AFR
Court No. 2
Reserved Judgment

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No. 189 of 2010

Tuesday this the 26th day of September, 2017

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

No. 14399116L Havildar (Technical Assistant) Shiv Kumar Joshi of 57 field Regiment (SITTANG YENAG YUANG) Resident of Village and P.O. Gangapur City Saloda Mod, Kaila Devi Colony Distt. Sawai Madhopur, Rajasthan.

…….. **Applicant**

By Legal Practitioner: Col R.N Singh(Retd), Advocate
Learned Counsel for the Applicant.

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi-110011.

2. Chief of Army Staff, South Block, DHQ Post Office, New Delhi -110001.

…… **Respondents**

By Legal Practitioner: Shri Kaushik Chatterji,
Learned Standing Counsel for the Central Government assisted by Maj Rajshri Nigam, Departmental Representative.

ORDER

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

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1. By means of this instant Original Application under Section 15 of the Armed Forces Tribunal,2007, the applicant has made the following prayers :

> *"(a) Pass an order or direction to the respondents to set aside the impugned order of finding and sentence of the summary court martial. And quash the entire proceedings.*
>
> *(b) Reinstate the applicant in the 57 FD regiment as battery Havildar Major w.e.f. 27.05.2009 to till date.*
>
> *(c) Pass an order or direction to pay all the arrears of pay and allowances to the applicant for the last 17 months which are due to him under AA section 93.*
>
> *(d) Pass and order or direction to grant me the rank of JCO promotion which is due to me w.e.f. 03 Feb 2009.*
>
> *(e) Pass an order to grant me any other relief which the court may deem fit."*

2. In the Summary Court Martial (herein after referred to as the SCM') proceedings, the applicant was charged as under :

> "(Mohit Verma)
> Colonel
> The Court
>
> ***CHARGE SHEET***
>
> The accused No 14399116L Rank Havildar (Technical Assistant) Name Shiv Kumar Joshi of 57 Field Regiment (Sittang Yenangyaung), is charged with :-
>
> Offence
>
> First Charge
> Army Act Section 52(a) — COMMITTING THEFT OF PROPERTY BELONGING TO A PERSON SUBJECT TO MILITARY LAW
>
> in that he,
>
> at Meerut, on 06 March 2009, committed theft of HDFC Bank ATM Debit Card; the property belonging to No 15135702Y Naik (Driver Special) Vijay Kumar, of the same Regiment.
>
> Second Charge
>
> Army Act Section 52 (f) — SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF ARMY ACT WITH INTENT TO CAUSE WRONGFUL LOSS TO A PERSON
>
> in that he,
>
> at Meerut on 06 March 2009, with intent to cause wrongful loss to No 15135702Y Naik (Driver Special) Vijay Kumar, of the same Regiment withdrew a sum of Rs 15,000/- (Rupees fifteen thousand only) from

HDFC Bank Account No 028511550012322 of said person by using ATM Debit Card.

Sd/-x-x-x-x-x-x-
Place : Meerut (Mohit Verma)
Date : 20 July 2010 Colonel
Commanding Officer
57 Field Regiment (Sittang Yenangyaung)"

3. In brief, the facts as narrated by the applicant in his Original Application may be summarised as under :

4. The applicant was enrolled in the Indian Army on 09th December 1987. In the year 2005, he was appointed as Battery Havildar Major in a Battery of 57 Field Regiment. On 13th February 2009, Gypsy No.05B092251Y while moving from Meerut to exercise Area in Punjab, met with an accident. The vehicle was brought back to Meerut and handed over to a civil workshop for repairs. Expenses of Rs.40,000/- was incurred in the repair of the said Gypsy which was paid to Shri Guljar Ahmad, owner of the workshop and the said payment was made by Vijay Kumar and Pawan Kumar and thereafter the Gypsy was brought back in the Unit at about 2100hrs on 06.03.2009. On the same day, Naik Vijay Kumar had requested the applicant to withdraw Rs.15,000/- from his account by his ATM-cum-Debit card which was kept in the office. The applicant on such request had withdrawn the money and handed over the amount to Naik Vijay Kumar at about 8 PM on the same day. The Court of Inquiry regarding withdrawl of Rs.15,000/- from the account of Naik Vijay Kumar by using his ATM card was initiated on 12th March 2009 and thereafter on 15th March 2009, summary of evidence was recorded, wherein statemens of the following five witnesses were recorded :

