that since the appellant did not file any statutory appeal against the punishment impugned and instead filed a writ petitition before the Hon'ble Patna High Court which was dismissed on 13-3-2012 for lack of jurisdiction, the present appeal is not maintainable.

10. It is also emphatically averred in the Affidavit-in-opposition by the respondents that the appellant committed grave misconduct of desertion along with Arms and Ammunitions while on active service. He was subsequently apprehended by the Police after a lapse of more than five years and tried by the Criminal Court, Gaya. The story of the appellant that he was

abducted by J&K extremists appears to be concocted. He intentionally deserted and when he was caught by the Police red handed along with arms and ammunitions, he fabricated such a story to make out a case for his desertion. He was tried by the Commander in SCM under the order of the competent authority and the said proceeding was held following the prescribed procedures. He was given all reasonable opportunities to defend his case and, thereafter, punishment was imposed which is commensurate with the gravity of the offence. Therefore, this Tribunal need not interfere with the punishment imposed and the appeal may be rejected.

11. No Affidavit-in-Reply was, however, filed on behalf of the appellant. In addition to extensive oral argument, written Notes on arguments on behalf of the appellant was also filed by Mr Suman Basu, Learned Counsel for the appellant.

Argument/Discussion & Views

I. Non-compliance of Section 104 & 105 of the Army Act, 1950

12. Appearing on behalf of the appellant Mr. Suman Basu, learned counsel argues that, even though the Indian Army was duty bound to invoke the provision of section 104 of the Army Act 1950 and seek release of the appellant for custody within the Army when intimated by Civilian Police about

the seizure of Sten Machine Carbine together with one magazine and 20 rounds of 9 mm Cartridges in connection with Konch PS case No.37/97 dated 26-4-97 u/s 414 IPC and Sec. 25(1)(a-b), 26 (1) of Arms Act, no such positive steps were taken by the Army Authority in terms of Section 104 of Army Act. Further, no written information of the desertion of the appellant was furnished to the Civil authorities for his capture as mandated in Section 105 of Army Act. It is, therefore, specifically contended by Mr. Basu that non-compliance of Section 104 of Army Act 1950 is fatal for the prosecution.

13. We have paid anxious consideration to such submission of Mr Basu but we do not find much substance therein for the simple reason that even after his arrest by the police on the basis of source information about the movement of Ranveer Sena in a particular village, the appellant never disclosed his identity either before the Police or before the Court of Ld Judicial Magistrate 1st Class, Gaya during his trial that he was an army personnel. The appellant has also not averred within the four corners of the present petition that the police authorities had full knowledge about the factum of his desertion on active service from the armed forces. Even when he approached the Hon'ble High Court seeking bail, it is neither averred in the bail petition itself nor it was brought to the notice of the High Court during the bail hearing that he belonged to Indian Army. A close scrutiny of the judgement and order

of acquittal passed by the Ld Judicial Magistrate, 1st Class, Gaya on 29-09-2000 reveals that it was not brought to the notice of the Ld Magistrate at any stage of the Criminal Proceeding that he deserted the army in the year 1992 or was abducted by the JKLF and was subsequently sold to Ranveer Sena of Bihar wherefrom he allegedly escaped on 18th April 1997. Be that as it may, it is quite evident from the conduct of the appellant that even when he approached the Tribunal seeking redressal of grievances, he did not hesitate to suppress the material facts of his desertion while in active service in field areas at the material point of time with an ulterior motive to cover up heinous crime of desertion with arms and ammunition by introducing a cock and bull story of his abduction by extremists of Jammu & Kashmir and also subsequent sale to extremists of Bihar.

14. His forceful contention that both the civilian authorities and army authorities chose to ignore the relevant provisions enshrined in Sections 104 & 105 of Army Act appears to be misconceived. The civilian authorities, i.e. the Police and the Ld. Trial Court had no knowledge that he was a deserter while on active service in the field area, from the Armed Forces since neither the accused himself nor the police authorities had brought it to the notice of the Ld. Magistrate that the appellant who was facing trial before the Court of Ld. Judicial Magistrate 1st Class, Gaya as an undertrial prisoner was an Army

Deserter. True, the relevant records pertaining to SCM proceedings and pre-trial documents indicate that the Army Apprehension Roll was pending before the District Police Authorities for his apprehension since 1993. Therefore, there was a serious lapse on the part of the Police Personnel posted in Konch Police Station at different point of time within the span of long 7/8 years in not keeping up their constant endeavour to execute such apprehension roll pending since 1993. Resultantly, Army authorities also could not be intimated about his arrest and seizure of incriminating arms & weapons from his house on 26th April, 1997. In fact, only after his surrender on 29-06-2001 before the ASC Centre North, Gaya, necessary correspondences with the police for return of seized arms and ammunitions belonging to the army was initiated.

15. In this context it would be apt to reproduce Sections 104 & 105 of Army Act as under :

> "104. **Arrest by civil authorities** – Wherever any person subject to this Act, who is accused of any offence under this Act, is within the jurisdiction of any magistrate or police officer, such magistrate or police officer shall aid in the apprehension and delivery to military custody of such person upon receipt of a written application to that effect signed by his commanding officer. (Emphasis is ours)
>
> 105. **Capture of deserters.** – (1) Whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as in his opinion, may be able to afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant

> had been issued by a magistrate, and shall deliver the deserter, when apprehended, into military custody".
>
> (Emphasis is ours)

A plain reading of the text of those two afore-quoted sections of Army Act tends to show that the Magistrate or Police Officer is under Statutory obligation to extend all sorts of help in apprehending the accused against whom commission of any offence under the Army Act has been alleged and deliver the offender to Military Custody on the basis of written application to that effect signed by his commanding officer. It is, therefore, needless to mention that a duty is also cast upon the commanding officer to file an application before the Ld. Magistrate/Police Authorities praying for delivery of the offender to Military Custody as envisaged in the Section 104 of Army Act, 1950. As already discussed earlier, it is an admitted position that no such application was filed before the Ld. Magistrate praying for delivery of the offender, i.e. the accused facing trial before the Ld. Judicial Magistrate, Gaya. It is also pertinent to note that there is nothing on record to indicate that the Army Authority had any knowledge about apprehension of the deserter by the police in connection with Konch P.S. Case No.37/97 dated 26-4-1997 u/s 414 of IPC read with Section 25(1)(a-b) and 26(1) of Arms Act. In such a situation Mr Basu's argument that Indian Army is duty bound to invoke provisions of section 104 of Army Act is of no avail since no documentary evidence has also been brought on record to establish that Army Authorities were intimated by the

police in respect of seizure of Carbon weapon and ammunition and also lodgement of FIR by the Police against the appellant giving rise to the aforementioned Konch P.S. case immediately after such seizure and arrest. The seizure list dated 26-4-1997 itself prepared in connection with the said Konch P.S. case (Ex 4 in SCM trial) also does not evince that seized items, i.e. 1 Carbine machine gun, magazine & 20 rounds of ammunitions is meant for exclusive use of army personnel.

