

AFR
(Reserved)
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 15 of 2014

Friday, this the 11th day of August, 2017

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

Maj Kunwar Ambreshwar Singh, son of Mithlesh Bahadur, Movement Control Officer, Lucknow - Petitioner

Learned counsel for the petitioner : **Shri Akhilesh Kalra and Shri V.A. Singh, Advocates**
Vs

1. The Union of India, through the Secretary, Ministry of Defence, Parliament House, New Delhi.
2. The Chief of the Army Staff, Army Headquarters, New Delhi.
3. The Commander, 15th Infantry Division, General Officer Commanding, through Army Head Quarters, New Delhi.
- Respondents

Ld. Counsel for the Respondents : **Shri Asheesh Agnihotri, Advocate, assisted by Maj Salen Xaxa, OIC Legal Cell.**

Connected with

T.A. No. 1368 of 2010

Maj Kunwar Ambreshwar Singh, son of Mithlesh Bahadur, Movement Control Officer, Lucknow - Petitioner

Learned counsel for the petitioner : **Shri Akhilesh Kalra and Shri V.A. Singh, Advocates**
Vs

1. The Union of India, through the Secretary, Ministry of Defence, Parliament House, New Delhi.

2. The Chief of the Army Staff, Army Headquarters,
New Delhi.

- Respondents

Ld. Counsel for the :
Respondents.

Shri Asheesh Agnihotri,
Advocate, assisted by
Maj Salen Xaxa,
OIC Legal Cell

ORDER

Per Hon'ble Mr. Justice Devi Prasad Singh, Member (J)

1. Both these petitions, bearing T.A.No.15 of 2014 and T.A.No.1368 of 2010 have been filed by the petitioner, being aggrieved with the punishment, based on same cause of action, hence are being decided by a common judgment.

2. T.A. No. 15 of 2014 is preferred for setting aside the punishment of reprimand awarded to the petitioner on account of alleged misconduct of retaining certain arms and ammunitions by the Unit during the Operation Blue Star, resulting into denial of future promotions and also feeling aggrieved by rejection of his statutory appeal by an order dated 03.08.1989, against which petitioner had preferred a petition bearing Writ Petition No. 8051 (SB) of 1989 in the Lucknow Bench of Allahabad High Court, which was later on transferred to Armed Forces Tribunal, Regional Bench Lucknow and registered as T.A. No. 15 of 2014 while T.A. No. 1368 of 2010, which was also filed as Writ Petition No. 2170 of 1991 in the Lucknow Bench of Allahabad High Court, which

was later on transferred to Armed Forces Tribunal, Regional Bench Lucknow and registered as T.A. No. 1368 of 2010 has been preferred by the petitioner being aggrieved by rejection of his claim by the Chief of Army Staff to grant him substantive rank of Lt Col along with time scale on account of his punishment of reprimand. We take latter petition, T.A. No. 15 of 2014 as leading one.

3. We have heard Shri Akhilesh Kalra, learned counsel for the petitioner and Shri Asheesh Agnihotri, learned counsel for the respondents, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the records.

4. The effect of Operation Blue Star of June, 1984 still haunting and the present case is offshoot of said operation wherein a commissioned officer of Indian Army is struggling for justice since last 33 years.

5. Petitioner was commissioned in Indian Army in Madras Regiment on 06.08.1967. While holding the rank of Major in 26 Madras Regiment, in June, 1984 he was posted at Jalandhar as part of 38 Infantry Brigade and 15 Infantry Division, where a task was assigned to his Brigade to flush out the Sikh extremists from the Golden Temple Complex in Amritsar, Punjab. The operation began on 05.06.1984 by 26 Madras Regiment and continued up to 16.06.1984. The team of Officers of 26 Madras Regiment, which was assigned the task to flush out Sikh extremists, was having 16 Officers under the command of Lt Col K.M.G. Pannikar. However, out

of 16 Officers, only 6 Officers were present on 05.06.1984. Rest of the Officers were either admitted in Hospital or were on annual leave. Following Officers were present during Operation Blue Star on 05.06.1984:-

- (1) Lt Col K.M.G. Pannikar, Commanding Officer,
- (2) Maj K.A. Singh, Second-in-Command and Company Commander,
- (3) Maj Joginder Singh,
- (4) Capt Rajiv Chopra, Adjutant and Company Commander,
- (5) Lt J.K. Dang, Company Commander,
- (6) Lt R.P. Roperia, A.C., Company Commander.

6. The 26 Madras Regiment was detailed to participate in Operation Blue Star in June 1984 and admittedly at that time petitioner was holding the rank of Company Commander in the Unit. It has not been disputed that the petitioner took part in the operation and successfully completed the task assigned to him.

7. It has been stated by the petitioner that Major, later on promoted to rank of Lt Col, Joginder Singh fainted before the troops, proposed to enter into Golden Temple Complex, Amritsar to take part in the operation. On account of indisposed condition of Major Joginder Singh, the actual operation began with only 5 Officers, who took part in the operation with additional duties and they were; (1) Lt Col K.M.G. Pannikar, Commanding Officer; (2) Maj K.A. Singh (petitioner), Second-in-Command; (3) Capt Rajiv

Chopra, Company Commander; (4) Lt J.K. Dang, Company Commander; and (5) Lt R.P. Roperia, Company Commander.

8. According to the petitioner Lt R.P. Ruperia on 06.06.1984 was seriously wounded and admitted in Military Hospital Amritsar, where he succumbed to injuries on 09.06.1984. All these facts have not been denied by the respondents while filing the counter affidavit. Petitioner has specifically pleaded in Para-6 of the petition that the task assigned to him and accomplished by petitioner have not been disputed by the respondents while filing counter affidavit. According to the petitioner he followed the command of his Lt Col Pannikar and led initial entry in Golden Temple Complex, apprehended one of the Sevadars of Jarnail Singh Bhindrawala, recovered his body and other wanted extremists. Petitioner apprehended a large number of extremists, recovered a large number of arms and ammunitions and documents. Petitioner had made clearance of Western and Southern Parikrama, final clearance of Akal-Takht, neutralization of Gurdwara at Dukh Bhajan Berry and recovered a large number of explosives used for manufacturing grenades and bullets etc. by the extremists. These facts have not been denied in Para-4 of the counter affidavit.

9. It has been pleaded by the petitioner that on account of his performance during Operation Blue Star in

saving the people, by apprehending the extremists and recovering the arms, ammunitions and other documents etc. and discharging duty under the shadow of Gun fire, he was recommended for the award of 'Ashok Chakra' for acts of gallantry job during Operation Blue Star. This fact has not been categorically denied by respondents asserting that it is confidential record, which may have been weeded out. Accordingly, an inference may be drawn that the petitioner was recommended for the award of 'Ashok Chakra' because of his dedication and commitment to duty.

10. The problem begins from 08.06.1984 during Operation Blue Star, when on 08.06.1984 some troops of the Unit recovered 4 electronic items, which included 1 V.C.R., one-three-in-one, one Akai Deck and one colour T.V. The items were brought to Battalion Headquarters in presence of Lt Col Pannikar. According to the petitioner, troops requested that these items should be kept as souvenirs, which was acceded by Lt Col Pannikar. It was Lt Col Pannikar, who instructed Capt Rajiv Chopra to bring the 4 electronic items and keep them in Unit Lines at Jalandhar. On 14.06.1984 Maj K.S. Rao, joined the duty at Amritsar as Second-in-Command, being senior to the petitioner. He was informed that the Unit lines were to be vacated by the 26 Madras to accommodate some other Unit at Jalandhar. On the direction of Lt Col Pannikar and Maj K.S. Rao aforesaid 4 electronic items were put in the house of the petitioner in his absence,

since it was at isolated place under guard. When this fact came to petitioner's knowledge, he objected to Commanding Officer but it could not be materialized for the reason that still the petitioner was busy in Operation Blue Star.

11. On 16.06.1984 the Commanding Officer sent the petitioner and Capt Chopra to Jalandhar to organize despatch of families of personnel, who had died in the Operation, organize the welfare of wounded personnel, who were admitted in hospitals, organize the security and welfare of the families of Army personnel at Jalandhar and organize security of Unit area at Jalandhar and also to shift 4 electronic items to the residence of the petitioner.

12. However, on 30.06.1984 Brig H.S. Bedi organized and conducted a search at the residence of the petitioner but nothing was recovered but the 4 electronic items (supra) were allegedly said to be recovered from the house of Maj V. Ganju. Petitioner got information from Brig Bedi that on account of some anonymous letter the search was done with the assistance of some Sikh Officers.

13. A Court of Inquiry was held, which submitted its report, followed by disciplinary action against Lt Col Pannikar, Commanding Officer, Capt B.S. Panwar, petitioner and 5 JCOs. The Court of Inquiry was held in pursuance to order of Headquarters 15 Infantry Division through

convening order dated 12.07.1984 to investigate the circumstance under which certain items were taken away from the premises of Golden Temple, Amritsar and were found in possession of certain officers as well as in the Unit lines of 26 Madras. The Court of Inquiry was held from 26.07.1984 onwards. According to the finding of the Court of Inquiry 5 officers were blamed in connection with illegal detention of 4 electronic items (supra). They were; (1) Lt Col K.M.G. Pannikar; (2) Maj K.A. Singh (petitioner); (3) Maj K.S. Rao; (4) Capt Rajiv Chopra; and (5) Capt J.K. Dang. The relevant portion of the Court of Inquiry has been attached as Annexure No.2, submitted by the Presiding Officer Lt Col P.S. Sandhu. The relevant portion of finding of Court of Inquiry as produced by the respondents to appreciate the allegations is reproduced as under:-

"9. The four electronic items were found in a house behind the Western Parikrama by Nb Sub Mandanna on 08 Jun 84 and were sent to the rear at Jalandhar on the same day. The items were kept in the quarter guard of 26 MADRAS. On 18 Jun 84 the items were further shifted to Maj KA Singh's house from the quarter guard by the officer himself alongwith Capt Rajeev Chopra. The items were shifted again on 30 Jun 84 by Sep Sudalai, Maj KA Singh's batman, to Maj V Ganju's house. The items were finally recovered by Lt Col Bikram Chand on 01 Jul 84 through Sep Sudalai of 26 MADRAS from Maj V Ganju's house.

(Witness Nos 1 to 8,12 & 16 refer)

10. The court did not find evidence to prove that the four electronic items were retained for anyone's personal gain. These items were, however, kept for the collective use of

the Battalion with the full knowledge of the following officers :-

- (a) Lt Col KMF Panicker.*
- (b) Maj K S Rao.*
- (c) Maj KA Singh.*
- (d) Maj R Chopra.*
- (e) Capt JK Dang.*

(Witness Nos 4,5,6,10 &17 refer)

11. The intention to return the four electronic items to Govind Garh Fort was not proved as these items continued to be concealed till found through search on 01 Jul 84 from Maj V Ganju's house.

