A.F.R.
Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 33 of 2012

Friday this the day of 1st of September, 2017

Hon'ble Mr. Justice S.V.S.Rathore, Member (J)
Hon'ble Lt Gen Gyan Bhushan, Member (A)

No.15416770W Ex Sep (AA)
Sherpal Chahar S/o Shri Sampat Singh
R/o Village Bassujan Post Berichhar,
Tehsil Keragarh, District Agra.

…….. **Applicant**

By Legal Practitioner: Shri PN Chaturvedi, Advocate, Learned Counsel for the Applicant.

Versus

1. The Chief of the Army Staff,
   DHQPO, New Delhi 110011.

2. Command cum Chief Records Officer,
   AMC Centre and Records,
   Lucknow.

3. Union of India through Secretary,
   Ministry of Defence,
   DHQPO, New Delhi.

…… **Respondents**

By Legal Practitioner: Dr. Chet Narain Singh,
Learned counsel for the respondents

ORDER

Per Hon'ble Mr.Justice S.V.S. Rathore, Member (J)

1. By means of this Original Application, the applicant has made the following prayers :

> *"(i) Quash the orders of the Chief of Army Staff dated 01 Nov 2011 with all the consequential benefits to the applicant.*
>
> *(ii) Quash the SCM proceedings held on 15 Sept 2009/17 Sept 2009 with all the consequential benefits to the applicant."*

2. In brief the facts of the case may be summarised as under:

The applicant was enrolled in the Indian Army on 07.02.2003 and was tried by SCM and dismissed from service on 17.09.2009. The applicant while in service was granted casual leave w.e.f. 13.08.2009 to 18.08.2009 to attend the court case but he had re-joined unit eight days later on 26th August 2009. On return from leave in the unit on 26.08.2009 during conversation with Captain Ravinder Jamble (PW1), the applicant is alleged to have used abusive language and used criminal force by striking with his hand on his face. The applicant was tried by Summery Court Martial (SCM) from 15.09.2009 to 17.09.2009. He pleaded not guilty to the charges on the basis of evidence, he was found guilty and was sentenced to suffer rigorous imprisonment for three months in civil jail and was dismissed from service.

3. The accused applicant was charged as follows :

> *" CHARGE SHEET*
>
> *I, accused No.15416770W Rank SEP/AA Name SHER PAL CHAHAL of 37 Advance Medical Stores Depot attached with 874 AT Bn ASC is charged with :*
>
> *First Charge AA SEC 39(b)* *WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM*
>
> *In that he,*
> *At field, on 26 Aug 2009 having been granted 06 days Casual Leave wef 13 Aug 2009 to 18 Aug 2009, failed without sufficient cause to rejoin at 1800 hr on 18 Aug 2009, till he voluntarily rejoined at 2245hr on 26Aug 2009.*
>
> *Second Charge AA SEC 40(a)* *USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER*
> *in that he,*

At field, on 26 Aug 2009 at about 2245 struck with his hand on the face of NTS-17525A Capt Ravinder Jambhle on the same unit.

Third Charge *USING THREATENING LANGUAGE TO HIS SUPERIOR OFFICER*
AA SEC 40(b)
in that he,
At field on 26 Aug 2009 at about 2245hr when being questioned by NTS-17525A Capt Ravinder Jambhle about his overstaying leave and ***äbhi to bhol raha tha ab Maarunga bhi"****, or words to that effect.*
Field
28 Aug 2009 *(SS Dhalimal)*
Col
Comdg.Off."

4. In the said SCM, 11 prosecution witnesses were examined. The applicant was also examined and two defence witnesses were also examined. Finding the evidence to be sufficient, he was found guilty of all the three charges and accordingly, the punishment of Rigorous Imprisonment for three months and dismissal from service was passed against him. The finding and sentence was promulgated on the same day as per the provisions and countersigned by Brigade Commander on 19th October 2009.

5. Learned counsel for the applicant has raised some legal questions in support of his arguments that the proceedings of SCM were void because the mandatory provision of Rule 22(1) of the Army Rules, 1954 was not followed. The submission of the learned counsel is that under Army Rule 22(1) it was legally necessary to record the statements of the prosecution witnesses in writing. The Commanding Officer being a quasi-judicial authority, is supposed to pass a speaking/reasoned order to exercise one of the options given to him in Army Rule 22(3). In support of his arguments that the order of the Commanding Officer must be a reasoned order, he has placed reliance on the pronouncement of the Hon'ble Apex Court in the case of **M/s Kranti Associate Pvt. Ltd. & others vs. Shri Maqsood Ahmad Khan & others** (Civil Appeal No.7422 of 2010) decided on 08.09.2010. He has also placed reliance on the judgment passed by a Armed Forces Tribunal, Calcutta Bench in the case of **Ex Nk Uma Kant Dash vs. Union of India & others** and Military

Law Journal 2014, AFT, (Cal) 43 in support of his submission that evidence under Army Rule 22(1) must be reduced to writing.