(i) Major Himanshu Kalia
(ii) Captain Sachin Deepak
(iii) Subedar Kashmir Singh
(iv) Subedar Major Ram Nath Yadav, and
(v) Naik Vijay Kumar.

On 27th May 2009, SCM proceedings started against the applicant for the two charges, mentioned above, which was under Sections 52(a) and 52(f) of the Army Act. In the said SCM proceedings, the applicant was held

guilty and was punished with "dismissal from service" and also with the "reduction to rank". Feeling Aggrieved by the said punishment, the applicant filed O.A.No.2 of 2009 before this Tribunal and vide order dated 16th March 2010, the said O.A. was allowed and this Tribunal passed the following order :

> *"The proceedings of SCM have not been held in accordance with law. We accordingly set aside the sentence and conviction of the applicant and quashed the proceedings and direct the respondents to retrial from the stage of the arraignment of charges. It would be open to the petitioner to seek change of the friend of the accused."*

On 16.07.2010, the applicant gave the name of his friend in the retrial. During retrial, on 23.07.2010, the applicant submitted list of three witnesses to be examined in his defence, which was received by the Adjutant on the same day, but no defence witnesses were called by the C.O. violating Rule 137(2) of the Army Rules, 1954.

5. In the counter affidavit it has been pleaded that the applicant was initially tried by the SCM on 27th May 2009 for the two charges, firstly for committing theft of HDFC ATM-Debit card belonging to Naik Vijay Kumar and second for withdrawing Rs.15,000/- by using the said ATM card. On arraignment, the applicant pleaded guilty and was awarded punishment of dismissal from service and also reduction to the rank. Thereafter under the orders of this Tribunal passed in O.A.No.2 of 2009, the applicant was retried by the SCM which was held between 14th August 2010 to 26th August 2010. It was conducted by Col. Mohit Verma, the Commanding Officer, 56 Field Regiment on the two charges. In the retrial, the applicant pleaded not guilty to both the charges. The Court, after examining the seven prosecution witnesses and the written statements tendered by the applicant, found him guilty of both the charges and awarded him the punishment of dismissal from service and reduction to rank. The finding and sentence was promulgated on 26th August 2009 as per the provisions and was also countersigned by the Commander, 27th Artillery Brigade on 21st September 2009.

6. It has been argued on behalf of the applicant that Col. Mohit Verma was the Commanding Officer of 57 Field Regiment had vested interest, hence he was not entitled to conduct the SCM. In the first SCM

proceedings, Major Dinesh Singh Mankotia was appointed as friend of the accused, which was objected to by the applicant and keeping in view the objections raised by the applicant in the O.A. before the Tribunal, the Tribunal gave him liberty to request for change of his friend. In the retrial, though the friend of the accused was changed, but Major Dinesh Singh Mankotia was appointed as an officer attending the SCM. In the SCM, out of seven witnesses, five were already examined in the summary of evidence also, but the witnesses No. PW 6 and PW 7 were not examined in the summary of evidence and their examination is contrary to Section 16(3) of the Armed Forces Tribunal Act. The SCM while examining Captain Sachin Deepak (PW 5) had examined him by wrongly applying Rule 135 of the Army Rules 1954 because he was also examined in the summary of evidence. The evidence of prosecution and defence was closed on 21st August 2010 and the SCM on 21st August 2010 at 17:55 hrs was unduly adjourned till 1030 hrs on 26th August 2010 which is contrary to Rules 81(2) and 82(1) of the Army Rules, 1954. In the SCM proceedings, the Court virtually acted as prosecuting officer and not as Court. Court has examined and re-examined the witnesses and at the end, mentioned as "no question by the Court". The applicant's prayer to examine the defence witnesses, was not accepted. The answer nos.128 and 129 have been falsely recorded in the affirmative which was virtually given in negative.