(Witness Nos 2'3' 7&8 refer)

12. The revolver alongwith ten rounds was handed over voluntarily by Capt BS Panwar on 30 Jun 84 to Brig HS Bedi, Cdr 38 Inf Bde. It was picked up by the offr on 14 Jun 84 from the Grenade Factory in Golden Temple Complex lying in the junk (marked on Exhibit LO). The deadline for declaring surplus ammunition was up to 20 Jul 84. The contention of the officer that he still had time for declaring the revolver before the deadline of 20 Jul 84 is incorrect.

(Witness Nos 1, 3 & 9 Exhibit L refer)"

14. The Court of Inquiry concluded its opinion giving the names of the officers who may be held responsible for the improper possession of 4 electronic items (supra) and failure in command. The relevant portion of finding of Court of Inquiry is reproduced as under:-

"4. The following Offrs and JCOs of 26 Madras, being in the chain of command, during the period of the Battalion's deployment in the Golden Temple Complex are to be blamed for not exercising proper command and control over their men resulting in their picking up of various items only:-

- (a) IC-18988F Lt Col KMG Panicker as commanding Officer.*
- (b) IC-26682N Maj KA Singh as officiating 2IC and OC D Coy.*
- (d) IC-33407W Capt B S Panwar as officiating OC C Coy.*

(d) IC-39130Y Capt Rajeev Chopra as officiating OC B Coy till 10 Jun 84.

(e) IC-39545 N Capt JK Dang as officiating OC A Coy till 10 Jun 84.

(f) JC-62008 Sub M Vallachamy as officiating PC B Coy from 10 Jun to 15 Jun 84.

(g) JC- 63014 Sub Achuthan Pillai as officiating PC A Coy from 10 Jun to 16 Jun 84.

(h) JC-66082 Sub S Subbaiah as officiating OC Adm Coy.

(j) JC-99278 Sub V Ramachander as officiating OC SP Coy.

5. Following Officers are to be blamed in connection with illegal retention of the four electronic items (Exhibit R):-

(a) IC-18988F Lt Col KMG Panicker for permitting officers of 26 MADRAS to illegally retain the four electronic items.

(b) IC-26682N Maj KA Singh for illegally retaining the four electronic items in his house at Jalandhar from 18 Jun to 30 Jun 84.

(c) IC- 21856Y Kan KS Rao, IC- 39130Y Capt Rajeev Chopra and IC-39545 N Capt JK Dang for having knowledge regarding illegal retention of the four electronic items.

6. IC- 33407W Capt BS Panwar is to be blamed for illegally retaining Webley. 38 revolver MK VI Regd No 362564 with ten rounds from 14 Jun to 30 Jun 84.

7. The court is also of the opinion that the constraints under which 26 MADRAS operated from 04 Jun to 30 Jun 84 during Op Metal and Op Blue Star should be taken note of.

Certified that the provisions of Army Rule 180 have been complied with.

Presiding Officer sd/-xxxxxx
(IC-16376L Lt Col P S Sandhu)

Members (1) sd/-xxxxxx
(IC-15320M Kan Karam Chand)

Place: C/O 56 APO

(2) sd/-xxxxxx

(IC- 27936 N Capt Virendra Singh)"

15. From the material on record there appears to be no room of doubt that at least 8 officers were blamed for

failure to command, namely, Lt Col K.M.G. Pannikar as Commanding Officer, Maj K.A. Singh as Officiating 2IC and OC D Coy, Capt B.S. Panwar as officiating OC C Coy, Capt Rajiv Chopra as officiating OC B Coy till 10 Jun 84, Capt J.K. Dang as officiating OC A Coy till 10 Jun 84, Sub M Vallachamy as officiating OC B Coy from 10 Jun to 15 Jun 84, Sub Achuthan Pillai as officiating OC A Coy from 10 Jun to 16 Jun 84 and Sub S Subbaiah as officiating OC Adm Coy and 3 officers were collectively held responsible for the retention of 4 electronic items (supra). Capt B.S. Panwar was blamed for illegally retaining Webley .38 revolver. After perusal of original material on record and going through the recommendation of Court of Inquiry with its finding and opinion (supra) it appears that the 4 electronic items in question were not retained by the petitioner for his personal use by himself but they were kept under the command and control of Lt Col K.M.G. Pannikar, the Commanding Officer of the Unit. However, the purpose of all was not for personal gain but to keep the 4 electronic items as Souvenir in their Unit. Why disciplinary action was taken only against the petitioner and not against one senior (supra) and one junior officer who were later on promoted to higher rank is not understandable. Retaining the revolver is more serious offence but Capt B.S. Panwar was only given an entry of displeasure. The record reveals that a good number of items were also found in possession of other persons of the Unit, which included sten gun, Kirpans, Napkins, Bed sheets,

Khukari, torches etc. It has been argued disciplinary action has been taken only against the petitioner and not against 2 other officers.

Summary of Evidence

16. Nb Sub N.M. Mandanna, who participated in the Operation Blue Star, made a request to Lt Col K.M.G. Pannikar for retention of 4 electronic items as souvenir, which was acceded by him. It shows that neither there is any intention on the part of army personnel nor they intended to retain 4 electronic items for their personal use. It was N.M. Mandanna (P.W.1) who retrieved 4 electronic items and took them to Head Quarters for deposition. The relevant portion from the statement given by P.W.1 Nb Sub N.M. Mandanna is reproduced as under:-

"Since a JCO (Nb/Sub Chinnial) of my Coy was wounded due to extremists fire, I left the loc to evacuate him to the Coy HQ. On my return I retrieved the four electronics items and took them to the Bn HQ for deposition. At the Bn HQ my Coy Cdr IC- 2668 2 Maj KA Singh was present with the CO and other officers and JCO's of the unit. I was asked by my CO and Maj KA Singh as to why I had brought these items to the Bn HQ to which I replied that they had been staged from a house which was burning and would have been destroyed if left there. I also mentioned that since the unit had suffered heavy casualties, these items should be retained as souvenirs. All the other officers and JCO's and OR's present at the Bn HQ at this juncture also opined that these items ought to be retained to be used for welfare purposes in the unit. The CO said at that time that the items could be retained for the time being and that no other unauth stores should be picked up and that offenders would be dealt with severely. Having deposited these items at the Bn HQ I then returned to my duties of PI Cdr with my Coy"

17. P.W.1 N.M. Mandanna admitted that the officers were in disturbed mind during war like situation (from 04.06.1984 to 08.06.1984), who had not taken rest.

18. Capt Rajiv Chopra, who appeared as witness No.2 reiterated that it was not the petitioner, who himself kept 4 electronic items in the house but it was done as a safety measure on the instructions of the Commanding Officer. The relevant portion from the examination-in-chief of witness No.2 Capt Rajiv Chopra is reproduced as under:-

“On 15 Jun 84, IC-21856 Maj K S Rao joined the unit at the Golden Temple on his return from casual leave. He met the CO and discussed certain matters with him. Thereafter, he spoke to Maj KA Singh and IC-39545 Capt JK Dang and myself about the electronic items. He said that it was unsafe to keep the items in the unit as the unit lines at the Rear Loc were likely to be handed over to another fmn. He also suggested that since the items were of a sensitive nature, they should moved to a KA Singh’s house temporarily. Maj KA Singh initially refused, cause of the battalion no harm would come on him as the items were being shifted to his house for safety, and would be removed as early as practicable. Finally, Maj KA Singh on request from all officers, agreed.”

19. Capt Rajiv Chopra also stated in his statement that on 01.07.1984 when petitioner K.A. Singh arrived from Jalandhar to the Unit at 04.30 hrs, he woke all of us and he was completely broken and perplexed. He also stated that they jointly requested Brig Bedi to be considerate since nothing was done for personal gain. It shall be appropriate to reproduced few more lines from the statement of P.W.2 Capt Rajiv Chopra as under:-

“On 01 Jul 84, at about 0430h Maj KA Singh aggrieved from Jalandhar. He woke all of us in the Mess. He was

completely broken and perplexed. He requested Maj KS Rao that he should be taken to the CO immediately. We all went to the CO's residence at 05.30h on 01 Jul 84. The CO was getting ready at that time. Maj KA Singh narrated the complete story to him. The CO assured Maj KA Sing that he would do something about it. After that the Co went with the Col of the Regt to 6&17 Madras Regts. On 02 Jul 84 on a request from the CO and 2IC, the Cdr 38 Inf Bde came to the unit to address the offr/JCOs. He promised to help the unit by also said that the things were beyond his control. ”

20. From the statement of witness No.2 Capt Rajiv Chopra, it is also apparent that during search of petitioner's house on 01.07.1984 at 5.00 P.M., 4 electronic items were not recovered from petitioner's house rather the items were recovered from the petitioner's neighbor's house. This fact has been narrated by witness No.2 Capt Rajiv Chopra in reply to question No.25. For convenience question No.25, which is relevant and its reply given by the witness, are reproduced as under:-

“Q.25 Did you or anyone else try to trace out the four electronic items thereafter?”

A. The items could not be traced out, as Sep A Suldalai your batman who had been given the custody of the four electronic items for the safe keeping at your house; and knew their present, whereabouts; was detained in HQ 30 Inf Bde and not available for quarry. We were later informed that the items had been recovered from your neighbour's house.”

21. Witness No.7 Capt J.K. Dang admitted that 4 electronic items were recovered from a room of building behind the western Parikarma, which had been engulfed by fire. To save the items from fire, they were taken and deposited in the quarter guard and later on sent to the Unit at Jalandhar.

22. Maj K.S. Rao witness No.8 admitted that when he joined the Bn in Amritsar on 15.06.1984 Lt Col K.M.G. Pannikar, Maj K.A. Singh, Capt Rajiv Chopra and Capt J.K. Dang were constituting the team of the Unit. Maj K.S. Rao as a witness stated that Brig Bedi recovered 4 electronic items on 30.06.1984 during search of the Unit. The search was done in pursuance to an anonymous letter, which contained the names of persons who were in possession of 4 electronic items. The statement of witness No.8 Maj K.S. Rao further reveals Lt Col Pannikar in spite of having full knowledge with regard to possession of 4 electronic items did not disclose the information to Brig Bedi, Inquiry Officer, which further spoiled the atmosphere. He further made a statement on query that 4 electronic items were not found in the house of the petitioner.

23. Witness No.9 Sep A Sudalai, petitioner's batman is an eye witness of 4 electronic items. He affirms that those electronic items were recovered from the house of Maj Ganju. The relevant portion from his statement (examination-in-chief) is reproduced as under :-

"On 01 Jul 84 at about 1400h, I reached Jalandhar with the DQ 38Inf B de, under escort. I retrieved the four electronic items from Maj V Ganju's house through his batman sep Amar Chand and handed them over to the DQ 38 Inf Bde in the presence of the DQ Cdr, 38 Inf Bde. I was then brought back to Amritsar where I was kept in the HQ 38 Inf Bde, in isolation under an armed guard and not allowed to speak to anyone for the duration of my detention."