6. Learned counsel for the applicant raised the issue of legality of attachment of the applicant to 874 AT Bn, ASC and conduct of SCM by the Commanding Officer of that unit. Narrating the sequence of events about grant of leave, request for extension of leave and subsequent denial of leave, he submitted that keeping in view sequence of events as also keeping the fact the applicant belonged to a different unit but was not attached to the 874 AT Bn ASC as per laid down policy as such trial by the Commanding Officer of that unit is illegal and not as per laid down rules and policy.

7. Learned counsel for the applicant narrating the details leading to scuffle submitted that as to why would he use abusive language and hit his officer, such an act can be done by an insane person only and it is unbelievable that a Sepoy of the Army would react in such a manner to abuse or assault his superior officer. The story is concocted and the correct facts are that it was PW1 who hit the applicant and he only acted in exercise of right of private defence. The applicant suffered ear injury as is evident from the statements of DWs 1 and 2. It has also been argued that the provision of Army Rules 129 was not followed.

8. Learned counsel for the respondents submitted that the legality of attachment order of applicant has neither been challenged nor has been raised as a ground by way of the present Original Application. Notwithstanding the same, it is submitted that the applicant who belonged to 37 Advance Medical Stores Depot has been attached to 874 AT Battalion Army Service Corps vide HQ 71 Sub Area attachment order No 2042/16/A3 dated 27 Aug 2009 for the purposes of trial by court martial. The legality of attaching an individual to other units for the purposes of disciplinary proceedings have been discussed in detail and upheld by the Hon’ble Supreme

Court of India in **Civil Appeal No. 8360 of 2010 Union of India & Ors Vs Vishav Priya**, the relevant portions of which are reproduced as under:-

> *"33. In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions."*

9. The learned counsel for applicant has harped upon the provisions of Army Order 7/2000. A copy of the same has been attached as Annexure A-1. In accordance with the same, the necessary concurrence of Formation Commander, GOC 71 Sub Area in present case was obtained and attachment order has been issued vide HQ 71 Sub Area Attachment Order No 2042/16/A3 dated 27 Aug 2009.

10. As regards the requirement of attaching the applicant, it can be discerned from the facts of the case that the applicant has been charged for use of criminal force to his superior officer, Capt Ravinder Jambhle of 37 Advanced Medical Stores Depot, which was the parent unit of the applicant. Capt Ravinder Jambhle had reported about the said incident to his Commanding Officer, thereby making him a witness to the case. Hence, it was only prudent and proper on part of the respondents to attach him to another unit for disciplinary purposes due to the involvement of the personnel from his parent unit as witnesses in the present case. There appears to be no illegality in the same, more so when the attachment was issued by HQ 71 Sub Area which was the concerned formation involved in the present case.

11 The main thrust of the learned counsel for the applicant is that Army Rule 22 (1) was not complied with which would render the SCM void.

12. Before proceeding further in this matter, we would like to quote Rule 22 of the Army Rules, 1954 and also the Army Order 70/1984 which deals with the hearing of a charge by the Commanding Officer:

> *"**22**. **Hearing of Charge**.—(1) Every charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:*
>
> *Provided that where the charge against the accused arises as a result of investigating by a court of inquiry, wherein the provisions of the rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).*
>
> *(2) The commanding officer shall dismiss a charge brought before him, if, in his opinion, the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion he is satisfied that the charge ought not to be proceeded with.*
>
> *Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of section 120 without reference to superior authority as specified therein.*
>
> *(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time –*
>
> *(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or*
>
> *(b) refer the case to proper superior military authority; or*
>
> *(c) adjourn the case for the purpose of having the evidence reduced to writing; or*
>
> *(d) if the accused is below the rank of warrant officer, order his trial by summary court martial:*
>
> *Provided that the commanding officer shall not order trial by summary court martial without a reference 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 unless –*
> *(a) the offence is one which he can try by a summary court-martial without any reference to that officer.*

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4) Where the evidence taken in accordance with sub-rule (3) of this discloses an offender other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge(s)"

"Army Order No. 70/84 which deals with hearing of a charge by the commanding officer may be set out as under :

"AO 70/84 Discipline: Hearing of a Charge by the commanding Officer.

1. Discipline process under the Military law commences with Army Rule 22 which lays down that every charge against a person subject to the Army Act, other than an officer, shall be heard in the presence of accused. The accused shall have full liberty to cross-examine any witness against him. This is a mandatory requirement and its non-observance will vitiate any subsequent disciplinary proceedings. In the case of officers, the rule becomes equally mandatory if the accused officer requires its observance under Army Rule 25.

2. It is, therefore, incumbent on all Commanding Officers proceeding to deal with a disciplinary case to ensue that "Hearing of Charge " enjoined by Army Rule 22 is scrupulously held in each and every case where the accused is a person other than an officer and also in case of an officer, if he is so requires it. In case an accused officer does not require "Hearing of the Charge " to be held, the Commanding Officer may, at his discretion, proceed as described in Army Rule 22(2) or Army Rule 22(3).

