AFR
Reserved
Court No.3

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 317 of 2013

Monday, this the 15th day of Feb 2016

Hon'ble Mr. Justice D.P. Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

No. 15681440P Signalman Mukesh Purwanshi
S/O Vidhyaram, R/O of Vill. Ater, P.O. Ater, Tehsil -Ater, Distt. -Bhind (M.P.)

……Applicant

Ld. Counsel for the Applicant : **Shri Rohit Kumar, Advocate**

Versus

1. Chief of Army Staff, DHQ PO, New Delhi 110011.

2. Commandant cum Chief Records Officer Signal Records, Jabalpur.

3. Commanding Officer, 14 Corps Engineering Signal Regiment C/O 56 APO.

4. Union of India through Secy. Ministry of Defence, DHQPO, New Delhi

……Respondents

Ld. Counsel for the Respondents : **Mrs. Deepti Prasad Bajpai, Govt Counsel for the Respondents assisted by Lt. Col. Subodh Verma, OIC Legal Cell.**

(Per. Justice Devi Prasad Singh, J.)

1. This application under section 14 of the Armed Forces Tribunal Act 2007 (in short Act) has been preferred by the applicant being aggrieved with the impugned order dated 28.07.2006 for dismissal from service.

2. We have heard Ld. Counsel for the parties and perused the record.

3. Admittedly the applicant was enrolled in the Army in Corps of Signals on 16.01.2003. According to Ld. Counsel for the applicant, the applicant was on sanctioned leave from 14.01.2005. However, this fact has been denied by the respondents stating that the applicant was illegally absented himself without sanctioned leave from unit with effect from 14.01.2005. Para 4 of the Counter Affidavit has not been categorically denied by the applicant with submission that the applicant resumed duty voluntarily. For convenience sake, para 4 of the Counter Affidavit is reproduced as under:

> "*4. That the applicant was enrolled in the Army in the Corps of Signals on 16.01.2003. While serving with 14 Corps Engineering Signal Regiment deployed in operational area on active service, on 14.01.2005 the applicant illegally absented without leave from the said unit. When his illegal absent went beyond 30 days, in*

accordance with Section 106 of the Army Act, 1950 (in short Act), on 15.03.2005, a Court of Inquiry was held, which declared him to have illegally absented from the unit. Its declaration was recorded in the unit Court Martial Box. Later, after remaining illegally absent for 120 days, the applicant surrendered voluntarily at Depot Regiment of the Corps of Signals on 13.05.2005. While the applicant was at the said Depot Regiment, on 20.03.2006, he again illegally absented. Later, after remaining illegally absent for 110 days, the applicant again surrendered voluntarily. The applicant, thus, illegally absented on two separate occasions and his total illegal absence was for 230 days. Prior to these illegal absences, the applicant had earlier been punished for absenting without leave for 36 days."

4. Averment contained in Counter Affidavit has been replied by the applicant in Rejoinder Affidavit. For convenience sake para 4 of the Rejoinder Affidavit is reproduced as under:

"*<u>Para 4:</u> No comments except that the averment advanced by the respondents in their counter affidavit states that the applicant had become absent without leave, a court of inquiry was documented and adding that the applicant had reported for duty VOLUNTARILY – thus conclusively establishing that the intentions of the applicant were bona fide."*

5. At the face of record the applicant seems to concealed material fact with regard to absence without sanctioned leave stating that the leave was sanctioned from 14.01.2005 and he overstayed the leave and voluntarily rejoined duty at Depot Regiment of Corps of Signals on 13.05.2005.

6. On account of unauthorized absence from duty after 30 days, the respondents proceeded under Section 106 of Army Act, 1950. On 15.03.2005, a court of inquiry was held declaring the applicant to be absent from duty. Unauthorized absence was recorded in unit Court Martial Book. After reporting on 13.05.2005, the applicant again absented himself on 20.03.2006 for about 110 days. Thus total absent goes to 230 days in two phases.

7. Disciplinary action was initiated by the Commanding Officer (in short CO) and hearing of the charge was done. Thereafter on the directions of the Commanding Officer, Capt Surjit Bhowmick recorded the summary of evidence against the applicant. According to Ld. Counsel for the respondents, the summary of evidence were recorded in accordance to Army Rule 23. A copy of the summary of evidence has been filed as **Annexure R-1.**

8. The charge sheet and summary of evidence were handed over to the applicant on 22.07.2006. The applicant was tried by summary court martial on 28.07.2006. According to Ld.

Counsel for the respondents the applicant pleaded guilty to both the charges which was authenticated by putting his signature and provisions of Army Rule 115 (2) was duly complied with. It is not disputed by the respondents that the proceedings of Court Martial were concluded within 20 minutes (para 7 of the Counter Affidavit) since the Commanding Officer was expert in Court Martial and keeping the fact that the applicant admitted the guilt. The proceedings were promulgated by Capt Surjit Bhowmick, Officer In-charge documents of Depot Regiment.

