A.F.R.
RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

T.A. No. 34 of 2010

Wednesday, the 09th day of August, 2017

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

Vinay Kumar son of Shri Paran Nath Shukal, resident of Village and Post Ghancha, Pargana Diksir, Tehsil Tarakganj, District Gonda (presently residing at Mohalla Pahalwan Bir, Nawabganj, Kasba Nawabganj, Tehsil Tarakganj, District Gonda).

….Petitioner

By Legal Practioner **Shri S.P. Singh**, Learned counsel for the petitioner.

Versus

1. Union of India through the Secretary to the Government of India, Ministry of Defence, New Delhi.

2. The Chief of the Army Staff, Indian Army, Army Headquarters, New Delhi-110011.

3. General Commanding Officer-in-Chief, Madhya Command Headquarters, Lucknow.

4. Commanding Officer, 17 Guards (ATGM), C/O 56 A.P.O.

5. Commanding Officer, Record Office, Brigade of the Guards, Regimental Centre Kamptee-441001.

6. Lt Col Jarnail Singh, 17 Guards ATGM, C/O 56 APO.

…Respondents

By **Shri Asheesh Agnihotri**, Learned Central Govt Counsel assisted by Maj Salen Xaxa,OIC Legal Cell.

ORDER

Per Justice D.P. Singh, Member 'J'

1. We have heard Shri S.P.Singh, learned counsel for the petitioner and Shri Asheesh Agnihotri, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the record.

2. Notice was sent to respondent No. 6, but he did not turn up despite service of notice. The service of notice on respondent No. 6 seems to be an admitted fact since the Registry has received the own letter of respondent No. 6 indicating his personal problems, viz he is aged 72 years, living all alone, his wife expired, his two sons living abroad and his eyes watering all the time, and certain other infirmities. The said letter of respondent No. 6 is on record. Once a notice has been served and accepted by respondent No. 6, then it was incumbent on him to engage a counsel or appear in person to defend his case. Moreover, for reasons best known to him, the respondent No. 6 has not put in appearance despite service of notice, hence we proceeded to hear the matter *ex parte* against him.

3. Being aggrieved with the impugned order of discharge in pursuance to District Court Martial (DCM) proceedings and denial of pensionary benefits, the petitioner preferred a writ petition bearing No. 3833 (S/S) of 2003, which has been transferred to this Tribunal and now registered as T.A.No. 34 of 2010.

4. The petitioner was recruited on 12.06.1984 and appointed in 17 Guards ATGM on 15.08.1985 after completion of due requisite

training. On 25.02.1991, the petitioner met with an accident at Chandigarh Kalka Road. He was admitted in Command Hospital (Western Command) Chandi Mandir and in terms of medical opinion, he was downgraded to Medical Category CEE (temporarily), in consequence whereof he was detailed as Sahayak to the then Major (Now Lt Colonel (TS) Jarnail Singh.

5. On 08.11.1991, the petitioner addressed a complaint to Col Ajay Kumar Pahwa, the then Commanding Officer of the Regiment, alleging that on 01.06.1990 and 01.12.1990, he had given a loan of Rs.3,000/- and Rs. 9,000/- respectively (Total Rs. 12,000/-) to Maj Jarnail Singh, who later on refused to return the same. It may be noted here that before submitting the said report in writing, on receipt of oral information, the Commanding Officer had interviewed the petitioner in the presence of the then Company Commander Major I.B.Bhasin, where the petitioner had verbally raised his grievance with regard to non-refund of the aforesaid amount of loan by Maj Jarnail Singh. Based on his complaint dated 08.11.1991, Col AK Pahwa ordered a unit Court of Inquiry in the month of November, 1991 which was finalized and subsequently, a staff Court of Inquiry in the said case was ordered based on the aforesaid complaint, report of which was sent to the General Officer Commanding 11 Corps by the petitioner. The Staff Court of Inquiry was finalised in the month of June, 1992, pursuant to which the General Officer Commanding ordered to initiate disciplinary action against the petitioner and accordingly, the petitioner was attached to 48 Air Defence Regiment in February, 1993, where he

was tried by the DCM from 18th April to 2nd June, 1994. The DCM found the petitioner guilty of making false accusations against Major Jarnail Singh and violating Army discipline and accordingly sentenced him to one year RI with dismissal from service subject to confirmation by the confirming authority. It appears that the petitioner was immediately taken into custody to serve out the sentence awarded to him. The confirming authority, however, on confirmation remitted the unexpired period of RI but allowed the dismissal to stay on record.