3. It may be clarified that the charge at this stage is a 'Tentative' charge which may be modified after the hearing or during the procedure as described in Army Rule 22 (3) (c) or during examination after completion of the procedure under Army Rule 22(3) (c) , depending on the evidence adduced. Further, as long as the Commanding Officer hears sufficient evidence in support of the charge (s) to enable him to take action under sub-rules (2) and (3) of Army Rule 22, it is not necessary at this stage to hear all possible prosecution witnesses. As a matter of abundant caution it would be desirable to have one or two independent witnesses during the hearing of the charge(s).

4. After the procedure laid down in Army Rule 22 has been duly followed, other steps as provided in Army rules 23 to 25, shall be followed both in letter and spirit. It may be clarified that the statutory requirements of Army Rules 22 to 25 cannot dispensed with simply because the case had earlier been investigated by a court of Inquiry where the accused person (s) might have been afforded full opportunity under Army Rule."

13. Learned counsel for the applicant in support of his argument has placed reliance on a judgment of **Ex Nk Uma Kant Dash (supra).** We have carefully examined the aforesaid judgment. In the facts of that case, the evidence under Army Rule 22(1) was heard on three dates and the presence of the person involved was only on one date. In that context, it was decided that the evidence under Army Rule 22(1) should be recorded in writing. It has been observed in the judgment as under:

> *"In our considered view the import of Rule 22(1) of Army Rule is to hear the accused orally during hearing of charge and by no stretch of imagination it can reasonably be constructed that Rule 22(1) of Army Rule provides for oral hearing of the witnesses for the simple reason that in such a situation the mandatory requirement of cross-examination of witnesses by the accused cannot be satisfied. That apart, the Commanding Officer is mandated in Rule 22(2) of Army Rule to consider the evidence in order to form an opinion as to whether it is a case of dismissal of charge and, thereafter, only he is to be satisfied that the charge ought not to be proceeded with. In such circumstances, it is held that there is no scope for the CO to hear witnesses orally and their evidence is to be recorded in writing to comply with the mandatory requirement of Rule 22(1) as envisaged therein in unequivocal language."*

14. Before proceeding further, we would like to quote the pronouncement of Hon'ble Delhi High Court in the case of **Lance Dafedar Laxman Singh vs. Union of India & ors.** (1992 SCC OnLine Del 371) in paras 9 and 10 as under :

> *"(9). ..... The scope of investigation which is preliminary in nature to be conducted under the Army Rule 22 has strictly to be adhered to. The word 'Charge' came up for interpretation before the Division Bench of this Court in the case of Ex Sappy Rajbir Singh Vs. Union of India & Ors. in Crl.W. No.43/1985 decided on 27th May, 1988. It was pointed out that the word 'charge' referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the 'charge sheet' and the. 'charge'. Charge has been defined in sub-rule (2) of Rule 28 under this very chapter. It reads as under:*
>
> *(10) The "charge-sheet" has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the*

witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure for recording evidence is laid down in Army Rule 23."

(underlined by us)

15. Hon'ble Apex Court in the case of **Prithi Pal Singh Bedi Lt. Col. Vs. Union of India** (AIR 1982 SC 1413) in para 37 has discussed the procedure laid down for conducting the Summary Court Martial, which is reproduced as under :

"37. The submission is that before a general court martial is convened as provided in rule 37 it is obligatory for the commanding officer to hear the charge made against the accused in his presence giving an opportunity to the accused to cross-examine any witness against him and to call any witness and make any statement in his defence and that if the commanding officer is so satisfied he can '.. dismiss the charge as provided in sub-rule (2) of rule 22. If at the conclusion of the hearing under rule 22 the commanding officer is of the opinion that the charge ought to be proceeded with, he has four options open to him, one such being to adjourn the case fort the purpose of having the evidence reduced to writing, called summary of evidence. Rule 23 prescribes the procedure for taking down the summary of evidence which, inter alia, provides recording of the evidence of each witness, opportunity to the accused to cross-examine each such witness, etc. Rule 24 provides that the summary of evidence so recorded shall be considered by the commanding officer who at that stage has again three courses open to him, to wit, (a) remand the accused for trial by a court-martial, (b) refer the - case to the proper superior military authority; and (c) if he thinks it desirable, re-hear the case and either dismiss the charge or dispose - it of summarily."