The statement of Sudalai reveals that he was intercepted, tortured and harassed day and night by the Investigating Officer for some required information.

24. Witness No. 10 L/Hav C.V. Kesavan stated that he helped the petitioner K.A. Singh to shift the items kept in an unused room of petitioner to petitioner's neighbour's officer's house with the help of Sep Sudalai, petitioner's batman. The combined reading of the statements of other witnesses, including, P.W.1 Nb Sub N.M. Mandanna, P.W.2 Capt Rajiv Chopra, P.W.7 Capt J.K. Dang, P.W.8 Maj K.S. Rao, P.W.9 Sep A Sudalai and P.W. 10 L/Hav C.V. Kesavan makes following things clear;

(1) the recovery and possession of 4 electronic items (supra) was the combined decision of entire Unit; (2) the electronic items were not recovered from the petitioner's house; (3) being the combined decision of all officers, all collectively seem to be responsible for the retention of articles in contravention of Army orders issued during Operation Blue Star; (4) petitioner seems to have been picked up though he seems to have no major role in retaining the 4 items (supra), he followed the collective decision and order of Commanding Officer and the recovery of items was from his neighbour's house; and (5) from Golden Temple 4 items were not recovered by the petitioner but by Capt J.K. Dang (Witness No.7) & others, to save from fire.

25. Though all other officers have been promoted to higher ranks, against whom the Court of Inquiry has recorded a finding, except the petitioner, who seems to be a victim of circumstances and unfair treatment given by the Army/ respondents.

26. It is well settled that in the event of common failure, the practice of Armed Forces is to fix the responsibility on Commanding Officer but for the reason best known to the respondents, it has not been done. Court of Inquiry treated it as the command failure.

Charge sheet and trial

27. It is not disputed that a charge-sheet dated 18.03.1986 was served on the petitioner with regard to improper possession of the 4 items and removal from Golden Temple Complex during the Operation Blue Star matter. For convenience the charge-sheet dated 18.03.1986, attached as Annexure No.4 to the petition is reproduced as under :-

"CHARGE SHEET

The accused No IC-26682N Major (Substantive) AMBRESHWAR SINGH. Kunwar 26 MADRAS attached to Headquarters 86 Infantry Brigade, an officer holding a permanent commission in the Regular Army, is charged with:-

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY

63 DISCIPLINE

In that he,

At Jalandhar, between 18 Jun 84 and 30 Jan, was in improper possession of the following items, the property removed from the Golden Temple Complex during 'OP METAL' :-

<u>Ser NO.</u>	<u>Description</u>	<u>Quantity</u>
(a)	Sony Trinitron Colour TV Monitor Model No CKV 2760(Made in Japan)	one
(b)	National Panasonic Stereo three in one Model No TR 1400E (Made in Japan)	one
(c)	Multi 5 System Hitachi video Deck Ser No 30201943 Model No VT 9900 FM	one
(d)	Akai Stereo Cassette Deck Remanded to GOC is Inf Div.	one
Place :	field	Brigadier
Date :	18 March	Officer
commanding		Headquarters
86 Infantry Brigade"		

28. A plain reading of the charge-sheet indicates that the petitioner was charged for possession of the 4 electronic items (supra) as well as removal from the Golden Temple Complex though he had not removed from Golden Temple and also not found in possession (supra). The word possession has been defined in Black's Law Dictionary as under:-

" Possession. (14C)1. The fact of having or holding property in one's power; the exercise of dominion over property. [Cases: Property 10.]2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. Civil law. The detention or use of a physical thing with the intent to hold it as one's own. La. Civ. Code art. 342 (1). 4. (usu.pl.) Something that a person owns or controls;

PROPERTY (2). Cf. OWNERSHIP; TITLE (1) 5. A territorial dominion of a state or nation."

Possession in fact. (17c) Actual possession that may or may not be recognized by law. For example, an employee's possession of an employer's property is for some purposes not legally considered possession, the term detention or custody being used instead.-Also termed possession naturalis."

29. Hon'ble Supreme Court in a case reported in (2011) 11 SCC 347 **Ram Singh vs. Central Bureau of Narcotics** defined the word 'possession' as under :-

"Once an article is found in possession of accused, it can be presumed that he was in conscious possession. Possession is a polymorphous term which carries different meanings in different contexts and circumstances and, therefore, it is difficult to lay down a completely logical and precise definition uniformly applicable to all situations with reference to all statutes. A servant of a hotel cannot be said to be in possession of contraband belonging to his master, unless it is proved that it was left in his custody over which he had absolute control."

30. In **Avatar Singh vs State of Punjab** reported in (2002) 7 SCC 419, their Lordships of Hon'ble Supreme Court defined the word 'possession' as under :-

"The word "possession" no doubt has different shades of meaning and it is quite elastic in its connotation. Possession and ownership need not always go together but the minimum requisite element which has to be satisfied is custody or control over the goods."

31. In another case reported in (2002) 3 SCC 748 **Gurmail Singh vs. State of Punjab**, while defining Section 5 of the Terrorist and Disruptive Activities (Prevention) Act,

1987, their Lordships of the Hon'ble Supreme Court defined the word 'possession' as under :-

"The expression "possession" in Section 5 means a conscious possession introducing thereby involvement of a mental element i.e. conscious possession and not mere custody without awareness of the nature of such possession and as regards the meaning of the word "unauthorized" in the context, means and implies without any authority of law."

32. In the case reported in (1995) 5 SCC 238 **Gangadhar vs. B.G. Rajalingam**, their Lordships of Hon'ble Supreme Court while interpreting the word 'possession' relied upon Halsbury's Laws of England, IVth Edn., Vol. 35 in para 1214 at p. 735 and held as under :-

"Halsbury's Laws of England, IVth Edn., Vol. 35 in para 1214 at p. 735, the word "possession" is used in various contexts and phrases, for example, in the phrase "actual possession" or "to take possession" or "interest in possession" or "estate in possession" or "entitled in possession". In para 1211 at p. 732, legal possession has been stated that possession may mean that possession which is recognized and protected as such by law. Legal possession is ordinarily associated with de facto possession, but legal possession may exist without de facto possession; but legal possession may exist without de facto possession, and de facto possession is not always regarded as possession in law. A person who, although having no de facto possession, is deemed to have possession in law is sometimes said to have constructive possession. In para 1216 at p. 736 it is stated that the right to have legal and de facto possession is a normal but not necessary incident of ownership. Such a right may exist with, or apart from, de facto or legal possession, and different persons at the same time in virtue of different proprietary rights.

Possession is the objective realization of ownership. It is the de facto exercise of a claim to certain property and a de facto counterpart of ownership. Possession of a right is the de facto relation of continuing exercise and enjoyment as opposed to the de jure relation of ownership. Possession is the de facto exercise of a claim to

certain property. It is the external form in which claims normally manifest themselves. Possession is in fact what ownership is in right enforceable at law to or over the thing. A man's property is that which is his own to do what he likes with it. Those things are a man's property which are the object of ownership on his part."

33. In (1994) 5 SCC 410 **Sanjay Dutt vs. State through C.B.I. Bombay**, their Lordships of Hon'ble Supreme Court defined the word 'possession' as under :-

"Even though the word "possession" is not preceded by any adjective like "knowingly", yet it is common ground that in the context the word "possession" must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession."

34. In (1979) 4 SCC 274 **Supdt and Remembrancer of Legal Affairs vs. Anil Kumar Bhunja**, their Lordships of Hon'ble Supreme Court defined the word 'possession' as under :-

"Word" possession is not purely a legal concept but a polymorphous term which may have different meanings in different contexts. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. Therefore, the test for determining "whether a person is in possession of anything is whether he is in general control of it".

35. However, it was in AIR 1953 SC 278 **Seksaria Cotton Mills Ltd. Vs. State of Bombay**, their Lordships of Hon'ble Supreme Court discussed the words 'possession' and 'custody' and held as under :-

"Possession is an ambiguous term. The law books divide its concept into two broad categories. (1) physical possession or possession in fact and (2) legal possession which need not coincide with possession in fact. The offending form with which we are concerned draws the same broad line. But even on the factual side of the border niceties creep in and so the possession of a servant is called custody rather than possession. But what of an agent? If a man lives abroad over a period of years and leaves his house and furniture in charge of an agent who has the keys of the house and immediate access to and physical control over the furniture, it would be difficult to say that the agent was not in physical possession. It is true the legal possession would continue to reside in the owner but the actual physical possession would surely be that of the agent. And so with a del credere agent, because such a person is the agent of the seller only up to a point. Beyond that he is either a principal or an agent of the buyer. This distinction was discussed by one of us in the Nagpur High Court in Kalyani Kuwarji vs. Tirkaram Sheolal [AIR 1938 Nag 254] and was accepted by the Madras High Court in Kandula Radhakrishna Rao vs. Province of Madras, [(1952) 1 MLJ 494]."

36. The words 'possession and custody' again discussed by Hon'ble Supreme Court in (1976) 4 SCC 522 **Patel Tethabhai Chatur vs. State of Gujarat**, Para-6 to quote:-

"The liquor in his glass would be liquor in his possession. But at the same time it would not be correct to say that merely because a participant in a drinking party can stretch his hand and take liquor for his use and consumption, he can be held to be in possession of liquor. The question is not whether a participant in a drinking party can place himself in possession of liquor by stretching his hand and taking it but whether he is actually in possession of it. Possession again must be distinguished from custody and it must be conscious possession. If, for example, a bottle of liquor is kept by someone in the car or house of a person without his knowledge, he cannot be said to be in possession of the bottle of liquor. It cannot, therefore, be laid down as an absolute proposition that whoever is present at a drinking party must necessarily be guilty of the

offence of possession of liquor and must be charged for such offence. Whether an accused is in possession of liquor or not must depend on the facts and circumstances of each case."

37. Keeping in view the aforesaid definition of the word 'possession' and its dictionary meaning, petitioner could not have been charged for possession of the 4 electronic items and their recovery from Golden Temple for the reasons, that they were recovered from petitioner's neighbour's house and as stated by the witness No.7 Capt J.K. Dang, items were recovered from Golden Temple by Unit members to save from fire and not by the petitioner.

Framing of charges

38. Not only the charges framed against the petitioner are illegal under the facts and circumstances of case, but he could not have been punished for the alleged crime being short term custodian on behalf of the Unit, as directed by the Commanding Officer. Hon'ble Supreme Court in a case reported in (2000) 8 SCC 512 **Bank of India vs. Vijay Transport** held as under:-

"Property in custodia legis means that the property is kept in the possession and under the protection of court. Monies deposited in court by way of security are held by the court in custodial egis to the credit of the party who is ultimately successful. Any other person dealing with the amount so deposited does so at his or her peril and any limitative disturbance of the court's possession

without its permission amounts to contempt of its authority.”