16. It appears from the original Court Martial proceedings produced before us that ASI Parasuram Thakur of Konch Police Station (Gaya) was examined as PW2. He produced and proved (I)the original FIR against the appellant dated 26-4-1997, (II) Copy of Seizure List pertaining to GR Case No.661/97 dated 27-4-97 u/s 25(I)(a-b)/26(1) of Arms Act vide which a Carbine Machine gun bearing registration No.H8566 & 20 rounds of 9 mm ball ammunition were seized/ recovered by the Police on 24-3-2005 and the same were marked as Exhibit 12 & 13 respectively during SCM trial. In response to a query by the SCM he explained the circumstances under which the arms and ammunitions were recovered from the appellant. PW2 deposed that the weapon Carbine machinegun with 20 number of live rounds of live Ball ammunition were recovered from the house of accused Birendra Sarma during a raid on 26th April 1997. On a further query by the SCM as to whether the accused Birendra

Sarma handed over or surrendered his weapon willingly to the Conch PS, he answered in the negative and asserts that the weapons were recovered during the raid conducted by the Police party. The officer was, thereafter, asked as to whether the appellant was taken into custody of ASC Centre North Gaya on 25th April 1997 by the police authorities. The deponent's reply was in the negative and he emphatically deposes that accused sepoy Birendra Sarma was apprehended along with carbine machine gun and 20 rounds of 9 mm ball ammunitions which were recovered from the house of the accused located at village Mank on 26th April 1997. Thereafter, at least three crucial questions were put to the police officer and such questions together with its answer, which are absolutely relevant and highly essential for unearthing the truth of claims and counter claims by the parties in the light of the relevant rules and regulations of the Army Act and the Rules framed thereunder, are reproduced below :

"Q4. Was any Identity Card recovered from the accused Birendra Sharma?	No. As per record no identity card was recovered from the accused Birendra Sharma
Q.5. Was any Army clothing recovered from the house of accused Birendra Sharma?	No. As per record no Army clothing was recovered from the accused Birendra Sharma
Q.6. Did the accused Birendra Sharma disclose his identity that he was an Army Personnel?	No. As per record the accused did not disclose his identity."

17. Despite such categorical assertion by the police officer, PW2 which, in fact, demolishes the appellant's case sought to have been propounded in appeal, the appellant refuses to cross examine the prosecution witnesses as is evident from the endorsement made by the Court in the deposition sheet. In absence of cross examination by the accused or his friend, the case of the prosecution that because of appellant's failure to disclose his identity before the police, the army authorities could not be enlightened about his apprehension with incriminating weapons stands vindicated. The appellant's further case that he was taken into custody from ASC Centre North Gaya on 25th April 97 by the police authorities also stands demolished.

18. On the question of non-compliance of Section 105 of Army Act, we do not find much substance in Mr. Basu's argument on that score in-as-much as there is documentary evidence in the original record pertaining to, SCM proceedings as also pre-trial documents to establish issuance of Apprehension Roll on 6th December, 1992. The appellant was declared as deserter with arms and ammunitions with effect from 10th October, 1992 as required under Section 105 of Army Act. There is, however, no doubt that there was lack of an effective coordination between the District Police Administration and the concerned Konch police station under whose jurisdiction the appellant's house at Village Mank was located. Perhaps because of lapse of long 7/8 years from

the date of issuance of Apprehension Roll and declaration of the appellant as deserter by holding a proper Court of Inquiry, the concerned Police Officers posted in the Mank Police Station at different point of time could not co-relate the apprehension roll with the arrest of the appellant who managed to conceal his identity as an army personnel before the arresting and seizing Police Authorities. In fact, the appellant sought to foist the fictitious story on both the civil and army authorities in a very dexterous manner. But ultimately he could not get through the same to both the authorities. Be that as it may, the fact remains that there was a strict compliance of the provisions of Section 105 of Army Act by the Army Authorities. In such view of the matter objection raised on behalf of the appellant alleging non compliance of Section 104 and 105 of the Army Act stands overruled.

19. Against such factual backdrop, we are of the definite opinion that there was no violation of Section 104 of Army Act either by the civil authorities or by the military authorities. The question of invoking provisions of Section 104 of Army Act either by the Civilian authorities or by the military authorities, therefore, does not arise in the facts and circumstances of the present case,

II. <u>Veracity of Appellant's Version</u>

20. For a critical appreciation of the issues which came up for our consideration and adjudication in its proper perspective, it would be

convenient and useful to judge the veracity of appellant's version on the touch-stone of credibility and reasonableness. Before we proceed to record our ultimate findings on legal and factual issues involved in this case, we are to weigh attending circumstances and relevant sequence of events in between his desertion on 10-10-1992 and subsequent surrender on 29-6-2006 on the basis of both oral and documentary evidence on record for objective evaluation of situation prevailing at the material point of time. On a meticulous dissection of respective version of the parties as unfolded in their pleadings in the light of materials and circumstances on record, as have been made available to us in the original SCM proceedings as also pre-trial documents like recording of Summary of Evidence etc., the following facts emerge :-

a) While proceeding from 'B' Coy to HQ Coy of 874 ASC in Jammu & Kashmir, the appellant was found missing on and from 10.10.92 with Sten Machine Carbine (SMC) together with one Magazine and 35 rounds of 9 mm cartridges which had been issued to him.

b) On 6-12-1992 Apprehension Roll was issued with a request to the Superintendent of Police, Gaya, Bihar to apprehend the deserter at the earliest under intimation to the issuing authority.

c) A Court of Inquiry was held and on conclusion of the Court of Inquiry, the appellant was declared a deserter with arms and ammunitions on 10th Feb 1993.

d) The appellant after desertion escaped to Bihar and presumably joined the "Ranveer Sena", a banned extremist organization in Bihar.

e) Later, on prior information, Konch Police Station raided the appellant's village Mank on 26th April 1997 and apprehended him with Sten Machine Gun with 20 round of 9 mm cartridges from his house.

f) The appellant was, however, not in possession of his Identity Card or any Army clothing when he was arrested by the Police on 26th April, 1997.

g) He also did not disclose his identity to the Police when he was arrested from his home on 26th April, 1997.

h) As an undertrial prisoner in GR Case No. 661/97 u/s 414 IPC and Sec. 25(1)(a-b) & 26 of Arms Act, arising out of Konch PS case No. 34/97 dt. 26.4.97, he did not divulge before the Ld. Trial Court that he belonged to the Army.

i) Even while seeking bail as an under-trail prisoner, he did not bring it to the notice of the Hon'ble Patna High Court that he was an Army Personnel.

j) Despite his enlargement on bail on 25-12-97 in terms of the Hon'ble High Court's order , he never bothered to report either to his unit or to the ASC Centre, North, which is also located in Gaya.

k) Even though he was acquitted of all the charges framed against him on the ground of lack of evidence vide judgement and order dt. 29.9.2000 passed by the ld. Judicial Magistrate, 1st Class, Gaya, he did not physically report to his unit or to ASC Centre, Gaya until 29.6.2001.