16. Apart from it, in the case of **Major G.S.Sodhi vs. Union of India** (1991) 2 SCC 382), the Hon'ble Supreme Court has considered Army Rule 22 and the other Rules. The relevant part of the said judgment reads as under:

"6..... Rule 22 provides for the hearing of charges. Rule 23 lays down the procedure for taking down the summary of evidence. Rule 24 deals with remand of accused and lays down that the summary of evidence recorded under Rule 23 shall be considered by the Commanding Officer who thereupon-shall either remand the accused for trial by a court-martial or refer the case to the proper superior military authority and if the accused is remanded for trial

> *by a court-martial the commanding officer shall without unnecessary delay either assemble a summary court- martial or apply to the proper military authority to convene a court-martial. Rule 25 provides for the procedure to be followed on a charge against an officer. Rule 28 deals with framing of charges and lays down that the charge-sheet shall contain the whole issue or issues to be tried by a court-martial. Rule 33 deals with the defence by the accused person....."*
>
> *"11. ..... Rule 22 contemplates that every charge against a person other than an officer, shall be heard in the presence of the accused, and the accused shall have full liberty to cross- examine any witness against him, and to call any witnesses and make any statement in his defence. Rule 25 lays down the procedure on a charge against officer and is to the effect that where an officer is charged with an offence under the Act, the investigation shall, if he requires it, be held, and the evidence be taken in his presence in writing, in the same manner as required by Rules 22 and 23....."*

17. Hon'ble Apex Court in the above quoted two judgment and also in other cases, with reference to Army Rule 22(1) has used the word "heard" while at every other place, word recorded/reduced into writing has been used. Use of such words are in consonance with the main language of Army Rule 22.

18. Now we proceed to interpret Army Rule 22(1). Learned counsel for the respondents has argued that the case law laid down by the learned counsel for the applicant pronounced by the Co-ordinate Bench of this Tribunal in the case of **Ex Nk Uma Kant Dash** (supra) is per in-curium as no case law touching the point has been considered and, therefore, it cannot be considered as a good law. It has also been argued that appeal has been preferred challenging the said judgment and notices have been issued.

19. We have given our anxious considerations to this argument. A judgment can be said to be per in curium when it has been delivered by the Court in ignorance of the relevant statutory provision or binding decision of a Court of a co-ordinate jurisdiction or of a higher court. In this connection, the Full Bench of Allahabad High Court in the case of **Rana Pratap Singh vs. State of Uttar Pradesh**, (1995) 1 All CJ 200) has laid down as under :

> " This is what now brings us to what constitute the parameters of the per incuriam rule. As the Supreme Court in Punjab Land and Recreation Corporation Ltd. v. Presiding Officer, Labour Court, , explained, "The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of this Court." Further "In England a decision is said to be given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords""

20. Hon'ble Supreme Court in the case of **Municipal Corporation of Delhi vs. Gurunam Kaur** (1989 (1) SCC 101) in para 11 has held that a decision should be treated as per in curium when it is given in ignorance of the terms of the statutory or of a rule having the course of statute.

21. Similarly, Andhra Pradesh High Court in the case of **Ketari Kasulamma vs. Gontimi Chellokamma (**2002) 4 ALT 114 has observed in para 5 that in my considered opinion the said judgment of the learned Single Judge of this Court is per in curium. The provision contained in Section 10(1) of the Limitation Act, 1963 was not brought to the notice to the learned Single Judge in the above second appeal.

22. Thus, the legal position which emerges out is that if a judgment is passed in ignorance of a provision or rules related with the issue or in ignorance of a case law which has binding effect, then in such circumstances, the judgment rendered by the Tribunal/Court shall be per in curium. In this perspective, we have gone through the judgment of Division Bench of Armed Forces Tribunal, Calcutta in the case of **Ex Nk Uma Kant Dash** (supra) relied upon by the learned counsel for the applicant. It transpires from perusal of the judgment that the facts of that case were entirely different. In that case, the witnesses under Army Rule 22(1) were heard on three dates while the accused in that case was present only on the last date. Apart from it, Army Order 70/84 was also not brought to the notice of the Hon'ble Tribunal, Calcutta which throws light on the purpose and intention of Army Rule

22(1). The case laws of Delhi High Court and the Hon'ble Supreme Court which we have quoted earlier, were also not brought to the notice of the Hon'ble Tribunal. The Delhi High Court has specifically stated that the evidence under Army Rule 22(1) has not to be reduced in writing. While the Hon'ble the Supreme Court in all the cases where , it has considered Army Rule 22(1), has used the word "heard" and not recorded/"reduced into writing". Judgment of Hon'ble Apex Court in the case of **Prithi Pal Singh Bedi Lt. Col.** (supra) was brought to the notice of the Tribunal, but that was only on the point that the provisions of Army Rule 22(1) are mandatory. A perusal of the language of Army Rule 22(1) shows that it is very clear and there is no scope for any two interpretations. The word "heard" has been used intentionally by the Legislature and in the same section in the later part, while dealing with the stage of "Summary of Evidence", the word "reduced into writing" has been used. Therefore it emphatically comes out that distinction is a deliberate and has been introduced keeping in view the purpose of the evidence under Army Rule 22(1).