6. Being aggrieved with the impugned order of punishment confirmed by the confirming authority, a CWP bearing No.7960 of 1994 was preferred by the petitioner in Punjab and Haryana High Court, which was finally decided by the Hon'ble Court vide its order dated 15.11.1994. The relevant portion of the observations made by the Punjab and Haryana High Court as reproduced in para 11 of the counter affidavit is reproduced as under:-

> *"Keeping in view the peculiar facts of this case, as emerged from the pleadings of the parties and the records produced by the respondents, we are of the view that till the petition under Section 164(2) is decided, the petitioner would be entitled to the salary and other benefits as if he is continuing in service in the same rank from which he was dismissed. It will be open to the respondents to decide and assign him duties. If respondents decide to assign him duties, the petitioner would be entitled to accommodation in accordance with the rules. In case they do not assign duties, the petitioner would be entitled to salary and other benefits arising out of service as are admissible to other members of the force. A regular identity card may not be issued to the petitioner, but any other authorization may be issued to entitle him to draw various articles from the canteen according to his entitlement."*

7. In pursuance to the order (supra) passed by the Punjab and Haryana High Court, the petitioner filed a post confirmation petition dated 22.11.1994 under Section 164(2) of the Army Act. The Central Government, vide its order dated 05.09.1995, modified the order of dismissal to discharge from service with effect from the date of dismissal. A copy of the said order dated 05.09.1995 has been Annexure-1 to the writ petition. The relevant portion of the said order is reproduced as under:

> *".....the Central Govt has considered the aforesaid petition and after due consideration of all the issues raised therein, has remitted the sentence of dismissal from service awarded by the District Court Martial. The Central Govt further directs that you will be deemed to have been discharged from service with effect from the date your dismissal became effective. Your petition is rejected for all other purposes."*

8. However, since, according to the respondents, the petitioner had not completed minimum qualifying service of 15 years in accordance to Para 132 of Pension Regulations for the Army Part I, 1961, they declined to pay pension to the petitioner with effect from 05.09.1995, as averred in Para 15 of the counter affidavit. Being aggrieved, the petitioner filed a Contempt Petition No. 35 of 2000 in Punjab and Haryana High Court on account of alleged violation of order dated 15.11.1994. It is evident from the order of Punjab and Haryana High Court that the Hon'ble High Court had directed the respondents to

assign duty alongwith accommodation in accordance to rules with all consequential benefits. Accordingly, the petitioner should have been allowed to continue in service on 05.09.1995 with salary, but the same was not done. The Punjab and Haryana High Court initially issued notice to the Commanding Officer. However, later on, the said contempt petition was dismissed as withdrawn by the Hon'ble Court vide its order dated 31.10.2002.

9. It appears that the petitioner filed another writ petition bearing No.7292 (S/S) in Lucknow Bench of the Allahabad High Court, which was later on dismissed as withdrawn. In the said writ petition, the petitioner claimed service pension, gratuity and disability pension, etc. It is stated in the counter affidavit that since the petitioner was discharged on 05.09.1995, he was not entitled for pension on account of non-completion of qualified service of 15 years.

10. Subject to aforesaid backdrop, learned counsel for the petitioner has submitted that the impugned order dated 05.09.1995 is an order passed by the Government of India in appellate jurisdiction, that too was served on the petitioner on 21.10.2002 during the course of contempt proceedings before the Punjab and Haryana High Court.

11. It is also vehemently argued by learned counsel for the petitioner that a copy of the order dated 05.09.1995 was received by him on 25.11.2002. According to him, the discharge shall be deemed to take effect from the date of its communication in view of the law settled by the Apex Court in the case of '*State of Punjab versus Amar Singh*

Harika', reported in **AIR 1966 SC 1313**. It is also submitted that the order of Punjab and Haryana High Court (supra) was complied with only when the High Court had shown displeasure towards non-compliance and intended to frame charges of contempt against the respondents in contempt proceedings.

12. During the course of arguments, we had directed the respondents to place before us the original record, but an affidavit has been filed by the respondents coupled with oral statement at Bar, as is obvious from the order-sheet, that the records have been weeded out. While filing the counter affidavit, the respondents had not disclosed the date of the order of punishment awarded by DCM as well as compliance of Army Rule 180 during the Court of Inquiry. Since the respondent No. 6 did not put in his appearance in spite of service of notice, though he seems to be a serving officer, and information would have also been communicated to him by JAG Branch with regard to the pendency of the present case, we failed to get his version with respect to the defence set up by the petitioner.

13. Learned counsel for the petitioner has submitted that a false case was manufactured against the petitioner since he raised his voice against the high-handedness on the part of superior officers. His submission is that with a view to save their faces, the officers colluded and cooked up a cock and bull story against the petitioner, who was serving the nation as lowest rung of the India Army. He further submits

that the material on record proves beyond doubt that an amount of Rs.12000/- as loan was given by the petitioner to respondent No. 6.