9. A petition dated 28.02.2011 filed under Section 164 (2) of the Act, 1950 to Chief of Army Staff was rejected by a reasoned order on 23.03.2011. It may be noted that in the Original Application, the applicant has made a case of over staying of leave which has been refuted by the respondents while filing the Counter Affidavit under para 4 (B) of the Counter Affidavit and is not denied while filing Rejoinder Affidavit.

10. Absence without leave may be on different grounds. Absent without leave is a serious misconduct but overstaying leave may be justified for sufficient cause making out a case to dilute the punishment or increase it. For convenience sake para 39 of the Act is reproduced as under:

"39. Absence without leave:- Any person subject to this Act who commits any of the following offences, that is to say, -

(a) absents himself without leave; or

(b) without sufficient cause overstays leave granted to him; or

(c) being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or

(d) without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or

(e) when on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or

(f) when in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or

(g) without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there, shall, on conviction by court martial, be liable to suffer imprisonment for a term which may extend to three

years or such less punishment as in this Act mentioned."

11. It is well settled proposition of law that overstaying of leave for reasonable period may be justified with sufficient cause and may make out a case for severe or minor punishment. But in the event of absence without sanctioned leave, immediately after 30 days followed by Court Martial Army person may be declared deserter by following due procedure.

12. From the material on record it is also born out that the order of dismissal was passed on 28.07.2006 but the statutory complaint was decided on 23.03.2011 after filing of O.A. in the execution case which seems to be not justified for any reason whatsoever. Inordinate delay in deciding statutory complaint, keeps a man under mental pain and agony and may cause psychological disorders.

Arbitrariness and Bias

13. The first limb of the argument advanced by Ld. Counsel for the applicant is that the court martial proceedings suffers from vice of arbitrariness. Capt Surjit Bhowmick, officer incharge recorded the statement summary of evidence against the applicant and later on it was he, who promulgated the proceedings. It is also argued that by not providing the copy of court of inquiry, substantial injustice has been done and petitioner has been prejudiced to set out his defence.

14. In para 15 of the Counter Affidavit, it has been admitted that Capt Surjit Bhowmick was an independent witness in the hearing. It has not been disputed that Capt Surjit Bhowmick recorded the summary of evidence against the applicant (para 16 of the Counter Affidavit) and it was Capt Surjit Bhowmick who promulgated the result of the trial. A person who has been claimed to be an independent witness in a case, whether he may be permitted to record the summary of evidence and pronounce the order on behalf of the summary court martial? Factual matrix on record shows that the extra interest taken by Capt Surjit Bhowmick may be in association with Commanding Officer. Hon'ble Apex Court in the case reported in AIR 1987 S.C. 2386 ***Ranjit Thakur*** Vs ***Union of India and others*** (supra) held that at least minimal requirements of natural justice is committee of enquiry must compose of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non judice". It has been held that as to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party.

15. In the case reported in (1998) 5 Supreme Court Cases 513, ***State of West Bengal and others Vs Shivananda Pathak and others*** their Lordships of the Hon'ble Supreme Court have considered the bias and have held that the bias may be defined as a preconceived opinion or a predisposition

or predetermination to decide a case or any issue in a particular manner, so much so that such predisposition does not leave the mind open to conviction. Bias in fact is the condition of mind, which sways judgments and renders the judge unable to exercise impartially in a particular case. It has also been held that judiciary is not free from this fallibility. There Lordship further held that bias may be of many forms; it may be pecuniary bias, personal bias, bias as to subject matter in dispute, or policy bias.

Frank J of the United States in Lenahan has held:

> *If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions… Much harm is done by the myth that, merely by… taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.*
>
> *[See also Griffith and Street, Principles of Administrative Law (1973 Edn.) p. 155; Judicial Review of Administrative Action by de Smith (1980 Edn.) p 272; II Administrative Law Treatise by Davis (1958 Edn.) p 130"*

Justice Frank J employed distinction between prejudging of facts specifically relating to a party, as against

preconceptions or predispositions about general question of law, policy or discretion.