7. It has been argued by the learned counsel for the applicant that Col. Mohit Verma wanted to suppress the incident of accident of Gypsy, therefore, he deliberately suppressed this fact and got the Gypsy repaired at private workshop, wherein an expenditure of Rs.40,000/- was incurred. The applicant was also pressurised by Col. Mohit Verma to contribute to meet the expenses. When the applicant declined to make such payment, then vindictive approach was adopted against the applicant by Col. Mohit Verma. The promotion order of the applicant was received in the Unit few days back. Therefore, in such circumstances, it was absolutely unnatural for the applicant to make any such act of withdrawl of money from the Bank using the ATM-cum-Debit card of Naik Vijay Kumar. Actually he did so on the request of Naik Vijay Kumar himself and the money so withdrawn was paid to

Naik Vijay Kumar, therefore, there was no question of any theft or wrongful gain to the applicant and, therefore, the findings of the SCM not only on the legal ground, but also on the factual ground, are not sustainable in the eye of law.

8. It has been argued on behalf of the respondents that Col. Mohit Verma had no vested interest against the applicant. There was no occasion for Col. Mohit Verma to demand money from the applicant towards repair expenses of the Gypsy while the applicant had no concern with the said accident. It has also been argued on behalf of the respondents that the appointment of Major Dinesh Singh Mankotia as officer attending the trial, was not illegal. The Commanding Officer had right to nominate him. It has also been argued that it is the sole discretion of the Court itself to form an opinion and to award punishment. The opinion of the Officer attending the trial, is of no consequence. Therefore, the appointment of Major Dinesh Singh Mankotia will not adversely affect the Court Martial proceedings. It has also been argued that PW 6 and PW 7, who were examined in the retrial, were not examined in the summary of evidence and the Court had power under Rule 135 of the Army Rules, 1954 to examine any such witness. There is no bar to examine such witness during retrial. It has also been argued that the ground of non observance of Rule 135 of the Army Rules, 1954 has not been pleaded in the O.A. and for the first time, this point has been raised in the arguments. Rules 81 and 82 of the Army Rules, 1954 fall under Chapter "General and District Court Martial", hence these provisions are not applicable in the present case. It has also been argued that as per Rule 120 of the Army Rules, 1954, the verdict can be pronounced after conclusion of prosecution and defence evidence and Rule 120 of the Army Rules, 1954 does not prescribe any period within which the verdict must be pronounced. Therefore, simply because the verdict was pronounced after few days, would not render the SCM proceedings illegal or irregular. It has also been argued that in reply to question no.124 put to the accused, he himself had declined to call any witness in his defence and, therefore, now at this stage, he cannot claim that opportunity to lead defence evidence, was not given to him.

9. Learned counsel for the respondents has also argued that as per the version of Naik Vijay Kumar, which is supported by the evidence of Major Himanshu Kalia, the true facts are that the Saving Bank Accounts were recently opened by the personnel below officer rank of 57 Field Regiment for crediting the salary and respective Battalion offices were holding the ATM card kit. The applicant took the kit of Naik Vijay Kumar without his permission or without informing him and money was withdrawn from his account through ATM. The applicant was taken to the bank, where on the basis of the CCTV footage, he was recognised as the person who has withdrawn the money. It has also been argued that the applicant is unnecessarily pleading the story of the accident of Gypsy to deviate from the main issue of theft for which sufficient evidence exists against him.

10. Both the parties have filed their written statements, which have also been carefully considered by us.

11. Now we will consider the rival submission of the learned counsel for the parties on the basis of materials available on record.