In the absence of non-availability of record, we are dealing with the controversy in question under different heads, as follows:

CHARGES

14. Charges were framed against the petitioner on 17.03.1994 by the Commanding Officer Col Kanwar Lal. A copy of the charge-sheet is on record as Annexure-11 to the petition. For convenience, the same is reproduced as under:

"CHARGE SHEET

The accused, No 13686872P Gdsm Vinai Kumar of 17th Battalion, the Brigade of the Guards Regiment (ATGM) attached to 48 Air Defence Regiment, is charged with:-

Section 56 (a) *MAKING A FALSE ACCUSATION AGAINST A PERSON SUBJECT TO ARMY ACT KNOWING SUCH ACCUSATION TO BE FALSE,*

in that he,

at Field, on 08 Nov 91, in a complaint addressed to Col AK Pahwa, Commanding Officer 17 Guards (ATGM), accused that he had on 01 Jun 90, loaned Rs 3,000/- (Rupees three thousand only) and on 01 Dec 90 loaned Rs 9,000/- (Rupees nine thousand only), making a total of Rs 12,000/- (Rupees twelve thousand only), to Maj Jarnail Singh but when asked to return the loaned money, Maj Jarnail Singh refused to return the same or words to that effect, well knowing the said

accusation to be false."

Station: Ambala Cantt
Dated: 17 Mar 94

Sd/- Illegible
(Kanwar Lal)
Commanding Officer,
48 Air Defence Regiment.

"To be tried by a District Court Martial"

Station: Dholewal
Dated: 18 Mar 94

Sd/- Illegible
(VD Nishandar)
Brigadier
Commander,
715, (Independent)
Air Defence Brigade."

15. A plain reading of the charge-sheet dated 17.03.1994 framed by the Commanding Officer, with direction for a District Court Martial shows that the allegation against the petitioner is that he had raised a false allegation against Maj Jarnal Singh with regard to payment of loan followed by denial on his part to return the same. The petitioner was accordingly tried for an offence alleged to have been committed by him under Section 56 (a) of the Army Act read with Regulation 337 of the Regulations for the Army. For convenience, Section 56 (a) of the Army Act is reproduced as under:-

> *"56.* ***False accusations****. Any person subject to this Act who commits any of the following offences, that is to say,-*
>
> *(a) makes a false accusation against any person subject to this Act, knowing or having reason to believe such accusation to be false." or*
>
> *(b) in making a complaint under section 26 or section 27 makes any statement affecting the character of any person subject to this Act, knowing or having reason to believe such statement to be false or knowingly and wilfully suppresses any material facts; shall, on conviction by court- martial be liable to suffer imprisonment for a*

term which may extend to five years or such less punishment as is in this Act mentioned."

16. It is apparent from a plain reading of the provisions contained in Section 56(a) of the Army Act that allegation of false accusation is required to be proved. The accusation must be based on facts, which are known to be false. It must be proved that the person charged of this offence was knowing or having reason to believe such accusation to be false. In the present case, no finding has been recorded nor any material has been produced before the Tribunal to indicate that the petitioner had not lent Rs.12000/- to respondent No. 6 Maj Jarnail Singh and that the petitioner made accusation knowingly or having reason to believe such accusation to be false; rather, as is evident from the record, the petitioner did lend Rs.12000/- to respondent No. 6, which fact is also proved from the statement of Lt Col NKD Soni, who was examined during DCM proceedings. *Ex facie* the charge framed against the petitioner was based on unfounded facts.

17. Apart from above, Regulation 337 of the Regulations for the Army imposes restriction on borrowing and lending of money by Army personnel. For convenience, Regulation 337 is reproduced as under:

***"337. Borrowing and Lending Money**-No officer, JCO, WO or OR will lend or borrow money to or from any person belonging to the Forces or any regimental institutions run by civilian contractors or engage in any transaction whereby he will become in a private capacity a debtor or a creditor to any person belonging to the Forces or the civilian contractor. However, in exceptional cases where the borrowing or lending takes place*

between real blood relations or between spouses it may be permitted with the prior sanction of Army Commander in respect of officers and Div Commander in respect of others. Sanction in respect of Officers, JCOs, WOs and OR not serving under an Army Commander will be granted by Adjutant General, Army Head quarters.

Officers are warned against extravagance and money lenders. An officer, JCO, WO or OR who takes a legitimate loan from a bank or any other agency is obliged to repay it as per the terms and conditions laid down in the loan contract within the stipulated period."

18. A plain reading of the aforesaid regulation shows that not only the person, who lends money but also the person who borrows it, should be tried and punished for violation of restrictions imposed under the said Regulation. No action seems to have been taken against respondent No. 6 in spite of the complaint submitted by the petitioner. It shows that a catena of officers was involved to defend the prestige of one of their colleagues, who though had borrowed the money, but did not refund it. This is a sorry state of affairs with regard to abuse of the provisions of law, where a soldier (petitioner), the lowest rung of Indian Army, has been punished levelling false charges against him.