16. In the case of ***State of West Bengal and others vs. Shivananda Pathak*** (supra), Hon'ble Supreme Court has considered a number of decisions and held as under:-

> *"**31.** This Court has already, innumerable times, beginning with its classic decision in **A.K. Kraipak** v. **Union of India** laid down the need of "fair play" or "fair hearing" in quasi-judicial and administrative matters. The hearing has to be by a person sitting with an unbiased mind. To the same effect is the decision in **S.P. Kapoor (Dr) vs. State of H.P.** In an earlier decision in **Mineral Ltd. vs. State of Bihar** it was held that the Revenue Minister, who had cancelled the petitioner's licence or the lease of certain land, could not have taken part in the proceedings for cancellation of licence as there was political rivalry between the petitioner and the Minister, who had also filed a criminal case against the petitioner. This principle has also been applied in cases under labour laws or service laws, except where the cases were covered by the doctrine of necessity. In **Financial Commr. (Taxation), Punjab vs. Harbhajan Singh** the Settlement Commissioner was held to be not competent to sit over his own earlier order passed as Settlement Officer under the Displaced Persons (Compensation & Rehabilitation) Act, 1954. The maxim **nemo debet esse judex in propria sua causa** was invoked in **Gurdip Singh vs. State of Punjab."***
>
> ***"32.** The above maxim as also the other principle based on the most frequently quoted dictum of Lord*

*Hewart, C.J. in **R** v. **Sussex JJ**., ex p McCarthy KB at p. 259, that*

> *"it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done"*

constitute the well-recognized rule against bias.

33. *Bias, as pointed out earlier, is a condition of mind and, therefore, it may not always be possible to furnish actual proof of bias. But the courts, for this reason, cannot be said to be in a crippled state. There are many ways to discover bias; for example, by evaluating the facts and circumstances of the case or applying the tests of "real likelihood of bias" or "reasonable suspicion of bias". de Smith in **Judicial Review of Administrative Action** 1980 Edn., pp 262, 264, has explained that "reasonable suspicion" test looks mainly to outward appearance while "real likelihood" test focuses on the court's own evaluation of the probabilities.*

34. *In **Metropolitan Properties Co.** v. **Lannon** it was observed "whether there was real likelihood of bias or not has to be ascertained with reference to right-minded persons; whether they would consider that there was a real likelihood of bias". Almost the same test has also been applied here in an old decision, namely, in **Manak Lal** v. **Dr. Prem Chand Singhvi.** In that case, although the Court found that the Chairman of the Bar Council Tribunal appointed by the Chief Justice of the Rajasthan High Court to enquire into the misconduct of Manak Lal, an advocate, on the complaint of one Prem Chand was not biased towards him, it was held that he should not have presided over the proceedings to give effect to the salutary principle that justice should not only*

be done, it should also be seen to be done in view of the fact that the Chairman, who, undoubtedly, was a Senior Advocate and an ex-Advocate General, had, at one time, represented Prem Chand in some case. These principles have had their evolution in the field of administrative law but the courts performing judicial functions only cannot be excepted from the rule of bias as the Presiding Officers of the court have to hear and decide contentious issues with an unbiased mind. The maxim ***nemo debet esse judex in propria sua causa*** *and the principle "justice should not only be done but should manifestly be seen to be done" can be legitimately invoked in their cases"*

17. While applying these principles the involvement of Capt Surjit Bhowmick in recording summary of evidence and later on promulgating the order of the court reasonably create doubt in the mind of litigant vitiating the entire proceeding. The respondents while filing counter affidavit admitted that Capt Surjit Bhowmick assigned to record Court of Inquiry proceeding and later on promulgate result.

18. Another incident brought on record is that Major N. Veeramani during the summary of evidence has recorded the statement of Hav Ramji Das and Hav Balwant Singh as pointed out in the statutory petition by the applicant dated 28.02.2011. Later on Maj N. Veeramani was appointed as "friend of accused", and remaining statement was recorded by Capt Bhowmick. It appears to be not justifiable on the part of the respondents. Person once engaged to prosecute accused

himself cannot be “friend of accused” or counsel to defend him. It is serious lapse on the part of the respondents and bias on the part of the prosecution cannot be ruled out. Col S.K**.** Lohani of Depot Regiment himself has alleged that Commanding Officer of the Depot Regiment earlier recorded summary of evidence based on which Summary Court Martial of evidence was ordered. Hence he cannot be a “friend of accused”. Submission has been made by Ld. Counsel for the applicant that five pages of summary of evidence were recorded by Maj N. Veermani on 22.07.2006 as is evident from the proceedings, but later on Capt Surjit Bhowmick entered into the picture who certified the proceedings of summary of evidence. Factual matrix on record does not rule out the existence of bias.

19. Apart from above factual legal position of law which we have considered bias may be drawn from certain other judgment of Honourable Supreme Court where their Lordships held that persons participating in the preliminary inquiry cannot be witness nor he or she can be Inquiry Officer. Involvement of Capt Surjit Bhowmick seems to suffer from illegality.

20. In **Yunus Khan v. State of Uttar Pradesh**, (2010) 10 SCC 539, 2010 AIR SCW 6089, the Supreme Court considering the provisions of the statutory Rules held that a person who is a witness in the case can neither initiate the disciplinary proceedings nor pass an order of punishment.