l) The conduct of the appellant in not disclosing his identity as an Army Personnel either before the law enforcing agencies or the Court as also not reporting to his Unit or to the ASC Centre North in Gaya at the earliest opportunity speaks volume against him.

m) No explanation was, however, offered at any point of time as to why despite his enlargement on bail on 25-12-1997 he waited till 29-6-2001, i.e. for about 2 years and a half, to surrender before ASC Centre Gaya which was located in his home town near the place where his criminal trial was held.

n) Thus, the appellant deserted for a period of 8 years and 262 days.

o) His assertion in the Defence Statement dated 3-5-2002 submitted before the Convening Authority and marked as Ext. VIII during recording of summary of evidence as also averments made before this Tribunal that he surrendered to the then Adjt. ASC Centre (North), Gaya on 23d April, 1997, who took his identity card and handed him over to civil police, Gaya on 25th April 1997, stands completely demolished in view of the recovery of Sten Machine Carbine and 20 rounds of 9 mm ammunitions under a proper seizure list from his house at his native place i.e. village Mank and also his arrest therefrom as also lodgement of FIR to that effect giving rise to a criminal case against him. Those arms and ammunitions were found to be portions of Arms and Ammunitions with which he deserted while on active service. The unchallenged evidence of Shri Parushuram Thakur, ASI from Konch PS before the SCM whose cross-examination was also declined by the appellant, clearly gives a descent burial to the appellant's version.

p) That apart, no corroborative evidence/materials have been brought on record either at the stage of pre-trial proceeding or during SCM trial when he was called upon to adduce his evidence/ defence witness to substantiate his purported surrender to Adjutant, ASC Centre

(North) Gaya and his handing over to the civil police, Gaya on 25th April 1997 after taking away his Identity Card.

q) The appellant also did not serve continuously in an exemplary manner for three years as required under sub-sec. (4) of Sec. 122 of Army Act since he again absented himself without leave w.e.f. 5.6.2004 to 09.7.04 while attached with No. I Training Battalion for finalization of the disciplinary proceedings, knowing fully well that the purported period of limitation was going to expire on 29-06-04, and the trial was to be commenced within the said period of limitation.

r) He is proved to be a habitual offender. He was punished twice for the offences under section 39(b) and 57(b) of Army Act as per details given below :-

Sl No	Date of Punishment	Provision of Special Act	Punishment awarded
I	25th June 1995	U/S 39(b) of Army Act	03 days confinement to lines
Ii	06 Sept 1990	U/S 57(b) of Army Act	28 days rigorous imprisonment in military custody

Taking all these relevant facts and circumstances enumerated above together as also considering their salient features, we are of the definite view

that the version of the appellant regarding his abduction by the extremists of JKLF and subsequent sale to extremists of Bihar appear to be a cock and bull story which does not have any semblance of truth. We are, therefore, not prepared to accept such belated afterthought version which was floated with an ulterior motive to get rid of the serious charge of desertion with arms and ammunition on active service. In such view of the matter, we feel constrained to opine that the defence story as sought to have been propounded at the time of recording of summary of evidence at the pre-trial stage as also in the Defence Statement submitted before the Convening Authority appears to be founded on wild imagination, particularly to save his skin from the ambit and scope of disciplinary proceeding, Therefore, the defence story, as sought to have made out, is liable to be rejected in toto.

III. <u>Violation of Section 120(2) of Army Act</u>

21. It is next argued by Mr. Basu that, even though the appellant surrendered on 29th June 2001 before the Army Authority, the initiation of regular proceeding against him was inordinately delayed for the reasons best known to them. According to him, the Army Authorities proceeded to hold SCM instead of GCM in order to deny him a reasonable opportunity of defending his case adequately before the SCM, even though there was no emergency warranting immediate action as contemplated in Section 120(2) of

Army Act, 1950. It is forcefully argued by him that in the absence of any grave reason for immediate action, the Commanding Officer of the Unit ought to have recommended holding of General Court Martial/District Court Martial. It is vehemently argued by him that in the present case there is nothing on record to indicate that there were sufficient and adequate reasons to hold SCM on emergent basis. According to him, it is obligatory to specify the nature of military exigencies for trying summarily a case of serious nature of the offence involving desertion with Arms and Ammunitions on active service. It is, therefore, submitted by Mr. Basu that non-compliance of mandatory requirement envisaged in 120(2) of the Army Act has caused serious prejudice to the appellant because of inordinate delay in initiation of SCM proceedings and its disposal.

22. Such submission is, however, strongly disputed by Mr. Goswami, the learned counsel for the respondents. It is submitted by him that the conduct of the appellant during SCM trial was not above board and even when disciplinary action for a serious offence of desertion on active service was pending for finalization, he again absented himself on and from 5th June, 2004 without leave from the ASC Centre North. He, however, surrendered voluntarily on 9th July, 2004. There was sufficiently strong and emergent ground to initiate SCM proceeding instead of DCM/GCM proceeding since situation was grave

warranting immediate action because of his desertion with arms and ammunitions while on active service in the field area in the year 1992 and, thereafter, reportedly joining Ranveer Sena in Bihar posing a serious threat to the internal security of the country. After the lapse of more than 8/9 years from the date of commission of such a serious offence of desertion he was arrested by the police with the possession of incriminating ammunitions during a raid in his native place at village Mank within Bihar for which he had to face a criminal trial. After being acquitted of the charges for lack of evidence on conclusion of such trial, he surrendered before the authorities on 29th June, 2001. It is, therefore, forcefully argued by Ld. Counsel for the respondents that having regard to the gravity of offence of desertion with the arms and ammunitions on active service in the field area about 8/9 years ago, immediate action against the deserter appellant was extremely necessitated especially when the situation being seriously aggravated became highly detrimental to army discipline. There is, therefore, nothing wrong in holding Summary Court Martial and according to him there was no violation of the mandatory provisions as enshrined in 120(2) of Army Act, 1950.