23. It is settled principle of interpretation of Statute that when the language of a rule or section is clear in itself, then nothing has to be added to or removed from a Statute unless and until there are adequate grounds to justify the inference that the Legislature has intended something which it had omitted to express. How a Statute is to be interpreted, has been considered by the Hon'ble Supreme Court in the case of **Satheedevi vs Prasanna** (2010) 5 SCC 622), wherein the Hon'ble Supreme Court has observed in para 12 as under :

> *"12. Before proceeding further, we may notice two well recognized rules of interpretation of statutes. The first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction, only then it would not be open to the courts to adopt any other hypothetical construction on the ground*

> *that such hypothetical construction is more consistent with the alleged object and policy of the Act. The words used in the material provisions of the statute must be interpreted in their plain grammatical meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can legitimately arise."*

24. Keeping in view the principles of interpretation of statute, we have examined Army Rule 22. Army Rule 22(1) does not provide that the evidence of the witnesses shall be reduced into writing. Specific word "heard" has been used instead of word "reduced into writing". While after hearing the evidence as provided under Army Rule 22(1), some options are given to the Commanding Officer under Army Rule 22(3) and the third option is to adjourn the case for the purpose of having the evidence reduced into writing. Thus, it is evident that the word "heard" has been used by the authority making Rules. Keeping in view the purpose and intention with which Army Rule 22(1) was framed. Our view finds support from Army Rule 22(3) also which specifically says that the evidence under Army Rule 22 (3) shall be taken down in writing in the presence and hearing of the accused before the Commanding Office as he directs.

25. Now we proceed to examine the intention and purpose of recording of evidence under Army Rule 22(1). Army Rule 22 finds place in Chapter V titled – Investigation of Charge and Trial by Court Martial.

26. A plain reading of Rule 28 of the Army Rules shows that there is a clear distinction between the "charge sheet" and "charge". Rule 28 of the Army Rules, 1954 reads as under :

> ***"28. Charge-sheet and charge**.— (1) A charge-sheet shall contain the whole issue or issues to be tried by a court-martial at one time.*
>
> *(2) A charge means an accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence.*
>
> *(3) A charge-sheet may contain one charge or several charges."*

27. A plain reading of this Rule shows that the charge is only an accusation. It is contained in a charge sheet and the charge sheet is the formal charge sheet drafted against an accused which may contain several charges. Thus, the evidence under Army Rule 22(1) is only with regard to charge and not the charge sheet. It is only when the Commanding Officer on the basis of the evidence heard by him under Army Rule 22(1) forms an opinion that there is adequate material that the accused should be tried, then for the said purpose, the evidence has to be recorded in writing, as provided under Army Rule 22(3) and 23 which is commonly called "Summary of Evidence".

28. At the cost of repetition, we would refer the judgment of Hon'ble Delhi High Court in the case of **Lance Dafedar Laxman Singh (supra)** wherein Hon'ble High Court has considered the distinction between charge and charge sheet and has held in paras 9 and 10 as under :

> *"(9). ..... The scope of investigation which is preliminary in nature to be conducted under the Army Rule 22 has strictly to be adhered to. The word 'Charge' came up for interpretation before the Division Bench of this Court in the case of Ex Sappy Rajbir Singh Vs. Union of India & Ors. in Crl.W. No.43/1985 decided on 27th May, 1988. It was pointed out that the word 'charge' referred to means a simple complaint or allegation against the soldier concerned. The rules lay down a clear distinction between the 'charge sheet' and the. 'charge'. Charge has been defined in sub-rule (2) of Rule 28 under this very chapter. It reads as under:*
>
> *(10) The "charge-sheet" has to be framed after the preliminary investigation during which the statements of the witnesses and the plea of the accused are not to be recorded in writing. However, the nature of the offence has to be made known to the accused and the witnesses are to be examined in support of those allegations in his presence. The accused has also to be given full liberty to cross examine those witnesses deposing against him. The Commanding officer after holding the preliminary investigation has been given three options in sub-rule (3) of Rule 22. <u>If the Commanding officer is satisfied then the case should proceeded. He will adjourn it for purposes of having the evidence reduced into writing. The procedure for recording evidence is laid down in Army Rule 23."</u>*
>
> *(underlined by us)*

29. Thus, virtually Army Rule 22(1) is only an investigation stage and on the basis of the statements of the witnesses, heard, the CO has to form an opinion whether the case has to be proceeded with. It is clear from the rules that the statements of the witnesses so heard are not used in the subsequent proceedings. This fact finds support from the provisions of the Army Order 7/2000, wherein it has been provided that it is not necessary that all the witnesses of the prosecution should be heard under Army Rule 22(1). If the Commanding Officer is prima facie satisfied after hearing some of the witnesses that matter deserves to be proceeded against him, then there is no requirement under Rules or Army Order to further record the evidence of all the witnesses. Thus, the purpose of the Legislature to hear the prosecution witnesses under Army Rule 22(1) is very limited.

30. Learned counsel for the applicant has relied upon the judgment of Hon'ble Apex Court in the case of **Lt. Col. Prithi Pal Singh Bedi vs Union of India & others (**1982 AIR SC 1413)). This case has been relied upon on the point that Army Rule 22 is mandatory, where the person to be tried does not fall within the category of 'Officer'. In the aforesaid case, it has nowhere been observed by the Hon'ble Supreme Court that the evidence under Army Rule 22(1) has to be reduced into writing. Hon'ble Apex Court has also used the word "heard" with reference to Army Rule 22(1).