21. The Supreme Court in ***A.U. Kureshi*** *v.* ***High Court of Gujarat****,* (2009) 11 SCCF 84 AIR 2009 SC (Supp) 257; 2009 AIR SCW 2735, placed reliance upon the judgment in ***Ashok Kumar Yadav v. State of Haryana****,* (1985) 4SCC 417, AIR 1987 SC 454, 1986 Lab IC 1417, and held that no person should adjudicate a dispute which he or she has dealt with in any capacity. The failure to observe this principle creates an apprehension of bias on the part of the said person. Therefore, low requires that a person should not decide a case wherein he is interested. The question is not whether the person is actually biased but whether the circumstances are such as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision.

22. The existence of an element of bias renders the entire disciplinary proceedings void. Such a defect cannot be cured at the appellate stage even if the fairness of the appellate authority is beyond dispute. *(*Vide; **S. Parthasarthi v. State of Andhra Pradesh,** AIR 1973 SC 2701; (1973) 2 SCWR 464; 1973 Lab IC 1607; and **Tilak Chand Magatram Obhan v. Kamala Prasad Shukla**, (1995) 5 Serv L.R. 809; 1995 Supp (1) SCC 21.

INQUIRY PROCEEDING

23. It has been argued by Ld. Counsel for the applicant that copy of the court of inquiry was not given to him during the course of trial of Summary Court Martial. The Court of Inquiry assembled on 15.03.2005 presided by Lt Col GS Bhandari. It is submitted that the copy of the proceeding of the Court of inquiry have not been made available to the applicant. The Court of Inquiry was held in pursuance to proceedings contained in Rule 177 of the Army Rule 1954. Rule 179 (3) provides that previous notice should be given of the time and place of the meeting of a Court of Inquiry, and of all adjournments of the Court, to all persons concerned in the inquiry.

24. However, Rule 182 of the Army Rule 1954, provides that the proceeding of a Court of Inquiry is not admissible in evidence against a person subject to the Act. It can be used upon the trial of such person for willfully giving false evidence before the Court. Rule 182 further permits that the proceedings may be used by the prosecution or the defence for the purpose of cross examination of any witness (during court martial).

> "182. Proceedings **of court of inquiry not admissible in evidence**.- The proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of

the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court;

Provided that nothing in this rule shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness.)

25. It appears that keeping in view the provisions of Rule 182, under Rule 184 a person who faces 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. For convenience, Rule 184 is reproduced 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.

26. In the present case, the copies of the statements and documents of the court of inquiry were not given to the applicant. He moved an application under the Right to

Information Act, 2005, but it was rejected on the ground that it is not permissible under Section 8 (1) (g) and (h) of the Right to Information Act, 2005. There appears inherent failure on the part of the respondents in ensuring the compliance of procedural safe-guard provided under Army Rule, 1954 (supra) which seems to vitiate the proceedings. No satisfactory reply has been given by Ld. Counsel for the respondents. The copy of the court of inquiry was not supplied to the applicant.

27. In view of the above, involvement of Capt Surjit Bhowmick and Col SK Lohani during recording of Court of Inquiry and framing of accused respectively seems to suffer from element of vice of arbitrariness rendering the Summary Court Martial Proceedings void and it can not be cured. Non supply of statement and documents violates the statutory provisions (supra) which is fatal and vitiates enquiry.

Hasty proceedings:

28. It is well settled law that in case the action of the state or its instrumentalities is not in accordance with rules and regulations, supported by a statute, the Court must exercise its jurisdiction to declare such act to be illegal and invalid.

29. Apart from the above, it is further well settled proposition of law that in case the authorities want to do certain thing, it should be done in accordance with the statutory provision and not otherwise, with the compliance of principle of natural justice.

30. It has been vehemently argued by Ld. Counsel for the applicant that entire proceeding was concluded within a period of 20 minutes. This fact has not been denied by the respondents. It as been submitted by Ld. Counsel for the respondents that the Commanding Officer concerned has lot of experience with regard to court-martial proceedings; hence he concluded the trial within 20 minutes.

31. We now come to the contention of the learned counsel for the applicant that the trial was over in record time of 20 minutes which is an impossibility and that the procedural safeguards in the trial regarding translation of the charge in the language which the accused understands and the explanation to the accused about the implications of the plea of guilty in the trial and translation to the applicant of the summary of evidence was not followed. It is true that no time limit is provided for the concluding a trial but what has to be seen is that procedural requirements is to be complied with in letter and spirit or not. Mere 'lip service' is not sufficient. From the counter affidavit it appears that the respondent's case is that contents of the charge sheet were explained to the applicant in Hindi, the language he understands. The summary of evidence consists of 9 manuscript pages. From the proceedings on the plea of guilty recorded in the trial, it appears that the summary of evidence is said to have been read (translated and explained) and marked as Ext. signed by the court and attached to the

proceedings. Such reading and translation it is submitted by the applicant's counsel would take considerable time. The certificate as provided under Rule 115 (2A) is as follows:

"CERTIFICATE

Before recording the plea of guilty offered by the accused, the court explains to the accused the meaning of the charge (s) to which he had pleaded guilty and ascertains that the accused understands the nature of the charge (s) to which he has pleaded guilty. The court also informs the accused the general effect of that plea and the difference in procedure which will be followed consequent to the said plea. The Court having satisfied itself that the accused understands the charges and the effect of his plea of guilty accepts and records the same. The provisions Army Rule 115 (2) are complied with.

sd/-

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32. The certificate is typed and separately attached. It is stated in Para 13 (c) of the Counter Affidavit that a steno typist was present at the time of the trial. A perusal of the Summary Court Martial proceedings indicates that many of the columns have been filled in by hand.