23 SCM Trial was also disadvantageous to the appellant as assailed by the learned counsel for the appellant, on the ground that he was deprived of exercising his right to defend himself adequately during the SCM. Such

contention does not appear to be backed by sufficient materials and circumstances on record. On the contrary, it is quite evident and established from the records pertaining to the SCM proceedings that at every stage of the proceeding impugned he was afforded reasonable opportunities of defending himself. But the conduct of the appellant during trial speaks otherwise. He even declined to cross-examine the witnesses examined on behalf of the prosecution during Summary Court Martial. He was also advised to give the names of officers/JCOs or other rank of his choice as friend of accused well before the commencement of trial making it clear that in case of his failure to exercise his option in time any officer/JCO/OR as per availability shall be detailed by the Commanding Officer as friend of accused in terms of Rule 129 of Army Rule vide letter dated 16th March, 2005. He acknowledged receipt of such letter in presence of at least two witnesses on 16-3-2005. It, however, appears that he did not exercise his right for selection of anyone as friend of accused to defend him during summary Court Martial for the reasons best known to him. The copy of charge sheet, summary of evidence etc. had also been handed over to him vide their letter 16-3-2005 as per requirement of Rule 34 of Army Rules. In fact, the army authorities are under statutory obligation to provide legal assistance and advice to the appellant through a friend of his choice during Summary Court Martial as per Rule 129 of the Army

Rules. The appellant's refusal to exercise option in this regard as also reluctance to cross-examine witnesses during summary trial belies his contention that he was not afforded reasonable opportunity to defend himself during SCM trial. That apart, it is also palpably clear from the pre-trial documents which are also the part of SCM proceedings that during recording of summary of evidence also he declines to cross examine the witnesses. Taking all these facts and circumstances together into account we do not find any merit in Mr Bose's submission that the right to defend himself during SCM trial was denied to the applicant in any manner at any point of time and he has been seriously prejudiced because of holding of SCM Trial.

24. It is also contextually relevant to point out that the procedural irregularity while conducting the Summary Court Martial proceeding for trying an offence under Section 38 (1) read with 39 (a) of Army Act can be protected under section 149 of Army Rules since there is nothing to record to indicate that any prejudice has actually been caused to the appellant for such procedural irregularity, if any. In our considered view the SCM proceeding can be validated in certain cases despite apparent irregularity in procedure in terms of Section 149 of Army Rules. Having regard to the factual scenario projected in the present case and considered on the anvil of the provisions of Section 120(2) of Army Act, we are to opine that the protection under Rule

149 of Army Rules can well be extended to cure/validate the procedural irregularity if any.

25. We have very carefully taken into consideration submissions advanced by the learned counsel of both sides with reference to mandatory requirement envisaged in Section 120(2) of the Army Act, 1950 coupled with sequence of events leading to commencement of SCM trial. It is mandated in Section 120(2) of the Army Act that in case of an offence under Sections 34,37 and 69 of Army Act there cannot be a Summary Trial in normal circumstances but exception to this general rule has been provided only in emergent circumstances wherein even minimum delay in holding trial cannot be tolerated to meet the exigencies of circumstances which may be detrimental to military discipline. In such a situation also the Commanding Officer has to refer the matter to the appropriate authority justifying his action in holding summary trial in respect of any offence punishable under the afore-mentioned sections of Army Act. In this context it is pertinent to mention that the Commanding Officer recommended for holding District Court Martial for trying the serious offence of desertion with arms and ammunition, on active service vide his letter dated 16-11-2004. However, the competent authority having regard to grave emergency necessitating immediate action against the offender ordered the holding of summary trial to maintain strict discipline in

the Forces. Such being the legal and factual position, the Commanding Officer is duty bound to hold summary trial since his reference for holding District Court Martial has been turned down by the competent authority after taking the military discipline into consideration with utmost priority. That apart, offences punishable u/s 38(1) and 39(a) have not been dealt with in Section 120(2) of Army Act. Therefore, Summary Court Martial trial in the present case cannot be subjected to the provisions of sub section (2) of Section 120 of Army Act. The Competent Authority in fact rightly directed the Commanding Officer to hold summary trial against the offender who was to be charged for offences punishable u/s 38(1) and 39(a) of Army Act which are triable in exercise of powers of Summary Court Martial conferred u/s 120 of Army Act.

26. In our considered view violation of mandatory provision of 120(2) of Army Act as alleged could not be substantiated in view of the fact that speedy trial is a sine-quo-non for enforcement of military discipline. More so, whenever offences punishable u/s 38(1) & 39(a) of Army Act are not subjected to the provisions of sub section (2) of Section 120 of Army Act. However, delay in conducting SCM proceeding has been caused due to manifold compelling circumstances and reasons. A close scrutiny of SCM proceeding produced in original reveals that the Commanding Officer had to enter into several correspondences with the police authorities for recovery of seized sten

machine carbine, one magazine and 9 mm ammunitions etc. which were seized under a proper seizure list by them and were kept in their custody. It cannot be denied by any stretch of imagination that before commencement of SCM trial, the Commanding Officer or for that matter prosecution authorities are to collect all the relevant documents and materials etc. to ensure fair trial for the accused so that truth could be elicited through the process of trial. It appears from the relevant pre-trial documents that immediately after voluntary surrender of the appellant on 29th June 2001 at ASC Centre (North), Gaya after a period of 8 years and a half along with final acquittal order of the Criminal Court, ASC records (AT) was approached to forward desertion documents in respect of the delinquent Sepoy vide their letter No.8352/D/HQW/ST 1 dated 2-7-2001 and such desertion documents were received from ASC records (AT) vide ITS letter No.6476234/NE/DES dated 4-7-2001. Similarly, the Police Station Konch, Gaya was also approached for release of seized SMC and ammunition vide the Commanding Officer's letter No.2369/ST-12 dated 4-7-2001. The Ld. CJM was also approached to release the weapon and ammunition in question vide Commanding Officer's letter No.8352/DOPT/HQW/ST-12 dated 18th July, 2001 since seized properties produced before the Court requiring trial cannot be released without Ld. Trial Court's order.

27. The recording of summary of evidence was ordered on 7th December 2001 and such recording of evidence was completed on 7th May 2002, Subsequently recording of additional summary of evidence was completed on 27-7-2002. Again P.S. Konch, Gaya was approached for release of SMC and ammunition on 20-2-2003 and subsequently on 25-2 and 26-3-2003 but the same were not released by the police authority till 4-4-2003. Ultimately, after series of correspondences and repeated pursuation, one SMC & 20 rounds cartridges etc. were released by the PS Konch on 5-4-2003. Again further addl summary of evidence was ordered on 14-5-2003 to collect more evidence on the subject case as per advice of their higher Military authorities. Such recording of further addl Summary of evidence was completed on 19-7-2003 and after the lapse of almost 6 months, documents were received from HQ MB Area with comments/directions etc. Thereafter on 1-6-2004 action/procedure was initiated to hold SCM trial of the appellant. Unfortunately, as pointed out earlier the appellant absented himself again on and from 5th June 2004 to get the SCM time barred. His apprehension roll for such unauthorized absence was also issued on 20-6-2004. The appellant, however, voluntarily rejoined to the unit on 9-7-2004, i.e. after the expiry of purported period of limitation 29-6-2004.

28. It is, therefore, quite evident from the sequence of events as reflected through afore-mentioned various correspondences that delay in holding SCM trial was caused partly because of indifferent attitude of police authorities and other government agencies who failed to respond to the urgent requirement of the Army Commander, with utmost priority and due diligence for expeditious initiation of the SCM proceeding impugned. At any rate, having regard to the hard facts and unavoidable circumstances which forced delayed initiation of SCM trial by the CO as unfolded through the relevant pretrial documents and papers produced before us with the original case records of SCM proceedings, we do not find any merit in Mr Basu's submission that mandatory requirement of Section 120(2) of Army Act has not been satisfied. We are of the definite view that the SCM trial has been conducted and concluded in the instant case within the ambit and scope of provisions 120 of Army Act. As a matter of fact, the Summary Court Martial has been held against the offender appellant to try the offences punishable u/s 38(1) & 39(a) of the Army Act whereas offences punishable under Sections 34, 37 and 69 only have been specified in Section 120(2) of Army Act. In such view of the matter, Mr Basu's objection on that score appears to be devoid of merit.