39. Apart from the above, petitioner may not be held guilty for recovery of property from Golden Temple Complex for the reason that the consistent evidence on record indicates that for the safety of aforesaid 4 items from fire, they were removed from the Golden Temple Complex and brought to the Unit. The items were not removed by the petitioner for commission of crime but to keep the property by members of 26 Madras as souvenir and also it was not the sole act of the petitioner but the purpose of removal was to lawfully save the property from fire and retention of possession by the Unit, was in pursuance to consensus between the members and the order passed by the Commanding Officer Lt Col K.M.G. Pannikar. Hence, charges framed against the petitioner at the face of record do not seem to be correct as required under law. The purpose of framing of charges and its contents have been decided by a Bench of Kolkata Armed Forces Tribunal vide its order dated 13.07.2015 in O.A. No. 45 of 2015 **Rifleman Surinder Kumar vs. Union of India & others**, which has been followed in another O.A. decided by Armed Forces Tribunal, Kolkata in O.A. No. 30 of 2013, vide order dated 21.08.2015 **Commander Harneet Singh vs. The Union of India & others**. The relevant portion from O.A. No.45 of 2013 is reproduced as under:-

Purpose of charge-sheet

40. Purpose of charge-sheet is to specify the accusation for which the accused has been charged and required to meet during the course of trial. It is the first notice to an accused of the matter where of he/she is accused and it must convey to him with sufficient clearness and certainty that the prosecution intends to prove against him and of which he would have to clear mind. Object of the framing of charge is to enable the accused of the case he is required to answer during trial. Charges must be properly framed and evidences tendered must relate to matters stated in the charge. It has been settled by the Hon'ble Supreme Court that charge is not an accusation in abstract but a concrete accusation of an offence alleged to have been committed by the accused. Further the accused is entitled to know with the greatest precision and particularity the acts said to have been committed and section of the penal law infringed; otherwise he must be seriously prejudiced in his defence vide **AIR 1958 SC Page 672-Srikantiah B.N. v. State of Mysore; AIR 1948 Sind 40, 48 : (1948) 49 Cr.L.J. 72 – Waroo v. Emperor & AIR 1963 SC 1120 – Birichh Bhuian v. State of Bihar.**

41. To specify a definite criminal offence is the essence of Criminal Jurisprudence which is in tune with Article 14 of the Constitution of India and part and parcel of Principle of Natural Justice. Offence whatever may be, no trial may proceed without framing of charges. Section 211 of Cr. P. C. deals with the contents of charges. Section 212 of Cr. P. C. provides that the charge shall indicate the particulars, place and person, the time and place of the offence and Section 213 of Cr. P. C. provides that when manner of committing offence must be stated. Section 215 of the Cr. P. C. deals with the effect of errors for framing of charges.

42. It is further well settled that even if there are irregularity in framing of charges it may not be fatal

*unless irregularity and omission has misled and caused prejudice to the accused and occasioned a failure of justice itself not vitiates the trial. Failure to specify the manner and mode of offence makes a charge vague but where particulars are on record there could not have been any prejudice to the accused. Section 221 of the Cr.P.C. like Section 113 of the Army Rules, 1954 takes care of the situation and provides safeguard empowering the Criminal Court or the SCM to convict the accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence along with other offences to which charges are framed. Further merely because of an inapplicable provision has been mentioned in the charge, trial may not be invalidated vide **3950 (3976) (SC) : AIR 2005 SC 3820 : 2005(3) – State (NCT of Delhi) v Navjot Sandhu, 2005Cr.LJ.; (1995) 4 SCC 181- State of J&K v. Sudershan Chakkar; (2001) 4 SCC 38- Omvati v. State (Delhi Admn.); AIR 2011 SC 3114- Rafiq Ahmed @ Rafi v. State of U.P.; AIR 2012 SC 1485- Rattiram v. 30 State of M.P.; AIR 2012 SC 3026- Bhimanna v. State of Karnataka; AIR 2013 SC 840- Darbara Singh v. State of Punjab;***

43. However, in the present case at the face of record charges were not framed and hence the omission appears to be fatal. In a case reported in **1979 Vol.1 SCC Page 87- Bhupesh Deb Gupta v. State of Tripura**, Hon'ble Supreme Court has set aside the conviction since charges were framed entirely indicating different factual aspects which has no co-relation with the offence for which the accused was charged. Hence it was held that it caused prejudice to the accused. Relevant portion of the judgment is reproduced as under :-

"12. The wording of the charge framed by the Special Judge is that the money was remitted by Nikhil Chakraborty for showing, in exercise of official function a favour to the said Schindra Dey on the plea of securing service for the said Sachindra Dey. The High Court

understood the charge as meaning that the money was sent by Nikhil Chakraborty on behalf of Sachindra Dey as a gratification for securing service for the said Sachindra Dey. It appears from the charge and from the judgment of the courts below that the courts proceeded on the basis that the gratification was received by the accused for showing favour as a public servant. As the basis of the charge is entirely different from what is sought to be made out now i.e. the gratification was paid to the accused for influencing a public servant, it cannot be said that the accused was not prejudiced by the frame of the charge. It would have been open to the prosecution to rely on the presumption if the charge was properly framed and the accused was given an opportunity to meet the charge which the prosecution was trying to make out against the accused. On a careful scrutiny of the facts of the case, we are unable to reject the contentions of the learned counsel for the accused that he was prejudiced by the defect in the charge and that he had no opportunity to meet the case that is put forward against him."

*44. Framing of charges is the part and parcel of Article 14 of the Constitution of India. That is why it has been held by Hon'ble Supreme Court in the case of **Roop Singh Negi** (supra) that the 31 Enquiry Officer is not permitted to travel beyond the charges and any punishment imposed on the basis of the finding which was not the subject-matter of charges is illegal.*

*Principle of Natural Justice is equally applicable to the Armed Forces personnel. In the case of **Sheel Kr. Roy** (supra) Hon'ble Supreme Court held that it is well settled legal principle accepted throughout the world that a person merely by joining Armed Forces does not cease to be a citizen or be deprived of his human or constitutional right."*

40. In view of above, we are of the considered opinion that charges framed against the petitioner and served, do not contain the actual facts, material and allegations on record, which vitiate all subsequent actions, including punishment.

Trial

41. After framing of charges (supra), petitioner was not granted time to submit any response nor any inquiry was held. The charge-sheet also does not disclose the evidence and proposed action ought to be taken against the petitioner. No opportunity was given to the petitioner to defend himself in response to the charge-sheet in utter disregard to the principles of natural justice. Neither any evidence was led against the petitioner in pursuance to charge-sheet with liberty to cross-examine the witnesses nor the petitioner was permitted to lead evidence in defence. A selective charge-sheet was served only on the petitioner and not on any other officer, in contravention of finding recorded by the Court of Inquiry.

42. While filing the counter affidavit, it has been stated in Para-2 that the petitioner was tried by the General Officer Commanding 15 Infantry Division under Section 84 of the Army Act and awarded severe reprimand and at the trial the petitioner pleaded not guilty. In view of finding of guilt recorded against the petitioner, he was punished with severe reprimand. The statutory complaint preferred by the

petitioner under Section 27 of the Army Act was rejected by the Central Government in 1996. Another complaint was also rejected. However, it has not been explained as to how the petitioner has been charged though all the 4 electronic items were recovered from the house of Maj V. Ganju, petitioner's neighbor.

Section 84 of Army Act, (Summary Trial)

43. While filing counter affidavit, respondents have not filed copy of the orders and the relevant material under which it may be established that the Summary Trial under Section 84 was held. Petitioner categorically stated in Paras 37, 38 and 39 of the petition that neither notice was issued nor any inquiry was held with opportunity to defend himself. For convenience Paras- 37, 38 and 39 of the petition are reproduced as under :-

"37. That after the charge-sheet dated 18th March, 1986 was given to the petitioner, neither the authority who had given the charge-sheet to the petitioner nor any other authority gave any opportunity to the petitioner to reply the charge-sheet. The charge-sheet did not disclose as to what evidence would be realized against the petitioner. The charge-sheet also did not disclose as to what documents would be relied against the petitioner in order to prove his charge.

38. That as the petitioner was not required to answer the charge-sheet, nor the authorities required the petitioner to submit a reply, the petitioner did not submit any reply.

39. That after the charge-sheet was given to the petitioner no enquiry officer was appointed by the appointing authority. "

44. In response to averments contained in Paras- 37, 38 and 39 it has been asserted in Paras- 28, 29 and 30 of the counter affidavit that the petitioner was brought before the Commanding Officer, charges were read over, Summary of Evidence was recorded and at the time of Summary of evidence petitioner was given full opportunity to hear the witnesses and produce defence. It has further been stated that under Army Act, there is no provision to seek reply from the accused in writing with regard to charge-sheet. Same has been reiterated in Para-30 of the counter affidavit. For convenience Paras- 28, 29 and 30 of the counter affidavit are reproduced as under :-

"28. That the contents of para 37 of the writ petition as stated are denied. It is further submitted that before the summary of evidence is ordered against an accused, he is brought before his Commanding Officer and informed of the charges against him and of the decision to record Summary of Evidence. At the time of recording of the Summary of Evidence, the accused is given full opportunity to hear the evidence against him, cross-examine the prosecution witnesses, make his own statement (if he so desires) and produce defence witnesses. The petitioner was provided all these facilities as such it is incorrect on his part to say that he has not provided opportunity to defend himself.

29. That with respect to the contents of para 38 of the writ petition it is submitted that there is no provision in the Army Act to obtain the reply of the accused in writing in respect of the charge-sheet against him. The petitioner was given full opportunity at all stages of investigation and trial to defend himself.

30. That with respect to the contents of para 39 of the writ petition it is submitted that there is no provision under Army Act and Army Rules to appoint an Enquiry Officer."

45. In reply to Paras- 28, 29 and 30 of the counter affidavit again petitioner reiterated the averments contained

in the petition (supra) and assailed the averments of charge-sheet and subsequent punishment held in contravention of Army Act read with Article 14 of the Constitution of India. It is strange that in the counter affidavit respondents have set up a plea that after service of charge-sheet nothing is required and Summary of Evidence is sufficient to punish the accused under Section 84 of the Army Act. Hence, brief descriptions of the provisions are required to be indicated here.

46. Under Section 108 of the Army Act, there are 4 kinds of Courts Martial i.e. General Courts Martial, District Court Martial, Summary General Courts Martial and Summary Court Martial. Section 84 is used in the event of extreme urgency to punish an officer by Summary Trial.