33. Considering the various steps that are said to have been undergone in the Summary Court Martial proceedings including translating/explaining the summary of evidence which is of 9 manuscript pages to the applicant, translating the charge,

explaining the implication of the plea of guilty and getting the certificate under 115 (2A), types hearing and applicant on mitigation of sentence and filling in the other columns of the form it is doubtful that the trial could have been completed within 20 minutes if all that procedure said to have been followed was in fact followed in letter and spirit.

34. The Departmental Representative and counsel had presented his case with great ability raised an attractive argument. He submitted that the summary of evidence has been recorded in the presence of the accused and that at the trial it is not necessary that the entire evidence be translated and it is sufficient if the evidence pertaining to the duty of the court under Rule 116 (4) has been read out. Rule 116 (4) is as follows:-

> *116 (1)……*
>
> *(2)…..*
>
> *(3)……*
>
> *(4) If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of "Guilty", the court shall alter the record and enter a plea or "Not Guilty", and proceed with the trial accordingly".*

35. The contention of the Departmental Representative is that it is the court to which if it appears from statement of the

accused or the summary of evidence that the accused did not understand the effect of his plea of guilty that a duty is enjoined to alter the plea to 'Not Guilty' and therefore only such evidence needs to be translated which is relevant for the Court to determine whether the accused understood the plea of guilty. Elaborating his submission, the Departmental Representative contends that the Court is well conversant with the evidence recorded in the summary of evidence and, therefore, it would not take it much time to translate that portion which is relevant under Rule 116 (4).

36. The language of the printed form which is used in the summary Court Martial proceedings itself provides for the translation of the summary of evidence when it is recorded in a language which the accused does not understand. In our view the accused can understand the effect of his appeal of guilty only if he is aware of the evidence against him and of any weakness in the prosecution evidence and the merits of his plea in the voluntary statement, if any, made by him. The evidence has therefore either to be recorded in the language he understands or translated and explained to him. For proper exercise of the power under sub rule (4) of Rule 116, the evidence if it has been recorded in a language the accused does not understand has to be translated to him so that the Commanding Officer can interact with him to determine whether the accused has understood the effect of the plea or not, it is for that reason that the printed form envisages that the evidence

has been read, translated and explained. Summary of evidence had been recorded in English.

37. In such circumstances, as the applicant in his statement had set up a counter version, the Commanding Officer would have done better to exercise his power under Rule 115 (2) to advise the applicant to withdraw the plea of guilty assuming he had so pleaded or under Rule 116 (4) to alter the plea which he did not do, a lapse which goes to the root. It appears to us that the proceedings were conducted in great haste without providing reasonable opportunity, without serving copy of court of inquiry proceeding. It is to be noted that in SCM proceedings the accused is not permitted to be represented by a lawyer and for this reason the duty of the Court is for greater to ensure that the trial is fair. In our opinion, the trial of the applicant was done in haste which has caused prejudice. The conviction and sentence of the applicant is, therefore not sustainable.

STATUTORY RULES REQUIRE TO BE OBSERVED

38. Necessity to follow statutory rules has been held by a Constitution Bench of the Supreme Court in **Sukhdeo Singh V. Bhagat Ram,** AIR 1975 SC 1331: 1975 Lab IC 881: (1975) 1 SCC 421, has observed as under:-

> *"The statutory authorities cannot deviate from the conditions of service.* ***Any deviation will be enforced by legal sanction of declaration by Courts to invalidate actions in violation of rules and regulations.*** *The existence of rules and regulations under*

*statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and employee with no option to vary the conditions….. In cases of statutory bodies there is no personal element whatsoever because of the impersonal character of statutory bodies….. **the element of public employment or service and the support of statute require observance of rules and regulations.** Failure to observe requirements by statutory bodies is enforced by Courts by declaring (action) in violation of rules and regulations to be void. The Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to **observe the rules of natural justice and compliance with the rules and regulations imposed by statute**".*

39. While dealing with the issue of haste, the Supreme Court in the case of ***Bahadur singh Lakhumbhai Vs Jagdishbhai M. Kamalia***, 2004) 2 SCC 65: AIR 2004 SC 1159" 2004 AIR SCW 37 referred top the case of ***S.P. Kapoor V State of Himanchal Pradesh,*** (1981) 4 SCC 716: AIR 1981 SC 2181 : 1982 Lab IC 1111, and held as under:

> "When a thing is done in a post-haste manner, mala fide would be presumed".