12. First we will consider the argument of the learned counsel for the applicant regarding non compliance of Rules 81 and 82 of the Army Rules 1954. Rule 81 deals with the hour of sitting and Rule 82 deals with continuity of trial and adjournment of the Court. On the strength of these Rules, it has been argued on behalf of the applicant that the adjournment of the SCM proceedings on 21st August 2010 till 26th August 2010 was not in accordance with these Rules. The submission of the learned counsel for the respondent is very clear on the point that these two Rules comes under Chapter proceedings of General and District Court Martial", therefore, these Rules have no application in the Summary Court martial.

13. Learned counsel for the applicant, in reply to the submission, has drawn our attention towards some notes attached under the Rules and on the basis of the same, he has argued that these provisions shall also apply to the SCM. In this perspective, we will have to consider the effect of the notes attached with any Rule. On this point, we would like to refer to

paragraph 23 of the pronouncement of the Hon'ble Apex Court in the case of **H.C.Sarin vs. Union of India & others** (1976) 4 SCC 765 as under :

> *"23.In Tara Singh etc. etc. v. State of Rajasthan and Ors.(2) the importance which is to be attached to the note appended the rule has been emphasized by Ray, C. J. delivering the judgment on behalf of the Division Bench of this Court to which one of us (Krishna Iyer, J) is a party, in these terms:*
>
> > *"The notes are promulgated with the rules in exercise of legislative power. The notes are made contemporaneously with the rules. The function of the notes is to provide procedure and to control discretion. The real purpose of the notes is that when rules are silent the notes will fill up gaps."*

On this point, we would also like to quote paragraph no. 23 of the pronouncement of Hon'ble Supreme Court in the case of **Union of India & another vs. Charanjit S. Gill & others** (2000) 5 SCC 742 :

> *"23. In response to our directions an affidavit has been filed on behalf of the appellants with respect to:*
>
> *(a) the authority which had prepared the Notes appearing in Army Act, 1950 and Army Rules, 1954*
>
> *(b) the year in which these Notes were incorporated in the Army Act, 1950 and Army Rules, 1954.*
>
> *(c) the authority which had approved these Notes to be incorporated in the Army Act and the Rules framed thereunder. stating therein:*
>
> *"That Army Act, 1950 was enacted on the pattern of the Indian Army Act, 1911 and Army Rules, 1954 are on the pattern of Indian Army Act Rules, Army Rule 89 of Indian Army ActRules dealt with disqualifications of Judge-*
>
> *advocate. It also had note stating that for disqualification, see the Rule dealing with the Rule pari materia to Rule 39 of the present Rules that is Army Rules, 1959.*
>
> *That the manual of Indian Military Law, 1937, published by Govt. of India, Ministry of Defence (Corrected upto 1960) Reprint 1967, also contains Indian Army Act, 1911 with Notes as well as the Indian Army Act Rules with Notes. Since this was 1967 reprint, in this manual even Army Act, 1950 and Army Rules, 1954 are also contained.*
>
> *That in the year 1978 the JAG's Department compiled the Army Act & Rules in the new Manual with a view to make it more convenient for reference. Prior to it, as stated above, the Military Law of the country was outlined in the Manual of Military Law, 1937. The Manual contained the Indian Army Act, 1911, the Indian Army Act & Rules and explanatory notes under various Sections and Rules. The passage of time necessitated revision of the Manual and incorporation of explanatory notes under the relevant sections and clauses of the Army Act, 1950 and Army Rules, 1954. It also became necessary to include some other enactments essential to the subject, and to exclude from the Manual the repealed Indian Army Act, 1911 and the superseded Indian Army Act Rules. The Manual of Military Law containing*