47. The procedure for trial under Court Martial has been given under Chapter-II of the Army Act. Section 133 provides that the Evidence Act shall be applicable to all trial under Court Martial. Arraignment of accused is done under Rule 48 of the Army Rules and Rule 49 gives the accused an opportunity to file objection against the charges and Rule 50 empowers the prosecution to amend the charge. For convenience Rules 48, 49 and 50 of Army Rules, 1954 are reproduced as under:-

48. Arraignment of accused. —

- (1) *After the members of the court and other persons are sworn or affirmed as abovementioned, the accused shall be arraigned on the charges against him.*
- (2) *The charges upon which the accused is arraigned shall be read and, if necessary, translated to him, and he shall be required to plead separately to each charge.*

49. *Objection by accused to charge.* —*The accused, when required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules. The court after hearing any submission which may be made by the prosecutor or by or on behalf of the accused, shall consider the objection in closed court and shall either disallow it and proceed with the trial, or allow it and adjourn to report to the convening authority or, if it is in doubt, it may adjourn to consult the convening authority.*

50. *Amendment of charge.* —

- (1) *At any time during the trial, if it appears to the court that there is any mistake in the name or description of the accused in the charge-sheet, the court may amend the charge-sheet so as to correct that mistake.*
- (2) *If, on the trial of any charge, it appears to the court at any time before it has begun to examine the witnesses, that in the interest of*

justice any addition to, omission from, or alteration in, the charge is required, it may report its opinion to the convening authority, and may, adjourn and the convening authority may either direct the new trial to be commenced, or amend the charge, and order the trial to proceed with such amended charge after due notice to the accused.

48. The format of charge-sheet has also been provided with the Appendix-III of Army Rules, 1954. For convenience the same is reproduced as under:-

"The charge-sheet is signed by the Presiding Officer (or Judge Advocate) Marked B-2 and annexed to the proceedings.

The accused is arraigned upon each charge in the above mentioned charge sheet.

Are you guilty or not guilty of the (first) charge against you, which you have heard/read?

(set out).

(Instructions:—(1) When there is more than one charge the foregoing question will be asked after each charge (whether alternative or not) is read, the number of the charge being stated).

(2) If the accused pleads guilty to any charge the provisions of AR 52(2) must be complied with, and the fact that they have been complied with must be recorded. Where there are alternative charges and the accused pleads guilty to the less serious charge, the Court will enter after the plea is recorded: "The Court proceeds as though the accused had not pleaded guilty to any charge."

In the present case at the face of record the charge-sheet has not been framed in accordance with Rules with due opportunity to file objection.

49. It appears that the authorities seems to be of the opinion to proceed with Court Martial but in a hasty manner they punished the petitioner and later on seem to have made it a case for summary trial under Section 84 of the Army Act. The copy of the order of punishment has not been filed neither with the counter affidavit nor produced with the original record.

50. Assuming that the respondents had proceeded in accordance with Section 84 of the Army Act, it shall be appropriate to consider it. Section 84 of the Army Act is reproduced as under :-

"84. Punishment of officers, junior commissioned officers and warrant officers by area commanders and others. An officer having power not less than an area commander or an equivalent commander or an officer empowered to convene a general court- martial or such other officer as is, with the consent of the Central Government, specified by ²the Chief of the Army Staff] may, in the prescribed manner, proceed against an officer below the rank of lieutenant- colonel, a junior commissioned officer or a warrant officer, who is charged with an offence under this Act, and award one or more of the following punishments, that is to say,-

(a) forfeiture of seniority, or in the case of any of them whose promotion depends upon length of service, forfeiture of service for the

purpose of promotion for a period not exceeding twelve months, but subject to the right of the accused previous to the award to elect to be tried by a court- martial;

(b) severe reprimand or reprimand;

(c) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good.

51. A plain reading of the aforesaid contents in Section 84 indicates that an officer of the rank having power not less than an Area Commander or an equivalent commander or an officer empowered to convene a General Court Martial or such other officer as is, with the consent of the Central Government shall be entitled to proceed with Summary Trial in the manner provided. The Commanding Officer has been conferred power to punish Junior Commissioned Officer under Section 85 of the Army Act and not the commissioned officer. In the present case the charge-sheet, contained in Annexure-4, has been signed by an officer of the rank of Brig, who does not seem to be petitioner's commanding officer and secondly General Court Martial may be convened under Section 109 by the Central Government or Chief of the Army Staff or any officer empowered in this behalf as provided under Section 109 of Chapter X of Army Act. Accordingly, petitioner could have been tried and punished by the officer of the same rank though it has been stated by the respondents General Officer

Commanding has tried and punished the petitioner summarily but no material has been brought on record to establish this fact.

Procedure- Army Order (as prescribed)

52. A plain reading of Section 84 of Army Act, 1950 indicates that the power conferred by it shall be exercised in the manner prescribed. Army Order 51 of 1981 deals with the procedure for exercise of power under Section 84. Paras-11, 12 and 13 of Army Order 51 of 1981 provide procedure for disciplinary action, which are reproduced hereinafter. The earlier Army Order dealing with the subject matter i.e. Army Orders 181 of 1962 and 264 of 1969 have been cancelled. The Army Order 51 of 1981 has been further amended by an order dated 01.12.1983, which are reproduced as under:-

Disciplinary Action

11. If sufficient evidence is available at the preliminary investigation, disciplinary proceedings against the person(s) considered to be responsible for the loss will be initiated forthwith. Only in cases of doubt the result of the court of inquiry will be awaited before initiating disciplinary action. Where, however, it is feared that finalisation of findings of the court of inquiry is likely to be delayed for reasons of finding out administrative/procedural shortcomings and suggesting remedial measures, the court will be asked to submit their findings in two parts – one regarding the disciplinary aspect and the other regarding the remedial aspect – in that order. It will be ensured that all relevant witnesses connected with the inquiry are invariably examined. Disciplinary proceedings will be in all cases be progressed expeditiously and will not be held up for regularisation of the loss by the competent financial authority.

12. Offences, involving moral turpitude, fraud, dishonesty and culpable negligence involving financial loss will be tried by courts martial and not

disposed of summarily or by administrative action. It will be ensured that punishments awarded in such cases are commensurate with the gravity of the offence.

13. In cases where trial by court martial is time-barred, the following action can be taken against the delinquent(s) :-

(a) The accused may be brought to trial before a civil (criminal) court.

(b) Deductions from pay and allowances of the accused may be ordered under Army Act Sections 90 and 91 and Army Rule 205.

(c) The accused may be dismissed or removed from service

administratively under the provisions of Army Act Section 19 read with

Army Rule 14 or Army Act Section 20 read with Army Rule 17.

14. Branches/Directorates dealing with cases of loss of stores and public money may correspond directly with 'A' Branch of Command HQ in respect of cases falling under this order.

No 26 AO 51/81 :

Losses of stores and of public money-Reporting of cases where the Government is the CFA and measures for avoidance of delay in finalization of courts of inquiry and disposal of disciplinary cases in this regard (Amendment No 2).

Para 9 of AO 51/81 is reconstructed as under:-

"9. Where a court of inquiry clearly brings out that action to finalize the disciplinary aspect of the case is required to be taken at Army Headquarters a copy of the proceedings of the court of inquiry will be forwarded to Army Headquarters (AG/DV2). In cases of disciplinary action against civilian personnel, the papers will be forwarded to the competent disciplinary authority for initiating disciplinary proceedings."

53. The controversy in question, where allegation against the petitioner is with regard to unlawful possession of property during Operation Blue Star in Golden Temple

Amritsar, undoubtedly involves moral turpitude. The allegation that the petitioner taken it during Operation Blue Star and was having possession, though based on unfounded evidence but it involves moral turpitude.

54. Accordingly, in view of Para-12 of the Army Order 51 of 1981 (supra) petitioner could not have been charged and tried summarily on administrative side. The action taken against the petitioner seems to be without jurisdiction. The case should have been tried by Court Martial and not by administrative action in pursuance to power conferred by Section 84.

55. Now it is well settled proposition of law that an order, decision or even judgment given without jurisdiction vitiates and is a nullity in law. Law does not permit any court/tribunal/authority/forum to usurp jurisdiction on any ground whatsoever, in case, such an authority does not have jurisdiction on the subject matter. For the reason that it is not an objection as to the place of suing; "it is an objection going to the nullity of the order on the ground of want of "jurisdiction". Thus, for assumption of jurisdiction by a court or a tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the court or tribunal has power to decide on the adjudicatory facts for facts in issue. (Vide: **Setrucharla Ramabhadra Raju Bahadur v. Maharaja of Jeypore**, AIR 1919 PC 150:42 Mad 813:46 Ind App 151; **State of Gujrat v. Rajesh Kumar**

Chimanlal Barot, (1996) 5 SCC 477: AIR 1996 SC 2664: 1996 AIR SCW 3327; **Harshad Chiman Lal Modi v. DLF Universal Ltd.**, AIR 2005 SC 4446: 2005 AIR SCW 5369: (2005) 7 SCC 791; **Carona Ltd v. Parvathy Swaminathan**, AIR 2008 SC 187: 2007 AIR SCW 6546: (2007) 8 SCC 559; and **Jagmittar Sain Bhagat V. Dir., Health Services, Haryana**, AIR 2013 SC 3060: 2013 Lab IC 3412: 2013 IR SCW 4387.

56. In view of above, since action taken against the petitioner is without jurisdiction, being not empowered under Section 84 of the Army Act and not held in the manner prescribed, it vitiates and is nullity in law. In **Sushil Kumar Mehta vs. Gobind Ram Bohra**, (1990) 1 SCC 193: (1990) 1 Rent LR 428: 1989 Supp (2) SCR 149, the apex Court, after placing reliance on large number of its earlier judgments particularly in **Premier Automobiles Ltd. V. Kamlakar Shantaram Wadke**, AIR 1975 SC 2238: (1976) 1 SCC 496: (1976) 1 SCR 427; **Kiran Singh v. Chaman Paswan**, AIR 1954 SC 340: 1954 SCJ 514: 1955 SCR 117; and **Chandrika Misir v. Bhaiyalal**, AIR 1973 SC 2391: (1973) 2 SCC 474: 1973 SCD 793 held, that a decree without jurisdiction is a nullity. It is a coram non iudice; when a special statute gives a right and also provides for a forum for adjudication of rights, remedy has to be sought only under the provisions of that Act and the common Law Court has no jurisdiction; where an Act

creates an obligation and enforces the performance in specified manner, "performance cannot be forced in any other manner."

57. It is further argued by the learned counsel for the respondents that Section 84 further provides that the action under the said provision shall be taken with the prior permission of Central Government or Chief of the Army Staff. Legislature to their wisdom has specifically used the words "with the consent of the Central Government, specified by (the Chief of the Army Staff) may, in the prescribed manner, proceed against an officer below the rank of Lieutenant Colonel."