III. <u>Limitation</u>

29. It is next contended by Mr. Basu that the SCM proceeding impugned is barred by limitation and as such SCM trial is not maintainable. In this context it is pointed out by Mr.Basu that the appellant surrendered to the ASC Centre (North) Gaya on 29th June 2001 whereas trial in the SCM proceeding commenced on 2nd April 2005 and, therefore, it was after the expiration of a period of 3 years. Accordingly, the SCM trial for an offence of desertion with arms & ammunitions on active service being barred by limitation cannot be held legally sustainable and as such conviction and sentence for one year R.I. as also punishment of dismissal are liable to be set aside.

30. Such submission is, however, strongly disputed by Mr. Goswami, the learned counsel for the respondents. It is forcefully submitted by him that the period of limitation as stipulated in 122(4) of Army Act is not applicable to the impugned SCM trial which is held for trying an offence of desertion with arms and ammunitions on active service from field area. For a better appreciation of rival contention on the issue of limitation it would be useful to reproduce Section 122 of Army Act as under :-

" 122. **Period of limitation for trial** :

(1) Except as provided by sub-section (2) no trial by court martial of any person subject to this Act for any offence shall be

commenced after the expiration of a period of three years and such period shall commence –

(a) On the date of the offence; or

(b) Where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) Where it is not known by whom the offence was committed, ……..

(2) The provisions of sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in section 37.
(Emphasis is ours)

(3) In the computation of period of time ……

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in exemplary manner for not less than three years with any portion of the regular Army".
(Emphasis is ours)

31. A close look to the afore-quoted section 122 of Army Act reveals that Section 122(1) provides a general provision that no trial by court martial of any person subject to Army Act for any offence shall be commenced after the expiration for a period of 3 years. However, there are certain exceptions which have been indicated in sub section 2 of Section 122, which stipulates that general provision of sub section 1 of 122 pertaining to limitation shall not be applicable to a trial for an offence of desertion and fraudulent enrolment. The

sub section 4 of section 122 further makes it clear that no trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question not being an officer, has subsequently to the commission of the offence, served continuously in exemplary manner for not less than three years with any portion of the regular Army. In other words, a deserter cannot be tried by a Court Martial if such offender served continuously subsequent to the commission of an offence of desertion in an exemplary manner for not less than three years with any portion of the regular army. Contextually it is also relevant to mention here that the appellant surrendered on 29th June, 2001 and again absconded on and from 05-06-2004 for a period more than one month. The appellant thus failed to serve with the ASC (North) continuously in an exemplary manner for at least three years as stipulated in Section 122(4) of Army Act. Since the stipulation of 122(4) of Army Act does not hold good in the case of appellant, there is no bar of limitation in holding SCM trial against him. It is also worth mentioning here that Clause 22(a)(ii) of Army Order 43/2001/DV-DESERTION provides that a person subject to Army Act who deserts while on active service with arms and ammunitions is liable to be dismissed after 10 year of absence and desertion even if he does not surrender or is not apprehended under Section 19 of Army Act read with Army Act 14 Section 20 read with Army Rule 17, as the

case may be. It is, therefore, quite evident that desertion with arms on active service has been viewed with utmost importance and seriousness and that is why such desertion on active service has been shown as an exception in 122 (4) of Army Act wherein contingency of exemplary service for a period of three years has been provided to the benefit of a deserter imposing a bar to his trial by Court Martial while such beneficial contingency has not been extended to the offence of desertion on active service and no such bar has been imposed for commencement of trial against the offence of desertion on active service.

32. At any rate, in the present case there is no doubt that SCM proceedings against the appellant ought to have been initiated within the reasonable period of time. However, a close scrutiny of pre-trial documents annexed with the original case records pertaining to the SCM proceedings reveals that the CO of No.1 Training Battalion took positive steps on emergent basis for initiation of SCM proceedings against the appellant on 1st June 2004 perhaps on the footing that the case will become time barred on 28th June 2004. Accordingly, Officer-in-Charge, P.S. Konch, Gaya Bihar was requested to direct the concerned Police Officer of his Police Station to tender evidence in order to explain the circumstances of recovery of the arms and ammunitions from the house of the appellant during summary trial on 10th June, 2004. Carbine machine bearing Regd No.H-8566 and 20 rounds of 9 mm Ball issued to the

appellant by 874 A.T. Bn., ASC were recovered by the Konch P.S. vide their Japti Suchi (Seizure list). It appears that those seized weapons and ammunitions were collected by ASC Centre from the Police Station on 5th April, 2003. Similarly, 874 A.T. Bn ASC was also approached for production of relevant records showing details of Carbine Machine and 9 mm Ball in question issued to the appellant by them and also to forward the details of the Identity Card of the delinquent individual as per records held in their office, vide Commanding Officer's letter dated 21-6-2004. It is, therefore, palpably clear from the afore-mentioned pretrial correspondences that the Commanding Officer contemplated to expedite the process of holding SCM within 29th June 2004 and accordingly he fixed 10th June 2004 as the date for production of relevant records and recording of evidence of the concerned Police Officer of Konch P.S. during trial by SCM. Another letter dated 1st June 2004 was also addressed to No. 1 Training Battalion (AT) for production of relevant records showing whether the delinquent at the time of surrender was in possession of any identity card or otherwise.

33. The convict appellant was attached to ASC (North) Gaya since his date of surrender, i.e. on and from 29-6-2001. But he found it convenient to thwart the process of commencement of trial scheduled to be held on and from 10th June 2004. Accordingly he again absented himself without leave on and from

5-6-2004 to 09-7-2004 knowing fully well that in his absence the SCM trial could not be commenced and it would become time barred. He, however, voluntarily rejoined on 9th July 2004 after expiry of three years on 29-6-2004 being the period of limitation, perhaps as per his computation of period of limitation. Consequent to his rejoining the case was taken up again by the Commanding Officer, No 1 Training Bn. He submitted recommendation for holding DCM instead of SCM trial on manifold grounds like gravity of an offence of desertion on active service with arms and ammunition and further such trial as proposed would also not be barred by limitation as per section 122(4) of Army Act. However, the competent authority did not accept such recommendation of the Commanding Officer and he was asked to hold SCM trial (vide letter dated 16th March, 2005). However, the commencement of trial by Court Martial for commission of serious offences of desertion on active and fraudulent enrolment is not barred by section 122(4) of the Army Act. Admittedly, the appellant was tried summarily for commission of an offence of desertion with arms and ammunition while on active service in field area as also for absenting himself without leave from the unit lines from 05-06-2004 to 09-07-2004. Such being the factual position the commencement of appellant's trial by the SCM is not legally barred in terms of sub section (4) of Section 122 of the Army Act.