> *explanatory Notes under the current and operative Army Act & Rules were issued in 1983.*
>
> *That as stated above, the Manual of Military Law issued in 1983 was compiled by the office of Judge Advocate General and approved by the Govt. as evident from the preface of the Manual.*
>
> *That the Notes to Army Act and Army Rules were appended to Indian Army Act, 1911 and the Indian Army Act Rules and were followed as explanatory Notes and guidance. These suitably modified and amended were formally appended to the relevant provisions of the Army Act, 1950 and Army Rules, 1954 in 1983 after the same were duly approved by the Govt. That no facts which were not pleaded before court below have not been pleaded."*
>
> *However, no material has been placed on record to show that the Notes appended to the Rules were duly approved by the Government."*

14. In view of the aforementioned legal position, it is clear that Rules 81 and 82 of the Army Rules, 1954 falls within the Chapter proceedings of General and District Court Martial. While separate rules deals with the procedure provided for the SCM. Since there is no ambiguity in the rules, therefore, with the help of notes to derive a conclusion contrary to the rules would not be in accordance with the law. Therefore, we hereby find no force in this contention of the learned counsel for the applicant.

15. Great emphasis has been laid by the learned counsel for the applicant that two witnesses namely PW 5 and PW6 were not examined during summary of evidence, but in the retrial, the two witnesses have been examined, thus, their examination would be contrary to the provision of Section 16(3) of the Armed Forces Tribunal Act, 2007. Section 16(3) deals with the retrial under the orders of the Tribunal or the Supreme Court. Section 16(3) of the Armed Forces Tribunal Act may be quoted as under :

> "16 (3). *A person who is to be retried under this section for an offence shall, if the Tribunal or the Supreme Court so directs, whether or not such person is being tried or retried on one or more of the original charges, no fresh investigation or other action shall be taken under the relevant provision of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950 (45of 1950) as the case may be, or rules and regulations made there under, in relation to the said charge or charges on which he is to be retried."*

16. In the facts and circumstances of the case, retrial was ordered after the stage of arraignment by the Tribunal and an opportunity was given to the applicant to make a request for change of his friend. A perusal of clause (3) of Section 16, quoted above, shows that what is barred by this

sub-clause, is fresh investigation or other action. Admittedly, in this case no further investigation was done. Examination of the two witnesses in the retrial, who were not examined in the summary of evidence, cannot be said to be a part of investigation. The investigation concludes prior to the filing of the charge sheet. Since the retrial was directed after the stage of arraignment, therefore, the examination of two witnesses during the SCM proceedings cannot, by any stretch of imagination, be said to be any fresh investigation. Learned counsel for the respondents has argued that such power vests in the C.O. conducting the SCM under Rule 135 of the Army Rules, 1954. Rule 135 reads as under :

> *"135.* ***Calling of witness whose evidence is not contained in summary****.—If the prosecutor, or, in the case of a summary court-martial, the court intends to call a witness whose evidence is not contained in any summary of evidence given to the accused, notice of the intention shall be given to the accused, a reasonable time before the witness is called together with an abstract of his proposed evidence; and if such witness is called without such notice having been given the court shall, if the accused so desires it, either adjourn after taking the evidence of the witness, or allow the cross-examination of such witness to be postponed and the court shall inform the accused of his right to demand such adjournment or postponement."*

17. A perusal of the aforesaid rule, makes it absolutely clear that this rule deals with the evidence recorded during SCM proceedings, therefore, under this rule, the Commanding Officer conducting the SCM had ample power to summon a witness and examine any such witness and such examination of other witnesses, would not be barred by the provisions of Section 16(3) of the Armed Forces Tribunal Act, 2007. As the same would fall under the category of trial and not under the category of investigation.

18. It has also been argued by the learned counsel for the applicant that some of the witnesses, who were examined in the summary of evidence, have also been examined under Rule 135 of the Army Rules, 1954. It is true that wrong Army Rule has been quoted while examining the witnesses during retrial. Law is settled on the point that mere mentioning of a wrong rule/Section, does not wash away the evidence of such witnesses from the record, because the applicant cannot say that any prejudice has been caused to him simply by mentioning a wrong rule under which the witness has been examined.