Attention of the Court has not been drawn to any material on record by pleading or otherwise that the Central Government or Chief of the Army Staff had permitted to proceed under Section 84 of the army Act. The Court of Inquiry was not held against the petitioner but it was convened to find out the circumstances under which certain items were taken out from Golden Temple Complex during Operation Blue Star. The convening order does not seem to contain any and authority who passed the order. The original record which has been produced before the Tribunal shows that the convening order is in the following format; indicating the purpose, name of Presiding Officer and its Members for the Court of Inquiry. The provision contained in Section 84 of the Act seems to be mandatory and in the absence of permission granted by the Government of India or Chief of Army Staff, trial under Section

84 of the Act and punishment awarded thereon against the petitioner seems to be not sustainable, hence vitiates.

Court of Inquiry

58. The original record contains the copy of Court of Inquiry. The convening order gives the name of Presiding Officer and two of its Members. It neither contains the date and designation of the authority nor contains any signature of the authority who passed the order. For convenience the convening order is reproduced as under :-

"Confidential

In lieu of IAFD-931

PROCEEDINGS of a	:	Court of Inquiry
Assembled at	:	46 Armed Regt, C/O 56 Apo
On the	:	12 Jul 84 & subsequent days
By order of	:	HQ 15 Inf Div convening order No 3020/11/A3(complaint) dtd 12 Jul 84.
for the purpose of	:	To investigate the circumstances under which certain items allegedly taken away from the premises of the Golden Temple, Amritsar and were found in the possession of personnel of 26 MADRAS as well as in their Unit lines.

PRESIDING OFFICER

IC-1637L Lt Col PS SANDHU

MEMBERS

1) IC-15320M Maj KARAM CHAND

2) IC-27936N Capt VIRENDRA SINGH

The court having assembled pursuant to order, proceeds to examine the witnesses.

CONFIDENTIAL"

59. The Court of Inquiry was held in pursuance to provisions contained in Army Rules 177, 178, 179, 180, 181, 182, 183 and 184. For convenience Army Rules 177, 178 and 179 are reproduced as under:-

"177. Courts of Inquiry. —

- (1) *A court of inquiry is an assembly of officers or of officers and junior commissioned officers or warrant officers or non-commissioned officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them.*
- (2) *The court may consist of any number of officers of any rank, or of one or more officers together with one or more junior commissioned officers or warrant officers or non-commissioned officers. The members of court may belong to any branch or department of the service, according to the nature of the investigation.*
- (3) *A court of inquiry may be assembled by the officer in command of any body of troops, whether belonging to one or more corps.*

178. Members of court not to be sworn or affirmed. —

The members of the court shall not be sworn or affirmed, but when the court is a court of inquiry on recovered prisoners of war, the members shall make the following declaration: —

"I,....., do declare upon my honour that I will duly and impartially inquire into and give my opinion as to the circumstances in which.....became a prisoner of war, according to the true spirit and meaning of the regulations of the regular Army; and I do further declare, upon my honour that I will not on any account, or any time disclose or discover my own vote or opinion or that of any particular member of the court, unless required to do so by competent authority."

179. Procedure. —

- (1) *The court shall be guided by the written instructions of the authority who assembled the court. The instructions shall be full and specific and shall state the general character of the information required. They shall also state whether a report is required or not.*

- (2) *The officer who assembled the court shall, when the court is held on a returned prisoner of war or on a prisoner of war who is still absent, direct the court to record its opinion whether the person concerned was taken prisoner through his own wilful neglect of duty, or whether he served with or under, or aided the enemy; he shall also direct the court to record its opinion in the case of a returned prisoner of war, whether he returned as soon as possible to the service and in the case of a prisoner of war still absent whether he failed to return to the service when it was possible for him to do so. The officer who assembled the court shall also record his own opinion on these points.*
- (3) *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 except a prisoner of war who is still absent.*
- (4) *The court may put such questions to a witness as it thinks desirable for testing the truth or accuracy of any evidence he has given and otherwise for eliciting the truth.*
- (5) *The court may be re-assembled as often as the officer who assembled the court may direct, for the purpose of examining additional witnesses, or further examining any witness, or recording further information.*
- (5A) *Any witness may be summoned to attend by order under the hand of the officer assembling the court. The summons shall be in the Form provided in Appendix III.*
- (6) *The whole of the proceedings of a court of inquiry shall be forwarded by the presiding officer to the officer who assembled the court."*

60. The combined reading of Rules 177, 178 and 179 shows that the Court of Inquiry shall assemble in pursuance to order passed by the superior authority to collect evidence and thereafter report the matter, who had referred to it. The court

shall be guided by the written instructions of the authority who assembled the court. The instructions shall be full and specific.

61. The convening order does not show who directed to convene the Court of Inquiry. The bottom portion of the convening order shows that the Court having assembled pursuant to order, proceeds to examine the witnesses. Who directed to assemble court and proceed examine the witnesses is not borne out from the records submitted to the Tribunal. Attention has also not been invited to the order passed to convene the Court of Inquiry with specified instructions.

Non compliance of Rule 180

62. It is well settled proposition of law that the provisions contained in Rule 180 must be complied with during Court of Inquiry. In **Maj. Gen. Inderjit Kumar Vs. UOI & Ors.** (1997) 9 SCC 1 Hon'ble Supreme Court reiterated that Army **Rule 180** gave adequate protection to the person affected even at the stage of Court of Inquiry. In 2008(3) SLR in the matter of **Surendra Kumar Sahni Vs Chief of Army Staff** (Delhi) a division bench of Hon'ble High Court maintained that compliance to the requirements of Rule 180 is mandatory.

63. In view of above, it is our considered opinion that in the absence of any material indicating the name and designation of the officers who passed the order to convene

the Court of Inquiry, an inference may be drawn that no competent person had directed to hold the Court of Inquiry, hence all actions taken thereon in pursuance to it seems to vitiate.

Cryptic Order

64. One of the arguments advanced by the learned counsel for the petitioner is that while deciding the appeal, the competent authority has not assigned reason but rejected the appeal summarily. The order dated 03.08.1987, rejecting petitioner's statutory complaint by the Government of India has been filed as Annexure No.5 to the petition. For convenience the same is reproduced as under :-

"No.39.8/87/D(AG)
GOVERNMENT OF INDIA
MINISTRY OF DEFENCE
New Delhi, dated 3.8.87

ORDER

The Central Government after considering the statutory complaint dated 18th July, 1986 submitted by IC-26682 Major K.A. Singh of 26 MADRAS under the provisions of section 27 of the Army Act 1950 against the punishment of "severe Reprimand" awarded to him by FOC 15 Inf Div after summary trial on 12.4/86, hereby reject the said complaint.

By Order etc.

(G.P. Bahuguna)

Under Secretary to the Government of India.

Copy to;

The Chief of the Army Staff (2) : with the request that the above orders may be communicated to the officer through the staff channels. "

65. At the face of record the impugned order rejecting the statutory complaint seems to be non-speaking and cryptic. There is not even a whisper to the defence set up by the petitioner. After receipt of impugned order dated 03.08.1987 petitioner submitted another complaint dated 28.06.1988, containing the allegations and injustice done to him in detail. That too was ignored without entering into merits of the controversy. Petitioner's original complaint and other complaints were exhaustive, raising pleas specifically. One strange fact which comes out from the record is that petitioner's subsequent statutory complaint has been communicated by order dated 02.12.1988, as contained in Annexure No.7 to the petition, by the Commanding Officer, Col Asish Chakroborty referring to the decision of the Government of India, that too does not assigned any reason nor disclosed the grounds of rejection.

66. Now it is settled proposition of law that every order passed by the authorities, including judicial, quasi judicial or administrative order must be reasoned one. It is settled law that the reasoned order is the part of natural justice. Hon'ble Supreme Court has held in number of cases that the authorities have to record reasons, otherwise it may become a tool of harassment of the delinquent in the hands of authorities, vide ***K.R. Deb vs. The Collector of Central Excise, Shillong***, AIR 1971 SC 1447; ***State of Assam & Anr vs. J.N. Roy Biswas***, AIR 1975 SC 2277; ***State of Punjab vs. Kashmir Singh***, 1997 SCC (L&C) 88; ***Union of India &***

Ors. Vs. P. Thayagaraan, AIR 1999 SC 449; and **Union of India vs. K.D. Pandey & Anr**, (2002) 10 SCC 471. In the case reported in (2010) 4 SCC 785, **CCT vs. Shukla and Brothers** their Lordships held that reason is the very life of law. When the reason of law once ceases, the law itself generally ceases. Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, ore particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements.

67. The concept of reasoned judgment has become an indispensable part of the basic rule of law and, in fact, is a mandatory requirement of the procedural law. In one other case, reported in **Assistant Commissioner, Commercial Tax Department, Works, Contract and Leasing, Quota vs. Shukla and Brothers**, JT 2010 (4) SC 35 Hon'ble Supreme Court held that it shall be obligatory on the part of the judicial or quasi judicial authority to pass a reasoned order while exercising statutory jurisdiction.

68. In view of above, the impugned order passed by the appellate authority seems to suffer from the vice of

arbitrariness and is hit by Article 14 of the Constitution of India and hence does not survive.

Discrimination/Bias

69. We have noticed that from the finding and opinion expressed by the Court of Inquiry (supra) and the statements of the witnesses under Court of Inquiry, no case is made out solely against the petitioner. No recovery was done from petitioner's house. Items (supra) were recovered from his neighbour's house, namely, Maj V. Ganju. All 4 electronic items were kept as souvenir on the direction of Lt Col K.M.G. Pannikar but even then except petitioner no action has been taken against other officers. No punishment has been awarded to others by appropriate trial, rather the officers involved in the matter have been promoted to the higher posts, whose names came in light during Summary Inquiry as well as Summary of Evidence. The names of such officers and the rank to which they have been promoted, which has not been disputed by the respondents during the course of arguments, in terms of petitioner's information are as under :-

<u>Name of the officer</u>	<u>Promoted to the following ranks</u>
Lt Col K.M.G. Pannikar	Col
Maj K.S. Rao	Col
Capt Rajiv Chopra	Lt General
Capt J.K. Dang	Brig

Maj B.S. Panwar

Col "

70. There appears to be gross injustice done to the petitioner's career. He has been made an escape goat, who suffered because of incorrect decision and wrong committed by the then Lt Col K.M.G. Pannikar, who was the Commanding Officer of the petitioner. While deciding T.A. No. 1271 of 2010, vide order dated 14.10.2016 Raj Kumar vs. Chief of the Army Staff and others, the Tribunal considered a number of pronouncements of different High Courts and Supreme Court with regard to collective liability. For convenience the relevant portion of the judgment is reproduced as under :-

"13. In the facts and circumstances and the material evidence led by the prosecution, it leaves no manner of doubt that mens rea and common intention on the part of the petitioner and other co-accused is fully established. The defence set up by the petitioner that it was done at the behest of Commanding officer is unavailing and falls to the ground for the reason that the petitioner or any other co-accused had not raised any objection as to why the vehicle was diverted to the Village Bibiwala or at the scene of occurrence and why the four barrels of diesel was being loaded over to the trolley of a civilian tractor. The Delhi High Court while dismissing the writ petition of co-accused K. Kamraj observed as under:

"12. All these facts and circumstances clearly establish mens rea and common intention on the part of the petitioner. The petitioner's argument that

he was doing at the behest of the Commanding Officer is of no consequence. He should have raised the objection as to why the vehicle had come at an unknown place and why 11 the unloading was being done in the trolley of the civilian tractor. All these facts adequately attribute knowledge on the part of the petitioner. The facts of this case speak for themselves. The petitioner has no defence to make."