40. In the Apex Court in the case of ***Zenit Mataplast P. Ltd V. State of Maharashtra,*** (2009) 10 SCC 388: AIR 2009 SC (Supp) 2364: 2009 AIR SCW 6454 held that :

> "Anything done in undue haste can also be termed as arbitrary and cannot be condoned in law. It has been

retracted in the case, ***Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd., v. Devendra Kumar Jain****,* (1995) 1 SCC 638: 1995 AIR SCW 1150 and ***Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. Vikas Nigam Ltd. V. Devendra Kumar Jain*** (1995) 1 SCC 638; and ***Noida Entrepreneurs Association V. NOIDA***, AIR 2011 SC 2112: 2011 AIR SCW 3154: 2011 Lab IC 2531).

41. Similar view has been taken by the Supreme Court in **Ambica Quarry Works V. State of Gujarat**, AIR 1987 SC 1073: (1987) 1 SCC 213: 1987 (1) SCJ 275; and **Commissioner of Police, Bombay v. Gordhandas Bhanji**, AIR 1952 SC 16: 1951 SCJ 803: 1952 SCR 135. In both the cases, the apex Court relied upon the judgment of the **House of Lord in Julius v Lord Bishop of Oxford**, (1880) 5 AC 214: 49 LJ QB 57: 42 LT 546, wherein it was observed as under:-

"There may be something in the nature of thing empowered to be done something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."

42. In **Commissioner of Police (supra),** the apex Court observed as under –

"Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and

precision what they are expected to do or forebear from doing and exactly what authority is making the order ……. . An enabling power of this kind conferred for public reasons and for the public benefit is, in our opinion, coupled with a duty to exercise it when the circumstances so demand. It is a duty which cannot be shirked or shelved nor it be evaded, performance of it can be compelled."

43. In **Meera Massey v. S.R. Mehrotra,** (1998) 3 SCC 88: AIR 1998 SC 1153: 1998 AIR SCW 969, the apex Court observed as under:-

"If the laws and principles are eroded by such institutions, it not only pollutes its functioning deteriorating its standard but also exhibits ……. Wrong channel adopted …… If there is any erosion or descending by those who control the activities all expectations and hopes are destroyed. If the institutions perform dedicated and sincere service with the highest morality it would not only up-lift many but bring back even a limping society to its normalcy."

44. The Supreme Court has taken the same view in **Ram Chand v. Union of India, (**1994) 1 SCC 44: 1993 AIR SCW 3479, and held that "the exercise of power should not be made against the spirit of the provisions of the statute. Otherwise it would tend towards arbitrariness".

45. In **Purushottam v. Chairman, Maharashtra State Electricity Board**, (1999) 6 SCC 49: 1999 AIR SCW 4747, Hon'ble Supreme Court has held that appointment should be

made strictly in accordance with the statutory provisions and a candidate who is entitled for appointment, should not be denied the same on any pretext whatsoever as usurpation of the post by somebody else in any circumstances is not possible.

46. A constitution Bench of the Supreme Court in **Ajit Singh (II) V. state of Punjab** (1999) 7 SCC 209: AIR 1999 SC 3471: 1999 AIR SCW 3460, held that any action being violative of article 14 of the Constitution is arbitrary and if it is found to be de hors the statutory rules, the same cannot be enforced.

47. **Indra Sawhney vs. Union of India**, AIR 2000 SC 498: 1999 AIR SCW 4661: 2000 Lab IC 277, the Supreme Court reiterated the law laid down by it time and again that articles 14 and 16(1) of the Constitution of India provide for rule of equality which is the basic feature of the constitution and, therefore, there can be no deviation from the principles enshrined therein while making the appointment. Rule of equality is an antithesis of any kind of arbitrariness or private gain, whim or caprice of any individual. Even if the State has the discretionary power to issue executive instructions, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also "satisfy the mandatory requirement of the Statute" (Vide **A.P. Aggarwal v. Government (of NCT) of Delhi** 1999 AIR SCW 4300" AIR 2000 SC 205: (2000) 1 SCC 600. In **Kumari Shrilekha**

Vidyarthi v. State of U.P., AIR 1991 SC 537: 1993 AIR SCW 77: JT 1990 (4) SC 211, The Apex court held that every State act, in order to survive, must not be susceptible to vice of arbitrariness which is a crux of Article 14 of the Constitution and basis to the rule of law.