34. The most disturbing feature of this case is that the appellant absconded during the pendency of disciplinary proceeding w.e.f. 5-6-2004 to 09-7-2004 knowing fully well that the period of limitation would expire on 29-6-2004. It appears to be his deliberate move to get the SCM trial barred by limitation under misconception that such bar of limitation is also applicable to the case of desertion while on active service. In fact, he intended to take an advantage since SCM trial was about to commence in the last month, i.e. in the month of June, 2004 when the period of limitation was to expire on 29th June 2004. At any rate, the moot question arises if the appellant himself makes an endeavour to get the SCM proceeding barred by limitation by resorting to a wrong step whether he is entitled to take the advantage of his own wrong. In this context we would like to refer to a ruling of the Hon'ble Apex Court reported in **(1996) 4 SCC 127 (Union of India and other – Appellant vs. Major General Madan Lal Yadav (Retd) – Respondent).** In the case before the Hon'ble Apex Court, the Controller General of Defence Accounts in the special audit of local purchases sanctioned by the respondent prima facie found that the Maj. Gen (Retd) had derilicted his duty and action under Army Act was initiated against him. He was kept under open arrest on and from 26-8-1986 and the GCM was ordered on 24-2-1987. Accordingly the GCM assembled to try the respondent on 25-2-1987 and he was directed to be produced on 25-2-

1997. But he escaped from lawful military custody on the intervening night of 15 and 16-2-1987. He, however, voluntarily surrendered on 1-3-1987. The respondent challenged the jurisdiction of the GCM to try him on the ground of limitation. The trial by the General Court Martial was, therefore, held to be illegal and accordingly writ was issued by the High Court. In the aforementioned Mandan Lal Yadav's case (supra) the criminal Appeal was allowed and the Judgement of the High Court was set aside. It was held by the Hon'ble Apex Court in para 28 of the Judgement as under :

> (a)"28. ……It is obvious that that the respondent had avoided trial to see that the trial would not get commenced. Under the scheme of the Act and the Rules, presence of the accused is a precondition for commencement of trial. In his absence and until his presence was secured, it became difficult, nay impossible, to proceed with the trial of the respondent-accused. In this behalf, the maxim *nullus commodum 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 stopped to plead bar of limitation contained in Section 123(2)……".

35. In para 29 of the said judgement it is further held by the Hon'ble Apex Court as follows :

> (1) "29. ……The respondent having escaped from lawful military custody and prevented the trial from being proceeded with in accordance with law, the maxim *nullus commodum capere potest de injuria sua propria* squarely applies to the case and he having done the wrong, cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent GCM……"

36. Fortified with the ruling of the Hon'ble Apex Court in Maj Gen Madan Lal Yadav's case (supra) we are emboldened to opine that since the appellant had avoided trial to see that the trial would not get commenced in his absence and further that until his presence is secured the trial could not be commenced/proceeded with and thus he intended to take advantage of his own wrong to gain the favourable interpretation of law. He is, therefore, estopped to plead bar of limitation contained in section 122(4) of Army Act, even if it is held under narrow interpretation of 122(4) of the Army Act. However, we are of the definite view that the law of limitation is not applicable to the case of desertion with arms and ammunition while on active service from field area as per Section 122(4) of Army Act. In such view of the matter we feel inclined to hold that continuation of trial which commenced on 21st March 2005 is not barred by limitation and it is a valid trial. Therefore, the argument on that score advanced by Mr. Basu does not appear to be meritorious one and as such we do not find much substance therein.

IV. <u>Double Jeopardy</u>

37. The next facet of Mr. Basu's argument on the issue of double jeopardy is to be examined with reference to the contents of charges framed against the appellant during trial in G.R. Case No.661/97 u/s 25(1)(a-b)/26(1) of Arms Act vis-à-vis charges u/s 38(1) & 39(a) of Army Act framed against the appellant

during SCM trial which led to punishment of dismissal from service coupled with sentence of conviction awarding 1 year's Rigorous imprisonment. Now the question crops up as to whether previous trial for offences under section 25(1)(a-b) & 26(1) of Arms Act which ended in acquittal for lack of evidence would operate as a bar for a subsequent SCM trial and conviction for offences under Army Act. In order to settle this issue, we are to examine provisions as to offences punishable under two or more enactments as laid down in Section 26 of General Clauses Act, 1897 which reads as under :

> **"26. Provisions as to offences punishable under two or more enactments** – Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

38. On a plain reading of the afore-quoted Section of General Clauses Act, it appears that its concluding part clearly enacts that the accused is not to be punished twice for the same offence. In this context we may refer to a ruling of the Hon'ble Apex Court reported in **(2005) 11 SCC 600 [State (NCT of Delhi – Appellant vs. Nabjot Sandhu, alias Afsan Guru – Respondents)].** In paragraph 255 of the said judgement the import of Section 26 of the general Clauses Act was taken into consideration and the Hon'ble Apex Court has been pleased to observe as follows :

"255…….
26……..

a. It becomes at once clear that the emphasis is on the words "same offence". It is now well settled that where there are two distinct offences made up of different ingredients, the bar under Section 26 of the General Clauses Act or for that matter, the embargo under Article 20 of the Constitution, has no application, though the offences may have some overlapping features. The crucial requirement of either Article 20 of the Constitution or Section 26 of the General Clauses Act is that the offences are the same or identical in all respects".

39. It is, therefore, settled position of law that a subsequent trial or a prosecution and punishment are not bar if the ingredients of the two offences are distinct. If the offences are distinct, there is no question of the rule of double jeopardy being extended and applied, though the allegations in the two complaints made against the accused may be substantially the same.

40. Before turning to the facts and circumstances of the present case, it would be contextually relevant to quote clauses 2 & 4 of Section 300 of Criminal Procedure Code 1973 which provides as under :

"(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him in the former trial under section 220, sub-section (1).

(3) *********

(4) A person acquitted or convicted of any offence constituted by any acts may, not-withstanding such acquittal or conviction, be subsequently charged with and tried for, any other offence constituted by the same acts which he may have committed if the court by which he was first

tried was not competent to try the offence with which he is subsequently charged."