14. *In the case of Afrhim Sheikh, AIR 1964 SC 1263, Hon'ble Apex Court observed as under:*

"No doubt, a person is only responsible ordinarily for what he does and section 38 ensures that; but the law in section 34 (and also section 35) says that if the criminal act is the result of a common intention, then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which he had in its perpetration."

In Noor Mohammad Mohd Yusuf Momin, reported in AIR 1971 SC 855, the Apex Court observed as under:

"So far as section 34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention, participation in the commission of the offence in furtherance of the common intention invites its application."

15. *The crux of section 34 is to deal with situation or circumstances in which it may be difficult to distinguish between the act of individual members of a party or to prove exactly what part was played by each of them. The reason why all are deemed guilty in such cases is, that the presence of accomplices gives encouragement, support and protection to the person actually committing the act.*

16. Once it is found that a criminal act was done in furtherance of common intention of all, each of such persons is liable for criminal act as if it were done by him alone. The primary object underlying section 34 IPC is to prevent miscarriage of justice in cases where all are responsible for the offence which has been committed in furtherance of common intention. It may be noted that section 34 is restricted to common intention and does not embrace any knowledge. It does not require proof that any particular accused is responsible for commission of actual offence. It may well be applied to cases in which an offence is committed by only one or two or three persons who all had a common intention (vide Bharwad Mepa Dana AIR 1960 SC 289). "

17. A plain reading of the language used in section 34 of the IPC reveals that essence of section is simultaneous consensus of the mind of persons participating in the criminal action to bring about a particular result. Such consensus can be developed at the spot. The common intention must be to commit particular offence. The common intention of one must not only be known to other but must also be shared by him (vide Lallan Rai (2003) 1 SCC 268 and Hardev Singh AIR 1975 SC 179) "

71. In the present case, the common intention of all members of the Unit was to keep the electronic items as souvenir. The Commanding Officer Lt Col K.M.G. Pannikar took a decision and directed to retain the electronic items recovered from the house of petitioner's neighbour. In army the decision taken by the Commanding Officer is final. At the most petitioner's neighbour may be held responsible to have been in custody of electronic items on behalf of the Commanding Officer of the Unit. In no case the mens rea was to own the

property for personal use. In the absence of any mens rea under the teeth of fact that the recovery was not from petitioner's house, rather from neighbour's house and things were done at the command of Lt Col K.M.G. Pannikar, petitioner does not seem to have committed any crime under Section 63 of the Army Act, 1950, for which he was charged.

72. Under the command and control system, prevailing in army, there was no option except to keep the aforesaid 4 items at the appropriate place of the Unit, purported to be kept as souvenir, in no way makes out a case against the petitioner. Petitioner has been ill treated and discriminated and singled out for the purpose of punishment, which seems to have been done to save others. The statement of witnesses during Court of Inquiry and Summary of Evidence cries with regard to unanimous decision of the Unit to keep the 4 electronic items as souvenir, duly endorsed by the Commanding Officer with direction to retain them.

Offshoot

73. Learned counsel for the petitioner invited our attention to the recommendation of Lt Col Avtar Singh, who forwarded the statutory complaint pointing out the collective responsibility of the Unit. For convenience the recommendation of Lt Col Avtar Singh dated 13.06.1988 is reproduced as under :-

"RECOMMENDATION OF COMMANDING OFFICER"

1. IC- 26682N Major KA Singh has brought out a fresh point on which he has lodged a second statutory complaint. I have verified from the records and find that Lt Col KMF Panicker has been promoted to a full colonel and is posted as Branch Recruiting Officer Hamirpur.
2. I have known the officer earlier and I have found his personal integrity and honesty beyond reproach. Having verified the facts of the case and observed the officer, I am fully convinced that the officer has suffered deprivation and ignominy individually for an act committed collectively and for which the major onus of responsibility lay elsewhere.
3. I recommend that a sympathetic view of the whole case be taken and redress as sought by the officer be granted to him.

Station: C/O 99 APO

(Avtar Singh)

Date : 30 Jun 88

Lt Col

CO

74. Similar recommendation was made by Lt Col L.M. Tewari, petitioner's Commanding Officer dated 19.07.1986, same is also reproduced as under :-

" RECOMMENDATION OF THE COMMANDING OFFICER 26 MADRAS "

1. I Agree with the contention of the offr and am convinced that there is more than enough substance to consider this application favourably.
2. The feedback that I have obtained in the last one year has convinced me that the offr's actions were totally in good faith for the good of the unit and under the instrs of the previous CO, Lt Col KMG Panicker. Moreover, the actions of the offr's were dictated by the collectively will of the remainder offr's.
3. The offr has been, since his commissioning and epitome of honestly, loyalty & integrity – a fact borne out and vouchsafed by the C of I and the S of E.
4. The facts of the case indicate that the offr was embroiled in a web of not his creation and is a victim of circumstances and lack of moral will and courage of his Co.
5. The issue had been blowout of proportion in the aftermath of OP Blue Star, and the privation and ignominy suffered by the offr for one and a half years is not only sufficient punishment but also indicative of the fact that the punishment, has become a fault

- accomplish, in view of the delay of the justice machinery.
6. The laws of natural justice and the concept of mercy and punishment would seem to dictate that the offr's actions are definitely not acts of commission but commission and part of a collective act which does not merit the punishment meted out.
 7. I recommend that the offrs complaint be looked into sympathetically.

Station: C/O 56 APO
Date : 19 Jul 86

(LM Tewari)
Lt Col
CO

75. The observations made by the Commanding Officer of the petitioner's Unit show that the petitioner has been an epitome of loyalty and integrity, which is not only borne out from his career in the army but also from the Court of Inquiry and also from Summary of Evidence. It is unfortunate that the petitioner has been punished though nothing personally was recovered from him or from his house but from the neighbour's house. Under the direction of the Commanding Officer of the Unit 4 electronic items were kept under custody as souvenir but other officers have enjoyed promotion in the Army high offices (supra) and a young officer of the Indian Army suffered under the heat of Operation Blue Star for no fault on his part.

Mens rea

76. Thus, it appears that apart from the fact that the petitioner was not in possession of any of the 4 electronic items in question taken in possession during the Operation Blue Star of Golden Temple Amritsar. There is total lack of mens rea in the present case to the petitioner to retain 4

electronic items for his personal use. Hon'ble Supreme Court in a case reported in AIR 1991 SC 515, **Murarilal Jhunjunwala vs. State of Bihar** deprecated the frivolous and vexatious prosecution by the State in the absence of any mens rea and material evidence and the trial has been held to be vexatious and frivolous. In the present case petitioner's trial seems to be unjustified on the face of record on its every aspect. Neither the petitioner has taken out from Golden Temple Amritsar 4 electronic items nor he had kept these items for his own use. There is no material on record which may indicate petitioner's intention to keep the 4 electronic items with him. Whatever has been done, it was under the command and control of Lt Col K.M.G. Pannikar, the Commanding Officer. In the absence of any mens rea or intention, that too under the teeth of the fact that the items were not recovered from petitioner's house and decision was taken at the Unit level, trial of the petitioner and punishment awarded thereon seem to be suffering from the vice of arbitrariness.

77. In (2014) 8 SCC 918, **Richhpal Singh Meena vs. Ghasi**, Hon'ble Supreme Court held that accused must have knowledge of the consequences of one's intentional actions. In one another case reported in (2011) 1 SCC 601, **CCE vs. Pepsi Foods Ltd**, Hon'ble Supreme Court has set aside the punishment, where action of the accused was not suffering from any malafide intention but evaded payment of duty, in the absence of mens rea to commit the crime. In a case

reported in 1966 SC 955 **Collector of Customs vs. Sitaram Agarwala**, their Lordships of Hon'ble Supreme Court considered knowledge and intention and held a person who knowingly purchases smuggled goods from an importer cannot have an intention to evade a prohibition against import, for the prohibited goods have already been imported. A person who receives goods with the knowledge that they are stolen goods cannot possibly have an intention to commit theft, for the theft has already been committed, though he may have the intention to receive the stolen goods. Knowledge of an offence cannot be equated with an intention to commit the offence. Such a construction effaces the distinction between the two distinct elements of mens rea, knowledge and intention, laid down in the clause.

78. It is true that mens rea is not an essential element under certain statutory provisions but a plain and simple discharge of bonafide duty by the petitioner under the command and control of superior officers of the army shall not make out an offence, warranting punishment.

79. T.A. No. 1368 of 2010 was filed on 05.04.1991 in the High Court as writ petition, when on account of severe reprimand (supra) petitioner was superseded from his batch mates. While preferring the writ petition, petitioner prayed that he should be granted promoted on the substantive rank of Lt Col by time scale since petitioner's statutory complaint was

rejected by the Chief of Army Staff. In Para-23 of the writ petition, petitioner has pleaded as under :-

"23. That the petitioner submits that persons juniors to the petitioners and having lower average marks and having bad entries have been promoted to the substantive rank of Lt. Col. By time scale."