31. It is true that the provision of Army Rule 22(1) are mandatory, but as discussed, there is no requirement that such statements must be reduced into writing. In view of the discussion made above and keeping in view the pronouncement of Hon'ble Apex Court and also of the Hon'ble Delhi High Court, we find ourselves unable to agree with the views expressed by the Co-ordinate Bench of this Tribunal in the case of **Ex Nk Uma Kant Dash (supra)** and we, with great respect, are not inclined to follow the decision because the said judgment is *per in- curium*, wherein the pronouncement of Hon'ble

Delhi High Court in the afore-mentioned case and AO 70/84 were not considered. Therefore, we hereby hold that there is no requirement under Army Rules that the evidence under Army Rule 22(1) has to be reduced into writing.

32. The only ground raised on behalf of the applicant to show that the mandatory provision of Army Rule 22(1) was not complied with, is that it was not reduced into writing. Since we are of the considered view that there was no requirement that evidence under Army Rule 22(1) has to be reduced into writing, therefore, this ground of attack does not support the case of the applicant.

33. No other ground challenging the non compliance of Army Rule 22(1) has been pressed into service on behalf of the applicant.

34. Next argument of the learned counsel for the applicant is that the order of the Commanding Officer to convene the SCM must be a speaking order.

35. On this point, learned counsel for the applicant has drawn our attention towards the observation of the Hon'ble Supreme Court in para 23 in its pronouncement in the case of **Union of India & ors vs. Vishav Priya Singh** (Service Cases Today) 2013 SCT 633. Para 33 is hereby reproduced as under:

> "*In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions. We fully endorse and affirm the view taken by the High Court that SCM is an exception and it is imperative that a case must be made out for immediacy of action. The reasons to convene an SCM must be followed by well articulated reasons or the record itself must justify such resort".*

36. To consider the submission of the learned counsel for the applicant, we will have to consider Sections 116 and 120 of the Army Act which reads as under:

> ***"116. <u>Summary court-martial</u>****.—(1) A summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.*
>
> *(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such be sworn or affirmed.*
>
> ***120. <u>Powers of summary courts-martial</u>****.—- (1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.*
>
> *(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary genera! 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 (imprisonment for life)1 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,"*

37. The offences referred to in Section 120(2) are under Sections 34, 37 and 69 of the Army Act. Section 34 of the Army Act deals with the offences in relation to the enemy and punishable with death. This section has no application in the facts of the present case. Likewise Section 37 deals with the Mutiny, so the same has also no application in the facts of the present case. Section 69 deals with the Civil offences which reads as under:

> ***"69. <u>Civil offences.</u>*** *— Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence against this Act and, if charged there with under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say, —*
>
> *(a) if the offence is one which would be punishable under any law in force in India with death or with imprisonment for life, he shall*

> *be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned;*
>
> *(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."*

38. It is clear from the record that the applicant was in field area on active service where this incident took place. The main allegation against him was that he has assaulted his officer, therefore, in this case, urgent and immediate action was required, accordingly, SCM was convened and keeping in view the facts and the aforementioned legal position, the convening of SCM cannot be said to be in violation of the Army Act or the Rules because record itself justify such resort. There is no illegality in attachment of the applicant and convening of SCM.

39. Submission of the learned counsel for the respondents is that this point has been considered by a Bench of this Tribunal in T.A.No.48 of 2009 (date of decision 21.01.2010) wherein this point has been considered in detail and the Hon'ble Bench observed that it has not been shown what prejudice has been caused to the petitioner by the Trial being held by Commander, Administrative Battalion, Rajput Regimental Centre, Fatehgarh."

40. The arguments of the learned counsel for the applicant is that the procedure was not strictly complied with and on the strength of this submission, he has submitted that the subsequent proceedings were void. It is true that the provisions of Army Rule 22(1) are mandatory and if in a given case, it is concluded that the provisions of Army Rule 22(1) have been violated, then it will vitiate further proceedings. But so far as other infirmities and irregularities in the procedure are concerned, it does not vitiate the trial or subsequent proceedings. The applicant will have to show that his defence has been prejudiced by lapses in following the procedure, only then he

can get the benefit. In the instant case, no such argument has been advanced before us that the applicant's defence has been prejudiced by irregular attachment order. On this point, we have already quoted the judgment of a Coordinate Bench of the Tribunal. Apart from it, in the case of **Major G.S.Sodhi (supra),** Hon'ble Supreme Court has observed in para 21 as under :

> *"It must be noted that the procedure is meant to further the ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such."*

41. The aforesaid view expressed by the Hon'ble Supreme Court in the case of Major G.S.Sodhi (supra) has again been followed by the Hon'ble Apex Court in the case of **Union of India & ors vs. Major A.Hussain** [1998) (1) SCC 537], wherein the Hon'ble Apex Court has observed as under :