41. It is palpably clear from the afore-quoted provisions of Cr.PC of 1973 that when the same act or commission constitutes an offence under different enactments he cannot be punished under both the enactments for the same offence. However, previous acquittal or conviction of an offence does not bar trial for a distinct offence for which a separate charge might have been framed against the accused in the previous trial. An ultimate analysis of Section 26 of the General Clauses Act (X) of 1897 as also Art.20(2) of Constitution of India and Clauses 2 & 4 of Section 300 of Cr. Procedure Code leads us to opine that the Constitutional rule of double jeopardy under Art.20(2) of the Constitution clearly lays down that when a person is acquitted he cannot be tried again for the same offence. In fact, the character of the proceeding is to be ascertained at the first instance to examine applicability of Constitutional bar before initiation of subsequent trial for the same offence. In the present case it is an admitted position that the appellant had to face a criminal trial on the charge of illegal possession of arms and ammunition and also for contravention of various provisions of Arms Act. But his conviction and punishment of imprisonment and dismissal from service by Summary Court Martial was pronounced for commission of offences under the Army Act wherein the prosecution succeeded in proving the following charges under Army Act :

" CHARGE SHEET

The accused No.6476234-W Sep/AT Birendra Sharma of 874 Animal Transport Battalion, Army Service Corps, attached with No.1 Training Battalion (Animal Transport), ASC Centre (North), Gaya, is charged with :-

First charge DESERTING THE SERVICE
Army Act
Section 38(1) in that he,

When on active service at field, on 10 Oct 1992, while serving with 874 Animal Transport Battalion Army Service Corps, absented himself from the Unit with one Sten Machine Carbine Registered No.H-8566, Butt No.129, One magazine and 35 rounds of 9 mm ball ammunition, until surrendered at ASC Centre (North), Paharpur, Gaya on 29 Jun 2001 afternoon.

Second Charge ABSENTING HIMSELF WITHOUT LEAVE
Army Act
Sec 39(a) in that he,

At Paharpur, Gaya, on 05 Jun 2004 while attached with No.1 Training Battalion (Animal Transport), ASC Centre (North) for finalization of Disciplinary case for desertion as per the first charge, absented himself Without leave from the unit lines from 05 Jun 2004 to 09 Jul 2004.

Station : Paharpur, Gaya
Dated : 16 Mar 2005

Sd/- (R.K. Sharma)
Colonel
Commanding Officer
No.1 Trg Bn (AT)
ASC Centre(North)"

42. By juxtaposing the charges framed by the Ld. Judicial Magistrate, 1st Class, Gaya for commission of offences under section 25(1)(a-b) and 26(1) of Arms Act and the charges under section 38(1) and 39(a) of Army Act for commission of an offence of desertion with arms and ammunitions while on active service and for unauthorized absence from 5th June 2004 to 9th July 2004 during subsequent trial by Summary Court Martial under the Army Act, side by

side we find that the nature and character of the proceedings before the Ld. Judicial Magistrate, 1st Class, Gaya is totally different from that of SCM trial. It has rightly been argued by Mr. Goswami, Ld. Counsel for the respondents that initiation of Departmental Disciplinary Proceeding in exercise of bonafide and reasonably fair discretion against the delinquent even after his acquittal in a criminal trial is not legally barred. Rather initiation of such Departmental proceeding on Disciplinary ground is permissible even after the judgement of acquittal recorded by the Criminal Court. However, such a departmental proceeding must be bonafide and action of the authority in such cases must be reasonable and fair. In support of his contention he has referred to a ruling of the Hon'ble Apex Court reported in **2008(4) SCC 1 (Union of India and others – Appellant vs. Naman singh Shekhawat – Respondent).** In this connection we may also rely upon another ruling of the Hon'ble Apex Court reported in **AIR 2001 SC 1092 (Union of India vs. Sunil Kumar Sarkar)** wherein it is ruled that even if an employee was acquitted of the charge of bigamy under section 494 IPC, the acquittal or discharge of the employee does not prevent the department from proceeding against the employee for the same as a misconduct in employment. As already pointed out earlier in the present case the appellant's acquittal of charges under 25(1)(a-b) and 26(1) of Arms Act for lack of evidence has got no direct/indirect bearing in subsequent trial by SCM

for commission of an offence of desertion with arms and ammunition while on active service and unauthorized absence without the sanction of the competent authority. By no stretch of imagination the subsequent trial for commission of offence u/s 38(1) & 39(a) of Army Act can be treated as trial for the same offence and the same would be violative of Art. 20(2) of Constitution of India. In fact, it cannot be construed as second prosecution for the same offence for which the appellant was prosecuted and acquitted previously for the simple reason that the ingredients of two offences are quite separate and distinct. It is a settled position of law that the rule of double jeopardy cannot be extended and applied even though the allegations in the two complaints against the accused may be substantially same. The appellant was charged and tried for illegal possession of arms and ammunition in violation of various provisions of Arm Acts u/s 25(1)(a-b) & 26(1) of Arms Act in Criminal Trial whereas during trial by SCM he was charged and tried for commission of an offence of desertion with arms and ammunitions while on active service as also for unauthorized absence without leave u/s 38(1) and 39(a) of Army Act respectively. Importantly, Constitutional of mandate of Article 20(2) of Constitution as also statutory provision under Cr. P.C. 1973 and General Clauses Act 1897 bar double punishment for the same offence, but even if the same act constitutes offences under different laws and different sections of

the same act, there is nothing under the constitution to bar separate trial and punishment. Therefore, the subsequent trial by SCM held for distinct and separate offences under the relevant sections of Army Act is not barred either constitutionally or statutorily.

43. In view of above discussion on the issue of double jeopardy we are of the considered opinion that oral argument advanced by Mr. Basu challenging the validity of subsequent trial by SCM on the charges of desertion with arms and ammunitions on active service and also of unauthorized absence for more than a month even after his acquittal of charges u/s 25 (1)(a-b) and 26(1) of Arms Act by a criminal court is barred by the rule of jeopardy appears to be devoid of merit and as such objection on that score stands overruled.

Findings

44. In the light of foregoing discussion in preceding paragraphs, we cannot but hold that the appellant's trial by the Summary Court Martial is not barred by limitation since serious offence of desertion on active service with arms and ammunitions is not covered by Section 122(4) of Army Act. That apart, even if the contention of the learned counsel for the appellant is accepted that Summary Court Martial trial for desertion is barred in view of the provisions under Section 22(4) of Army Act, the appellant is estopped from pleading such plea of limitation since he cannot be allowed to take the advantage of his own

wrong in deliberately absenting himself to get the trial barred by limitation in view of the Hon'ble Apex Court's ruling reported in (1996) 4 SCC 127(supra). However, the SCM trial for the second count of charge u/s 39(2) of Army Act relating to absence for the period from 5-6-2004 to 9-7-2004 without any leave is, however, held to be within the period of limitation.

45. We are to hold further that the appellant utterly failed to substantiate his plea that he was tried by the Summary Court Martial without any grave reason as required under Section 120(2) of Army Act in order to deny him reasonable opportunity to defend himself in Summary Court Martial and as such principles of natural justice were violated. More so, whenever unrebuttable materials on record clearly suggest that sufficient opportunities were afforded to the appellant but he refused to make the best use of such reasonable opportunities by declining cross examination of witnesses at the pre-trial stage when summary of evidence was recorded in his presence. Similar is the situation when he was tried summarily. He refuses to cross-examine witnesses examined during trial and to adduce defence witnesses when he was called upon to do so. As already discussed earlier, he was also supplied with the copies of Summary of Evidence, Charge sheet and other relevant pretrial documents in the presence of witnesses as mandated under Rule 34 read with Rule 33 of Army Rules vide letter dated 16-3-2005 issued by

the Commanding Officer No.I Training Battalion (AT) ASC Centre (North). In such view of the matter there is nothing on record to show that the golden principles of natural justice were not adhered to in his case. In our opinion prescribed procedure and rules were strictly followed while conducting the Summary Court Martial trial. We are of the further view that even if there was any procedural irregularity, the same can be protected under Section 140 of Army Rules. Accordingly, irregularity in procedure, if any, in the SCM proceeding in question can thus be validated.