80. However, averments of Para-23 (supra) of the writ petition, have been denied in Para-25 of the counter affidavit dated 11.11.1991. The reply of Para-25 of the counter affidavit has been denied in Para-25 of the rejoinder affidavit by the petitioner. The reply given in Para-25 of the counter affidavit seems to be vague and unreasoned. Attention has been invited to the fact that the age of retirement of a Major is 50 years, whereas the Lt Col retires at the age of 51 years. In Para-3 of the petition it has been pleaded that the petitioner belongs to 1968 batch and his batch mates were granted rank of Lt Col (Time Scale) in June 1990 by an order dated 23.09.1990. It has further been pleaded that in view of Para- 66 of Army Regulations substantive promotion to the rank of Lt Col is to be made by time scale on completion of 21 years of service, subject to fitness. According to the petitioner he was entitled for promotion by selection to the rank of Lt Col in the year 1985 but he was not considered by the Board. It is categorically pleaded by the petitioner that no adverse entry has been recorded in petitioner's ACRs from 1982 to 1990. When his case was considered in 1990 for time scale promotion to the rank of Lt Col after completion of 21 years of service, no adverse remark was communicated. Impugned

order of punishment of severe reprimand was challenged in Writ Petition No. 8051 (SB) of 1989 in the High Court. It is also pleaded that in the year 1989-90 petitioner's case was recommended for promotion by the Reporting Officers stating that he should not put to suffer in view of severe reprimand while participating in Operation Blue Star in Golden Temple Complex. Because of impugned order of punishment the petitioner could not be promoted to the rank of Lt Col (Time Scale) in 1990. While filing counter affidavit, respondents have not denied that the promotion to the rank of Lt Col (Time Scale) is done in accordance with Para-66 of Defence Services Regulations, subject to completion of 21 years of reckonable commissioned service but not more than 26 years' reckonable commissioned service. Para-66 of the Army Regulations is reproduced as under :-

"Substantive promotion by Time Scale to the Rank of Lt Col –

(a) All officers (other than Military Nursing Service, Army Medical Corps, Army Medical Corps (Non-Tech), Army Dental Corps, Remounts and Veterinary Corps, Military Farms and Special List):-

(i) Substantive promotion to the rank of Lt Col of officers not promoted by selection against the authorised establishment of Lt. Cols. May be made, subject to their being considered fit in all respects, by time scale on completion of 21 years reckonable commissioned service but not more than 26 years reckonable commissioned service provided they have not become due for retirement on the basis of the age of superannuation prescribed for the rank of time scale Lt. Col. Officers so promoted will not be reckoned against the authorised establishment of Lt. Cols but will be held in a separate „non-selection“ list. The number of officers held on the „non-selection“ list will count against the authorised establishment of officers in the rank of Major."

81. From the combined reading of petition and the counter affidavit filed by the respondents, there appears to be no room of doubt that the petitioner was considered for substantive rank of Lt Col (Time Scale) in June, 1990 but was not approved for granted of substantive rank in spite of recommendation in ACRs' entry only because of the impugned order of punishment with regard to severe reprimand. In Para-12 of the counter affidavit it has been stated that the petitioner was punished in pursuance to trial by General Officer Commanding 15 Infantry Division under Section 84 of the Army Act with severe reprimand. It is also not disputed that during trial the petitioner has not pleaded guilty. It is also not disputed that the award of severe reprimand was challenged by the petitioner in Writ Petition No. 8051 (SB) of 1989, which was pending at the time when writ petition was filed for promotional avenues.

82. The respondents have not denied by categorical pleading that petitioner's ACRs entries do not contain any remark except the severe reprimand. This makes us to believe that the petitioner's promotion to the substantive rank of Lt Col (Time Scale) was with held and petitioner was superseded only because of the entry of severe reprimand granted in pursuance to trial under Section 84 of the Army Act.

83. In view of above, our considered opinion is that the respondents have been failed to establish even an iota of charges against the petitioner. Petitioner seems to have been arbitrarily and vexatiously prosecuted and punished under the heat of Operation Blue Star, may be with an intention to cool down the atmosphere and the Commanding Officer Lt Col K.M.G. Pannikar who had actually taken a decision to retain four electronic items in question has not been prosecuted.

84. All the officers who were directly involved, including officer from whose house electronic items were recovered, were not tried though intention of whole Unit was common i.e. to retain the items in question as souvenir. Those who actually took the decision to retain the items as souvenir have been promoted to higher rank and enjoyed higher status and rank of army service and a person who has worked hard with appreciation in his service career, recommendee of Ashok Chakra, suffered because of no fault. Whether it is fate or something else, a question, which crops up in our mind but we may not able to reply, but compensate the petitioner for the loss and mental agony he suffered for the last three decades. He suffered because of arbitrary and vexatious trial and punishment thereon resulted into loss of his promotional avenues in service, mental pain and agony.

Cost

85. Hon'ble Supreme Court in the case of ***Ramrameshwari Devi and others V. Nirmala Devi and others***, (2011) 8 SCC 249 has given emphasis to compensate

the litigants who have been forced to enter litigation. This view has further been rendered by Hon'ble Supreme Court in the case reported in ***A. Shanmugam V. Ariya Kshetriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam represented by its President and others***, (2012) 6 SCC 430. In the case of ***A. Shanmugam*** (supra) Hon'ble the Supreme considered a catena of earlier judgments for forming opinion with regard to payment of cost; these are:

1. ***Indian Council for Enviro-Legal Action V. Union of India***, (2011) 8 SCC 161;
2. ***Ram Krishna Verma V. State of U.P.***, (1992) 2 SCC 620;
3. ***Kavita Trehan V. Balsara Hygiene Products Ltd.*** (1994) 5 SCC 380;
4. ***Marshall Sons & CO. (I) Ltd. V. Sahi Oretrans (P) Ltd.***, (1999) 2 SCC 325;
5. ***Padmawati V. Harijan Sewak Sangh***, (2008) 154 DLT 411;
6. ***South Eastern Coalfields Ltd. V. State of M.P.***, (2003) 8 SCC 648;
7. ***Safar Khan V. Board of Revenue***, 1984 (supp) SCC 505;
8. ***Ramrameshwari Devi and others*** (supra).

In the case of ***South Eastern Coalfields Ltd*** (supra), the apex Court while dealing with the question held as under :

"28. ...Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by

swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation”.

86. In the case of **Amarjeet Singh V. Devi Ratan**, (2010) 1 SCC 417 the Supreme Court held as under :-

“17. No litigant can derive any benefit from mere pendency of case in a court of law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrongs by getting an interim order and thereafter blame the court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim actus curiae neminem gravabit, which means the act of the court shall prejudice no one, becomes applicable in such a case. In such a fact situation the court is under an obligation to undo the wrong done to a party by the act of the court. Thus, any undeserved or unfair advantage gained by a party involving the jurisdiction of the court must be neutralized, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court”.

87. The question of award of cost is meant to compensate a party who has been compelled to enter litigation unnecessarily for no fault on its part. The purpose is not only

to compensate a litigant but also to caution the authorities to work in a just and fair manner in accordance to law. The case of ***Ramrameshwari Devi and others*** (supra) rules that it the party who is litigating, is to be compensated.

88. In the case of ***Centre for Public Interest Litigation and others V. Union of India and others***, (2012) 3 SCC 1, the Hon'ble Supreme Court after considering the entire facts and circumstances and keeping in view the public interest, while allowing the petition, directed the respondents No 2, 3 and 9 to pay a cost of Rs. 5 crores each and further directed respondents No 4, 6, 7 and 10 to pay a cost of Rs. 50 lakhs each, out of which 50% was payable to the Supreme Court Legal Services Committee for being used for providing legal aid to poor and indigent litigants and the remaining 50% was directed to be deposited in the funds created for Resettlement and Welfare Schemes of the Ministry of Defence.

89. Since we have held that the trial under Section 84 was not only without jurisdiction but also was not in conformity with the law and even if it was within jurisdiction then based on unfounded facts on account of total lack of evidence, hence the trial and punishment vitiates and the petitioner is entitled for relief and we propose to set aside the punishment of severe reprimand. Accordingly, T.A. 15 of 2014 deserves to be allowed since petitioner's promotional avenues to the substantive rank of Lt Col (Time Scale) was withheld and the

petitioner was superseded in 1990 because of impugned punishment (supra) by his batch mate. Consequently, T.A. No. 1368 of 2010 is also liable to be allowed with cost, which is filed by the petitioner for promotion to the substantive rank of Lt Col (Time Scale) with effect from the date his junior was promoted to the said post.

90. Question pricks our mind why the petitioner was punished with severe reprimand in spite of no misconduct or crime committed by him? Is it act of God or act of man ?

Lord Westbury defined the act of God (damnum fatale in Scotch Laws) as an occurrence which no human foresight can provide against and of which human prudence is not bound to recognize the possibility. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort".

However, we feel that the heat of Operation Blue Star resulted into quick action against some persons, including the petitioner without application of mind and verification of genuineness of allegations. In case the petitioner is believed, then he was a person who was recommended for 'Ashok Chakra' because of his bravery but later on suffered on account of arbitrary action on the part of respondents to cool down the heat. A man made situation, intended to cause damage to personal life, liberty, dignity, status and rank must sternly be dealt with by judicial process, more so when it spoils the whole career of an officer. Our Swadharma doctrine since ages, in English has been translated by Sir Edwin Arnold, to quote:-

The Swadharma doctrine can be summarized in following two lines:-

***"Do thy duty, that is best,
Leave with God all the rest !"
Or, in the words of the Gita,
"Find full reward
Of doing right in right ! Let right deeds be
Thy motive, not the fruit which comes from
them.
And live in action ! Labour ! Make thine acts
Thy piety, casting all self aside,
Contemning gain and merit; equable
In good or evil; equability
Is Yoga, is piety !"***

91. The judicial review of an state action is divine task given to judicial fraternity by Almighty God and that should not succumb to any pressure. Hence it shall be appropriate to allow the petitions with cost, which is quantified to Rs.10,00,000/- (rupees ten lacs only) by directing the respondents to give notional promotion to the petitioner to the substantive rank of Lt Col (Time Scale) along with his batch mates with all consequential benefits, including rercalculated salary and post retiral dues of the rank of Lt Col.

ORDER

Both the petitions are allowed with the following directions :-

- (1) T.A. No. 15 of 2014 is **allowed**. The order of punishment of reprimand awarded to the petitioner on account of alleged misconduct, order dated 03.08.1989, passed by the Central Government

rejecting the complaint of the petitioner, contained in Annexure No. V to the petition and also the order dated 02.12.1988, passed by the General Officer Commanding, 15, Infantry Division rejecting the complaint of the petitioner are set aside with all consequential benefits.

- (2) T.A. No.1368 of 2010 is also **allowed**. The order passed by the Chief of the Army Staff refusing to grant substantive rank of Lt Col by time scale to the petitioner and all other orders and directions whereby the petitioner has been deprived from promotional avenues of the substantive rank of Lt Col by time scale, are set aside.
- (3) The respondents shall promote the petitioner notionally on the substantive rank of Lt Col (Time Scale) along with his batch mates for the purpose of payment of arrears of salary and post retiral dues, pension and other benefits in accordance with rules.
- (4) The petitioner shall be deemed to have been retired from service on the substantive rank of Lt Col (Time Scale), at the age of 51 years, after completing required period of service for the purpose of payment of arrears of salary and post retiral dues and for all other consequential benefits.
- (5) The consequential benefits shall be paid to the petitioner expeditiously, say, within a period of four

months from today. The order shall be communicated to the respondents, forthwith by JAG Branch.

- (6) The cost, which is quantified to Rs.10,00,000/- (rupees ten lacs only) shall be deposited within four months and shall be released to the petitioner through cheque by the Registry.

T.A. **allowed** accordingly.

(Air Marshal Anil Chopra)
Member (A)

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

Dated: August 11, 2017
JPT