19. It is a well settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor.

In **Ram Sunder Ram vs. Union of India & Ors.** [2007 (9) scale 197], it was held as under :

> *"It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law [see N. Mani v. Sangeetha Theatre & Ors. (2004) 12 SCC 278]. Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the learned counsel for the appellant.*

In **N. Mani vs. Sangeetha Theatres & Ors.** (2004) 12 SCC 278, it is stated in para 9 as under :

> *"9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does not exist and can be traced to a source available in law."*

In view of the above pronouncements, the argument of the learned counsel has no force.

20. The main stress of the learned counsel for the applicant was on two grounds. Firstly on the ground that Col. Mohit Verma, who has conducted the SCM was a person interested and, therefore, he ought not to have conducted the SCM and secondly, that the nomination of Major Dinesh Singh Mankotia as part of the SCM proceedings has prejudiced him and such act of the Col. Mohit Verma supports his contention that Col. Mohit Verma was interested in his punishment and, therefore, he deliberately continued Major Dinesh Singh Mankotia as part of the SCM proceedings.

21. A perusal of the judgment in O.A,No.02 of 2008 shows that the appointment of Major Dinesh Singh Mankotia against the will of the

applicant, was challenged before the Tribunal even in the earlier O.A. and this point was considered by the Tribunal in para 13 of its earlier judgment, which is quoted as below.

> *"13. The next contention advanced by the Ld. Counsel for the petitioner is that there was non-compliance of Rule 129 of the Rules. On this point, ld. Central Government Counsel has produced at the time of hearing a copy of the letter dated 15.05.2009 of the petitioner Shiv Kumar Joshi, addressed to the Commanding Officer requesting that Maj. D.S.Mankotia on 57 Fd. Regt. will be a friend of the accused in the Trial. It is difficult for us to appreciate how this letter could have been sent on 15.05.2009 by the applicant when the charge sheet is said to have been served upon him on 21.05.2009/27.05.2009. The trial begins after the charge sheet is issued and not earlier to that stage in what circumstances this letter was written on 15.05.2009 intimating that Maj. D S Mankotia is the next of friend of the accused in the trial, is not quite clear. We however need not go into the question any further because we are setting aside the conviction on another ground."*

22. In the retrial, the applicant made a prayer for the change of his friend and Lt. Col. Harpal Singh (Retd) was appointed as his friend. Thus, there was full compliance of Rule 129 of the Army Rules, 1954. In spite of that, Major Dinesh Singh Mankotia was continued by the Commanding Officer Col. Mohit Verma, who was conducting the trial as part of SCM. The submission is that presence of Major Dinesh Singh Mankotia has adversely affected the decision making process against him.

23. Learned counsel for the respondents on this point has admitted that Major Dinesh Singh Mankotia was continued as part of the SCM, but virtually he has no role to play in SCM and it is only the Commanding Officer, who has to form his opinion on the basis of the materials on record. Even if he has continued as part of the SCM, then no prejudice could have been caused to the appellant. On this point, learned counsel for the applicant has drawn our attention towards Rule 127 of the Army Rules, 1954 which reads as under :

> *"127. **Clearing the court**- (1) The officer holding the trial may clear the court to consider the evidence or to consult with the officers or junior commissioned officers, attending the trial.*
>
> *(2) Except as above-mentioned all the proceedings including the view of any place, shall be in open court, and in the presence of the accused."*

In view of this rule, the argument of learned counsel for the respondents that Maj. Dinesh Singh Mankotia has no role to play loses all its force.