46. Based upon the relevant facts and circumstances backed by documentary evidence relied upon by the respondents, we are of the definite view that the appellant is at fault in not disclosing his identity either before the police officers who conducted raid in his house and also seized arms and ammunitions recovered from his house under proper seizure list taking them to be the stolen properties or before the Ld. Judicial Magistrate, 1st Class, Gaya during criminal trial. In such a situation, objection regarding non-compliance of section 104 of Army Act appears to be misconceived one. Further, the relevant pretrial documents which include Apprehension Roll issued by 874 AT Battalion on 6th December, 1992 clearly indicate that after his desertion with arms and ammunition while on active service on 10th October 1992, the army authorities took immediate steps for capturing the deserter as required under Section

105 of Army Act, They unequivocally sought for assistance from Civil Authorities towards capture of the appellant. In such view of the matter, we are to hold that the provisions of Section 105 of Army Act have been complied with while because of non-disclosure of the appellant's identity before the Civil Authorities the question of compliance of handing over of the appellant as a deserter to the army authorities as per requirement of Section 104 of Army Act does not arise at all.

47. We further feel constrained to hold that the appellant's specific version that when he went to join the unit of ASC Centre (North) , Gaya, Adjutant of ASC Centre (N) took away his identity card and handed him over to the police, is undoubtedly his after thought to cover up the commission of serious offence of desertion with arms and ammunition from field area while on active service. Such version, has not been substantiated either by the police authorities or by the appellant himself by adducing cogent, consistent and reliable evidence As per legal requirement u/s 101 of Evidence Act, the burden of proof lies on the party who substantially asserts existence of certain facts. Therefore, onus lies on the appellant to prove the happening of events which he asserts. The respondent Army Authorities who have denied such happenings cannot be asked to prove the negative. Astonishingly, the appellant did not make any endeavour what so ever to adduce any defence

witness from his side in support of his version regarding the specific story of abduction by extremists of Jammu and Kashmir and subsequent sale to the extremists in Bihar either during summary trial or at the pretrial stage of recording of summary of evidence even though he was called upon to adduce such defence witness during summary trial. He did not care to put his version of the incident to the witnesses even in the form of defence suggestion during summary trial or recording of summary of evidence at the pretrial stage even though he was afforded an opportunity to cross-examine Prosecution Witnesses. Instead of availing of such opportunity, he chose to decline cross-examination of prosecution witnesses. That apart, as indicated earlier the police officers' unchallenged evidence during trial by summary court martial establishes the factum of raid in the house of appellant and recovery of arms and ammunitions seized under the proper seizure list. Such unchallenged evidence is sufficiently strong to belie the appellant's version that he was handed over to the police by the Adjutant, ASC(North) after taking away his Identity Card. The appellant has thus miserably failed to discharge the onus cast upon him u/s 101 of Evidence Act.

48. Mr Basu, Ld Counsel for the appellant has sought to argue, relying upon a ruling of the Hon'ble Apex Court reported **in AIR 2004 SC 481 (State Union of India, Appellant vs. Ram Saran – Respondent),** that the offence of

unauthorized absence should be treated as one of “less heinous offences”. He draws our attention that the offender in the case before the Hon’ble Apex Court, was levied only the fine of 2 months pay which he was drawing at the time when the proceeding was initiated to meet the ends of justice. He, therefore, urges this court to take a lenient view in this case against the backdrop of mitigating circumstances.

49. We have taken into consideration the ruling of the Apex Court cited on behalf of the appellant with reference to materials and circumstances of record made available to us in the present case. It, however, appears that the facts and circumstances of the present case are not identical to the facts and circumstances of Ram Saran’s case (supra). The sentence for imprisonment for 3 months imposed on the CRPF constable was modified to a fine of 2 months pay drawn at the time when proceedings were initiated against him for overstaying the period of leave while working in the C.R.P.F. In the case in hand the appellant was found guilty not only of unauthorized absence triable under Section 39(a) of Army Act but also for commission of serious offence of desertion with arms and ammunitions while on active service u/s 38(1) of Army Act. In such view of the matter, the question of modification of R.I by levying reasonable amount of fine only do not appear to be in consonance with

the gravity of charges levelled against him in the facts and circumstances of the present case.

50. Having regard to overall assessment of the evidence collected during SCM or at the time of recording of summary of evidence which have been made a part of the SCM proceedings, we are to hold that the appellant's version regarding his abduction by extremists of J&K and subsequent sale to extremist forces of Bihar cannot be accepted as truthful one since such version has failed to pass through the test of judicial scrutiny and reasonableness for lack of corroborative evidence. The appellant's version, therefore, stands rejected in toto. In such view of the matter we are unable to accept the defence case that in view of his abduction by extremists, he cannot be held liable for commission of the offence of desertion on active service.

51. It is further held that the Constitutional Rule against double jeopardy under Article 20(2) of the Constitution that when a person is acquitted he cannot be tried again for the same offence, does not operate as a bar in the present case for the simple reason that the appellant's Summary Court Martial trial was held for two counts of offences under 38(1) and 39(a) of Army Act and their ingredients are distinct and separate from the offences under 25(1)(a-b)/26(1) of Arms Act for which he was tried in a Criminal trial and was also acquitted of such offences for lack of evidence. It is, therefore,

held that the subsequent SCM trial was barred neither under Article 20(2) of the Constitution nor under statutory provisions of Section 300 of the Cr.PC and Section 26 of General Clauses Act.

Decision

52. As a sequel to our findings as above the impugned SCM Proceedings holding the appellant guilty of offences under section 38(1) & 39(a) of Army Act is held to be valid and legal. Accordingly the sentence directing the appellant to suffer Rigorous Imprisonment for 12 months (1 year) with a direction that the sentence of Rigorous Imprisonment shall be carried out by confinement in civil prison with further order for dismissal from service passed in SCM trial appears to be quite reasonable, fair and is also in commensurate with the gravity of the charges proved against him and as such we do not find any cogent reason and convincing ground to interfere with the findings of guilt as also the quantum of sentence inflicted upon the appellant. Therefore, both the finding of guilt as also the sentence inflicted thereupon should, be upheld.

53. Accordingly, the findings, sentence and punishment awarded to the appellant on 2nd April 2005 by the Summary Court Martial and duly promulgated on 26th May 2005 are hereby upheld.

54. In the result, the appeal in the form of OA No.54/2012 stands dismissed on contest, however, without costs.

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

56. 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