> *"In G.S. Sodhi's case this Court with reference to Rules 22 to 25 said that procedural defects, less those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused."*

At this juncture, we would like to quote Rule 149 of the Army Rules, which reads as under :

> ***"149. Validity of irregular procedure in certain cases**,— Whenever, it appears that a court-martial had jurisdiction to try any person and make a finding and that there is legal evidence or a plea of guilty to justify such finding, such finding and any sentence which the court-martial had jurisdiction to pass thereon may be confirmed, and shall, if so confirmed and in the case of a summary court-martial where confirmation is not necessary, be valid, notwithstanding any deviation from these rules or notwithstanding that the charge-sheet has not been signed by the commanding officer or the convening officer, provided that the charges have, in fact, before trial been approved by the commanding officer and the convening officer or notwithstanding any defect or objection, technical or other, unless it appears that any injustice has been done to the offender, and where any finding and sentence are otherwise valid they shall not be invalid by reason only of a failure to administer an oath or affirmation to the interpreter or shorthand writer; but nothing in this rule shall relieve an officer from any responsibility for any willful or negligent disregard of any of these rules."*

42. A perusal of the aforesaid rule shows that the Court Martial would not be held to be invalid, even if there was an irregular procedure where no injustice was caused to the accused. During course of argument, learned counsel for the applicant has nowhere argued that the applicant's defence has been prejudiced by any such irregularity in the procedure. Hon'ble Supreme Court in the case of **Major A.Hussain** (supra) has also observed as under :

> *" When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court martial unless it is shown that accused has been prejudiced or a mandatory provisions has been violated. One may usefully refer to Rule 149 quoted above."*

43. We have already discussed that there is no requirement of law that the evidence under Army Rule 22(1) must be reduced into writing. This is the main ground of challenge of the learned counsel for the applicant. Applicant has fully participated in the proceedings. Even otherwise, Army Rule 22(1) is only a pre-trial/investigation stage, therefore, keeping in view the pronouncement of Hon'ble Supreme Court that if there is sufficient evidence, then any irregularity in the pre-trial or the investigation stage becomes immaterial, this argument pales into significance.

44. It has also been argued that after recording the evidence in Army Rule 22(1), the Commanding Officer has to form an opinion and, therefore, the order of forming an opinion, must a speaking order. On the point of purpose of recording reason, he has cited the case of **M/s Kranti Associate Pvt. Ltd. (**supra), wherein the word "speaking order" has been defined and the purpose of passing an speaking order has also been considered, but the perusal of the language of Army Rule 22(3) is clear enough which only says that if the Commanding Officer is of the opinion ..... The word used in the rule must be given a literal meaning. It transpires from Army Rule 22(3) that after compliance of sub-rule (1), the

Commanding Officer shall form his opinion. At this stage, we would like to refer the judgment of Vishwa Priya Singh (supra), (relevant part quoted in the earlier part of the judgment). In the said judgment, Hon'ble Apex Court has held that reasons to form opinion must be reduced into writing which follows with the words "or the record itself must justify such resort." In the facts of this case as stated earlier, the incident had taken place in an active service area which establishes the urgency to hold SCM. Perusal of the original record shows that on conclusion of hearing of the charge(s) on the proforma in column 7 the Commanding Officer has passed the following order "To be disposed off summarily". So it appear that there was application of mind.

45. Now we come to the last limb of the arguments of the learned counsel for the applicant on this point. Learned counsel for the applicant has argued that the evidence of PW-1 Captain Ravinder Jamble is unworthy of reliance, keeping in view the evidence of the defence witnesses. He has also argued that no Sepoy can dare to use criminal force against his officer. In reply to his argument, learned counsel for the respondents has argued that no officer would ever falsely implicate a Sepoy of his own Unit and if he gives evidence to this effect, then something must have happened. In this perspective, now we proceed to examine the evidence of the witnesses.

46 The submission of the learned counsel for the applicant is that during evidence under Army Rule 22(1), only seven witnesses were heard. However, in the SCM proceedings, 11 prosecution witnesses have been examined. In the earlier part of the judgment, we have already discussed this aspect and as per rules, read with AO 7/2000 there is no necessity that all the prosecution witnesses must be examined under Army Rule 22(1). If during hearing of the evidence under Army Rule 22(1), the Commanding Officer forms an opinion that there is sufficient evidence to proceed against the

accused, then there is no need to hear the evidence of the remaining witnesses. Therefore, this argument has no substance.

47. Learned counsel for the applicant has also argued that in the summary of evidence, 12 witnesses were examined, while during SCM proceedings, only 11 witnesses were examined. The learned counsel for the applicant could not point out as to how his rights/defence have been prejudiced by non-examination of any such witness. When the evidence produced during SCM proceedings were sufficient against him, then non production of any witnesses during SCM proceedings would not be material.