24. It has also been argued on behalf of the applicant that on 23rd July 2010, the applicant had submitted a list of three witnesses to be examined in his retrial in his defence, but the said witness have not been examined and therefore, the applicant was deprived from leading his defence evidence, which has caused great prejudice to the applicant. It transpires from the record that the applicant had given his list of witnesses in July, 2010 to the Adjutant and not before the Commanding Officer conducting the SCM proceedings. On 21st August 2010, the applicant was put a question whether he intends to call any witness in his defence, then in reply to this question, the witness has stated 'No', but in his reply, he has also stated that he shall file his written statement in defence, which was taken on record and marked as Ext.11, thus it is part of SCM proceedings. The applicant had already tendered his statement in defence and, therefore, now he cannot say that opportunity to lead evidence in defence was not given to him. He has given a detailed handwritten statement in defence dated 21st August 2010, therefore, it cannot be said that opportunity to lead defence evidence was not given to him. He has given his own handwritten statement in his defence and has declined to call any witness in his defence.

25. A great emphasis has been laid by the learned counsel for the applicant on the point that there was specific allegation of the applicant in the first SCM proceedings against Col. Mohit Verma and also in the retrial. His specific allegation was that Col. Mohit Verma, who has conducted both the SCM proceedings was bent upon to punish him, because he has not obeyed his direction to contribute towards the expenses of the repair of the Army Gypsy damaged in a road accident in Punjab. In the first SCM also which was set aside by the Tribunal, this plea was raised as is apparent from the record. In his retrial, also this specific plea has been taken by the applicant. The submission of the applicant is that when such a plea was taken, then it was obligatory on Col. Mohit Verma to recuse himself from holding the SCM and to attach

him to other Unit, so that the SCM proceedings be conducted by another independent Commanding Officer, but said course was not adopted by Col. Mohit Verma, because he himself was willing to conduct the SCM for the reasons best known to him. We find much substance in this submission. There are two reasons for it. The first reason is that the accident of Gypsy in Punjab has not been denied and when a specific plea was taken by the accused during SCM, then his plea ought to have been considered by calling witnesses. Since there were allegations against Col. Mohit Verma himself that he asked the applicant to contribute towards expenses of repair of Gypsy and also threatened him, therefore, it was the moral duty of the Commanding Officer to recuse himself from SCM proceedings. Apart from it, once Col. Mohit Verma had conducted the SCM proceedings and had expressed his opinion, then the retrial by the same Commanding Officer also does not appeal to reason. A person, who has already expressed his opinion on the basis of plea of guilty of the applicant, then the subsequent trial by the same officer, cannot be said to be without bias, particularly keeping in view the peculiar fact of this case. It is settled principle of law that justice should not only be done, but it must also appear to have been done. When a person is saying that he has been threatened by his C.O. to see as to how he can escape, then the same C.O. cannot be said to be independent and SCM by him is not in accordance with the principles of natural justice.

26. Learned counsel for the applicant has also argued that it is settled law that the SCM proceedings should sparingly be initiated and the course of SCM proceedings should be adopted only under compelling circumstances. In the facts of this case, the occurrence has taken place in a peace area in the Meerut City on 06th March 2009. The Court of Inquiry was held on 12th March 2009, summary of evidence was recorded on 15th March 2009 and SCM started on 22th May 2009 i.e. after more than two months the SCM started. Therefore, it leads to only conclusion that there was no urgency and hurry to hold the SCM. Hon'ble Supreme Court in the case of **Union of India & others vs. Vishav Priya Singh**.(2016) 8 SCC 641 has held that SCM proceedings

should sparingly be held. We would like to quote para 35 of the Hon'ble Supreme Court in the aforementioned case as under :

> *" 35. ..... 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 convent an SCM must be followed by well-articulated reasons or the record itself must justify such resort."*

In this perspective, learned counsel for the applicant has argued that the continuation of Major Dinesh Singh Mankotia as part of the SCM in spite of his specific apprehension, was against law and has rendered the SCM proceedings against the principle of natural justice.