48. In **M.A. Haque v. Union of India** (1993) 2 SCC 213: 1993 AIR SCW 784: 1993 Lab IC 996, the Supreme Court observed as under:-

> *"…….. We cannot lose sight of the fact that the recruitment rules made under article 309 of the constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will o-pen a back door for illegal recruitment without limit. In fact the Court has, of late, been witnessing a constant violation of the recruitment rules and scant respect for the constitutional provisions requiring recruitment to the services through the public Service Commissions. It appears that since the Court has some cases permitted regularization of the irregularly recruited employees, some governments and authorities have been increasingly resorted to irregular recruitment. The result had been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course".*

49. Therefore, it is evident from the aforesaid judgments of Hon'ble Supreme Court that whenever any action of the authority is in violation of the provisions of the statute or the

action is constitutionally illegal, it can not claim any sanctity in law and there is no obligation on the part of the Court to sanctify such an illegal act. Wherever the statuary provision is ignored, the court cannot become a silent spectator to such an illegal act, and it becomes the solemn duty of the Court to deal with the persons violating the law with the heavy hands (Vide **R.N. Nanjundappa v. T. Thimmaiah**, AIR 1972 SC 1767: 1972 Lab IC 618: (1972) 2 SCR 799; **B.N. Nagaranaj v. State of Karnataka**, AIR 1979 SC 1676: (19790) 2 SCWR 168: (1979) 4 SCC 507; **Delhi Development Horticulture Employees' Union V. Delhi Administration, Delhi**, AIR 1992 SC 789: 1992 Lalb IC 847: 1992 AIR SCW 616, **State of Orissa V. Sukanti Mohapatra**, AIR 1993 SC 1650: 1993 Lab IC 1513: (1993) 2 SCC 486; **Jawahar Lal Nehru Krishi Vishwa Vidayalaya, Jabalpur, M.P. v Bal Kishan Soni**, (1997) 5 SCC 86: JT 1997 (4) SC 724; **State of Himachal Pradesh Vs Nodha Ram**, AIR 1997 SC 1997 AIR SCW 112: (1996) 1 SCR 54; **Ashwani Kumar v. State of Bihar**, 1997 AIR SCW 509: AIR 1997 SC 1628: 1997 Lab IC 578; **State of M.P. v. Dharam Bir**, (1998) 6 SCC 165: JT 1998 (4) SC 363; **Municipal Corporation, Bilaspur v. Veer Singh Rajput**, (1998) 9 SCC 258: 1999 AIR SCW 4849: **Nazira Begum Lashkar v State of Assam**, AIR 2001 SC 102: 2000 AIR SCW 3959: 2001 Lab IC 42; **Dr. Chanchal Goyal (Mrs.) v. State of Rajasthan**, (2003) 3 SCC 485: AIR 2003 SC 1713: 2003 AIR SCW 1132; **M.D.**

U.P. Land Dev Corpn. V. Amar Singh, AIR 2003 SC 2357: 2003 Lab IC 1757 : (2003) 6 SCC 123; **Haryana Tourism Corporation Ltd. V. Fakir Chand**, AIR 2003 SC 4465: 2003 Lab IC 3678 : 2003 AIR SCW 5233; **Sultan Sadik v. Sanjay Raj Subha**, AIR 2004 SC 1377: 2004 AIR SCW 278: (2004) 2 SCC 377; and **A. Umaranai v. Registrar, Co-operative Societies**, (2004) 7 SCC 377; and 112: AIR 2004 SC 4504: 2004 Lab IC 3206).

50. Admittedly in the present case provision contained in Rule 184 (supra) has not been complied with, which vitiates the proceedings.

Plea guilty:

51. It has been pleaded in the Original Application that Army Rule 22 (1) read with Rule 115 (2) of the Army Rules, 1954 have not been complied with. It has been recorded that the applicant has declined to cross-examine the witnesses, namely, Hav Ramji Das and Hav Balwant Singh. In column 8 it has been recorded that the proceedings held under Army Rule 22 (1) in the presence of independent witness Capt Surjit Bhowmick of Depot Regiment and Sub Maj Arjun Behera of Depot Regiment (Corps of Signals). According to Ld. Counsel for the applicant the provisions contained in Army Rule 115 (2) in conjunction with Army Rule 52 (2A) as well as policy letter dated 15.03.1988 have not been complied with. For

convenience sake, Army Rule 52 (2A) and Army Rule 115 are reproduced as under:

> *"52. (2A). Where an accused pleads "Guilty" such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner:-*
>
> *Before recording the pleas of "Guilty" of the accused, the court explained to the accused the meaning of the charge (s) to which he had pleaded "Guilty" and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded "Guilty". The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge (s) and the effect of his plea of "Guilty", accepts and records the same. ; The provisions of rule 52 (2) are thus complied with.)"*

47. "115. **General Plea of "Guilty" or "Not Guilty"**.-

(1) The accused person's plea – "Guilty" or "Not Guilty" (or if he refuses to plead, or does not plead intelligibly either one or the other, a plea of "Not Guilty") – shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court, but before it is recorded, the court shall ascertain that the accused understands the nature of of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in

procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.