48. We have examined the evidence of all the prosecution witnesses. The allegation against the applicant is that he has abused and has used criminal force against Captain Ravinder Jamble who was his Administrative Officer. Applicant has over stayed the leave granted to him. Captain Ravinder Jamble has been examined as PW1 and he has fully supported the prosecution case. In his evidence, he has also mentioned the words used by the applicant in abusing him and has also stated as to how the incident occurred. Apart from it, so far as the charge of over staying of leave is concerned, that is an admitted fact that he has over stayed the leave, though he has furnished an explanation which was found to be not satisfactory. It is pertinent to mention that so far as regards the charge of over staying of leave is concerned, the defence of the applicant is that he had to attend a case which was listed on 13.08.2009 which was adjourned to 17.08.2009 and therefore, he could not come, but no documentary evidence could be produced by the applicant in support of his explanation regarding pendency of the case and also that he was a party or a person interested in the said case. Even before this Tribunal, the applicant could not furnish any documentary evidence to prove that he was either a party or a person interested in the litigation which he had to attend, was listed on 13.08.2009 and was adjourned to 17.08.2009. In cross-

examination to the PW1, the only question put to this witness by the applicant was, why would I hit and abuse you. The witness has given detailed answer of this question put to him in the cross-examination. The other prosecution witnesses have also supported the case of the prosecution. Some of the witnesses were cross-examined as to whether Captain Ravinder Jamble told him that he had sustained injury and this question was replied by them in negative. Simply because Captain Ravinder Jamble has not told everybody that he had sustained an injury, cannot be a ground to disbelieve his otherwise reliable evidence. Apart from it, his evidence that injury was sustained by him in this incident stands corroborated by the evidence of PW-10, who has taken Captain Ravinder Jamble to the hospital. PW-11 Lt. Col. Vinay Gera of Command Hospital, who has not only supported the fact of injury to Captain Ravinder Jamble, but has also mentioned it in the case history that Captain Ravinder Jamble told him that Sherpal Chahar had hit him on his face with his fist and therefore, he deemed it fit to initiate a medico legal case and entered the details in the register and informed everybody. It is pertinent to mention that the applicant Sherpal Chahar had declined to cross-examine this witness, therefore, the evidence of this witness remains unrebutted.

49. In defence, the applicant has examined Lt Issuant Suniana and also Major Awamish Karan of the Command Hospital, Northern Command. Both these witnesses have medically examined the applicant on 30th August 2009. Lt Issuant Suniana examined him first and thereafter he referred him to ENT, OPD. These witnesses were not asked about the duration of injury, if any. They have also not stated that Sherpal Chahar told him as to how he has received the said injury. The second defence witness who is an ENT Specialist, has stated that he has examined Sepoy Sherpal Chahar and on examination he found his ear i.e. primarily the ear drums, as well as ear within normal limits. He also conducted hearing voice

test for him which was done from a distance of 600 cm. and he found the hearing of Sepoy Sherpal Chahar normal. Nose and throat was also well and did not reveal any significant abnormality. He reassured the patient and gave him pain killers and anti-allergic medicines. No question was put to this defence witness. Thus, these witnesses have not given any statement which support the defence of the applicant that he was assaulted by Captain Ravinder Jamble and he acted in exercise of right of private defence. Therefore, the evidence led by the prosecution, the case of the prosecution was fully proved and there was sufficient evidence in support of all the three charges.

50. Learned counsel for the applicant has also argued that the provision of Rule 129 of the Army Rules were not followed. Rule 129 of the Army Rules reads as under :

> *"129.* ***Friend of accused****.— In any summary court-martial, an accused person may have a person to assist him during the trial, whether a legal adviser or any other person. A person so assisting him may advise him on all points and suggest the questions to be put to witnesses, but shall not examine or cross examine witness es or address the court."*

51. A perusal of the record shows that at every stage of the trial, the provisions of Army Rule 129 were complied with, while the evidence under Army Rule 22(1) was heard. IC-61607H Maj Bharat Singh and JC-680525M Sub Maj Tapan Das were present. During SCM proceedings. JC- 680803P Sub Raghubee Singh was friend of the accused. Thus, there was no violation of Army Rule 129.

52. In view of the above discussions, we are of the considered view that the judgment of the Division Bench of Armed Forces Tribunal, Calcutta in the case of **Ex Nk Uma Kant Dash** (supra) was per in curium and, therefore, it loses its binding effect. There is no legal requirement that evidence of witnesses under Army Rule 22(1) should be reduced in to writing. We do not find any procedural illegality or irregularity in conducting the SCM and

finding recorded on the basis of the evidence is also in accordance with the material on record.

53. In view of the discussions made above, we do not find any merit in the present O.A.

54. Thus, this O.A. lacks merit, deserves to be dismissed and is hereby **dismissed.**

(Lt Gen Gyan Bhushan)
Member (A)

(Justice S.V.S.Rathore)
Member (J)

Dated: September , 2017.
PKG/UKT