27. Learned counsel for the respondents has argued that the applicant's photographs while withdrawing money from ATM-Debit card was captured in the CCTV footage and he was identified by the bank authorities. Thus, there was ample evidence that he not only obtained ATM-Debit card of Vijay Kumar, but has also withdrawn money from the bank. The defence of the applicant is that the ATM card was given to him by Vijay Kumar and he has withdrawn the money and thereafter handed over the same to Vijay Kumar and Vijay Kumar has admitted that he has received the money. Simply because the money was received by Vijay Kumar with slight delay, it cannot be said that the same was not without his prior permission. It has also been argued that it was due to the pressure of the authorities that Vijay Kumar has given a statement contrary to the defence of the applicant.

28. Apart from it, at the stage of conclusion of the prosecution and defence evidence on 21st August 2010, the proceedings were adjourned to 26th August 2010. It is submitted that such a long adjournment was contrary to the spirit of the procedure prescribed for the SCM. It has been argued that Rule 120 of the Army Rules, 1954 provides for giving the verdict. Rule 120 reads as under :

> *"120. **Verdict.**—After all the evidence, both for prosecution and defence, has been heard, the court shall give its opinion as to whether the accused is guilty or not guilty of the charges."*

On this point, learned counsel for the respondents has submitted that Rule 128 of the Army Rules, 1954 gives power to adjourn the SCM. Rules 128 reads as under:

> *"128.* ***Adjournment.—*** *A summary court-martial may adjourn from time to time and from place to place, and may, when necessary, view any place."*

29. A perusal of the two rules, quoted above, makes it clear that the power to adjourn the hearing is given to the Officer conducting the SCM, but the intention of the Legislature is very clear that there should not be any undue delay in giving the verdict. In the instant case, after concluding the evidence, there was delay of about five days and no plausible explanation for such a delay could be brought to our notice by the learned counsel for the respondents. The submission of the learned counsel for the applicant on this point is that reason for this delay was that the respondents were consulting as to how the verdict be passed against the applicant when there was no material on record to hold that the applicant was guilty. Law is settled on the point that burden to prove the defence plea is not as heavy on the accused as is on the prosecution to prove its case. Accused is required only to show the preponderance of the possibility of his defence case. In the instant case, the applicant has come forward that with a specific defence. The incident on which he has based his defence, has not been denied. The witnesses were cross-examined on this point. The applicant has raised all the grounds, including the accident of the Gypsy and the fact that Naik Vijay Kumar has received Rs.15,000/- from him and also regarding the threat extended to him by the Commanding Officer Col. Mohit Verma. He has also mentioned that he has not been paid salary of the last 15 months due to which he and his family are at the verge of starvation. In para 3 of his written statement, he has made detailed narration of the accident of Gypsy and also the fact that he was compelled to help Pawan Kumar. Since he was not in a position, therefore, he declined to give any money to Pawan Kumar. Thus, all the pleas which have been raised by the applicant before this Tribunal, were brought before the Commanding Officer in the SCM proceedings, but inspite of that, the C.O. Col. Mohit Verma neither made any effort to enquire into the fact of accident of Gypsy and when such a special plea was raised by the applicant,

involving Col. Mohit Verma himself, then he must have recused himself from conducting the SCM. Therefore, in the peculiar facts and circumstnces of this case, we are constrained to hold that the SCM proceedings conducted during the retrial, because of the reasons mentioned above, was conducted against the principle of natural justice. The SCM conducted by Col. Mohit Verma has caused prejudice to the applicant in his defence. Continuance of Maj. Dinesh Kumar Mankotia in the retrial was also not expected in the peculiar facts of this case. So the apprehension of the applicant cannot be said to be baseless.

Therefore, we are of the view that the O.A. deserves to be allowed and the SCM deserves to be set aside.

30. Accordingly, this O.A. is hereby **allowed**. The punishment of dismissal from service and reduction to rank awarded by the SCM are hereby set aside. The applicant shall be treated to be notionally in service till he is entitled to full pension in the rank held by him at the time of dismissal, however, he will be entitled to only 25% of back wages. Respondents shall comply with the order within four months from the date a certified copy of this is produced to the respondents.

31. In the circumstances of the case, no order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

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

Dated: September , 2017.
PKG