[2A) Where an accused pleads “Guilty”, such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner:-

“Before recording the plea of “Guilty”, of the accused the court explained to the accused the meaning of the charge (s) to which he had pleaded “Guilty” and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded “Guilty”. The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge (s) and the effect of his plea of “Guilty”, accepts and records the same. The provisions of rule 115 (2) are thus complied with.]

3. Where an accused person pleads guilty to the first of two or more charges laid in the alternative, the court may, after sub-rule (2) of this rule has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges without requiring the accused to plead thereto, and a record to that effect shall be made upon the proceedings of the court.”

52. A plain reading of Army Rule 52 (2A) shows that when accused pleads “guilty” then pleading of “guilt” should be recorded on each charge. Further it provides that the Presiding Officer or Judge Advocate, on behalf of the Court, shall ascertain that the accused understands the nature of the charge to which he has pleaded “guilty”. The averments contained in para-K of the Original Application with regard to non compliance of Army Rule 115 (2) read with Army Rule 52 (2A) seems to be not categorically denied. In para-2 of the counter affidavit, it has been said that averments of the applicant in the present O.A. are denied except those which have been specifically admitted. The applicant having pleaded guilty to both the charges has authenticated the same. The reply seems to be vague and does not establish that the applicant was apprised by the Presiding Officer or the Judge Advocate with regard to consequence of guilt, which seems to be mandatory. In the case reported in AIR 1982 SC 1413 ***Lt Col Prithi Pal Singh Bedi vs. Union of India*** the Hon’ble Apex Court has held that Rules 22 and 23 are mandatory to the persons who are not officers. It has been settled by the Tribunal in the case of **Rishi Ram Pandey v. Union of India,** T.A. No 1287 of 2010 decided on 06. 09.2012 that provisions contained in Rule 115 (2A) and Rule 52 (2A) are mandatory and its non compliance shall vitiate the trial.

53. Apart from above, summary court martial (Army Act Section 120) provides that summary court-martial may be held in case circumstances require immediate action without determining the discipline of the officer to face District Court-Martial or in active service, Summary General Court Martial. For convenience Section 120 of the Army Act, 1954 is reproduced as under:

> *"120.* ***Powers of summary courts martial****.- (1) subject to the provisions of sub-section (2), a summary court martial may be any offence punishable under this Act.*
>
> *(2) When there is no grace reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.*
>
> *(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.*
>
> *(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation or of*

imprisonment for a term exceeding the limit specified in sub-section (5).

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

54. In the present case nothing has been brought on record which may indicate that the Commanding Officer had decided to proceed with Summary Court-Martial indicating immediate requirement to proceed against the applicant. The provision contained in sub-Section (2) of Section 120 is mandatory for the reason that Summary Court Martial divests Army personnel from pursuing detailed procedure or applicability of detailed proceedings under the Army Rule made in consonance with the principles of natural justice. In case the Presiding Officer of the Summary Court Martial does not make an endorsement to proceed under Rule 120 showing the urgency then such proceeding may be held bad in the eyes of law in case prejudice is cause to Army personnel. In the present case, the hasty trial within 20 minutes itself indicates that the Presiding Officer consciously did not follow the conditions provided by sub-Section (2) of Section 120 of the Act.

Findings

55. Keeping the factual matrix of the controversy discussed hereinabove, the finding may be summarised as under:-

(a) Existence of bias may not be ruled out (supra), rather there appears to be bias on part of respondent.

(b) Non supply of copy of statement and documents of the Court of Inquiry is violative of Rule 184 (supra) which is substantial illegality and vitiates the trial.

(c) The procedure provided for summary trial could not have been completed in 20 minutes, hence the decision seems to be hasty showing existence of bias and arbitrariness. The provision contained in Army Rule 52 read with Army Rule 115 has not been complied with which vitiates the trial in view of proposition of law settled by Hon'ble Supreme Court (supra).

(d) The summary court martial proceeding has not been held in accordance with the statutory provisions (supra) hence violative of Article 14 of the Constitution of India vitiates the trial.

56. In view of findings recorded and discussion made in the preceding paras of the present order, the O.A. deserves to be allowed. Accordingly O.A. is **allowed.**

Impugned order of discharge dated 28.07.2006 and rejection order of Chief of the Army Staff dated 23.03.2011 are

set aside with all consequential benefits. However arrears of salary are confined only to 25%. The applicant shall be deemed to be in service for the purpose of other service benefits till end of his tenure in the rank he was holding at the time of discharge. Let the consequential benefits be provided to the applicant expeditiously say within four months from the date of production of certified copy of this order.

No order as to cost.

(Air Marshal Anil Chopra)
Member (A)

(Justice D. P. Singh)
Member (J)

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