WEEDING OF RECORDS

19. From the material on record, it appears that the petitioner has been continuously pursuing his matter right from the date of pronouncement of judgment in his case by the Punjab and Haryana High Court. First, he approached the Punjab and Haryana High Court, then filed a contempt petition there and thereafter filed a writ petition in Lucknow Bench of the Allahabad High Court, which is now before us

as TA for adjudication. This petition seems to have been filed on 07.07.2003. Counter affidavit was filed by the respondents on 19.07.2004 after serving a copy thereof on the petitioner's counsel. The matter has thus remained *sub judice* throughout, first in Punjab and Haryana High Court, then in Allahabad High Court and now before this Tribunal. In the circumstances, there was no justification on the part of the respondents to weed out the record. In none of their affidavits i.e. counter affidavit and supplementary counter affidavits, the respondents have stated that the records have been weeded out. The record seems to have been weeded out on 18.01.2011, as is evident from the certificate dated 17.04.2012.

20. Learned counsel for the petitioner has invited our attention to a decision of this Tribunal dated 02.03.2016 in **TA No.39 of 2012,** *Selina John versus Union of India and others*, wherein we have considered the provisions of Army Regulations relating to weeding out of record. For convenience, Para 32 of the said judgment is reproduced as under:

> "32. Attention has been invited to Regulations 592 to 596 (ii) of Regulations for Army, which under the head 'Retention And Destruction Of Documents' provides the conditions under which a document may be destroyed. Regulation 592 of the Regulations seems to be relevant and for convenience sake is reproduced as under:-
>
> *"592.* ***Disposal Of Obsolete Documents. –****(a) A board will be assembled annually in every unit and formation office for the purpose of recommending documents for destruction. The board will as far as possible be composed of three officers, but a JCO, WO or Senior NCO with an intimate knowledge of the records*

may be detailed as a member. All documents coming within the scope for destruction will first be examined by a competent official of the office concerned, who will withdraw for preservation any documents or files containing matter likely to be of value. The recommendations of the board will be submitted on IAFY-2001 to the brigade/sub-area commander or in the case of higher formations, services or departments not under a brigade/sub-area commander to the commander of the higher formation or head of department concerned. The officer to whom IAFY-2001 is submitted will issue orders regarding the disposal of the documents, ensuring that no documents are destroyed with may be of interest from a historical, financial, statistical, instructional, technical, legal or general point of view. The following classes of documents will always be preserved:-

(i) Papers containing decisions on important matters or departmental policy.

(ii) Maps and plans relation to operations.

(iii) Operation Orders.

(iv) War Diaries.

(v) Regimental Long Roll.

Files relating to purchase transactions will be retained for a minimum of five years or more if considered necessary. Before such files are destroyed, orders of the senior officer of the status of GSO 1 or equivalent will always be obtained.

NOTE

In addition the procedure outlines in the pamphlet "Classification and Handling of Classified Documents" will be followed regarding the destruction of classified documents.

(b) The period for which documents relating to disciplinary cases will be preserved is an under:-

(i)	*Discipline-Policy*	*Permanent*
(ii)	*Legal & Judicial*	*do*
(iii)	*Applicability of Arms Act-Policy*	*do*
(iv)	*Court-Martial-General & Policy*	*do*
(v)	*Conduct of civil suits-General and Policy*	*do*
(vi)	*SCM Proceedings*	*3 years*

(vii)	*Administrative action under the Army Act and Rules-Individual cases*	*10 years*
(viii)	*Arms and Amn-Losses, Disciplinary cases*	*do*
(ix)	*Plural Marriage*	
	(aa) Policy	*Permanently*
	(ab) Individual cases	*10 years*
(x)	*Appeals under Section 26 and 27 of the Army Act*	*5 years*
(xi)	*Delegation of Power*	*5 years*
(xii)	*Periodical Reports and Returns*	*10 years*
(xiii)	*Penal Recoveries*	*10 years*
(xiv)	*Regimental & Private debts-Officers, JCOs & OR*	*5 years*
(xv)	*Complaints against Officers, JCOs & OR-Vigilance cases*	*5 years*
(xvi)	*Civil Suits-Individual cases*	*10 years*
(xvii)	*Courts of inquiry proceedings Relating to MT accidents not subject Matter of litigation*	*10 years"*

21. A plain reading of Regulation 592 of the Regulations for the Army shows that no document shall be destroyed which may be of interest from historical, statistical, instrumental, technical, legal or general point of view as well as legal and judicial conduct of suit. After referring to the aforesaid statutory provision in the decision (supra), we had considered the pronouncements of Hon'ble Supreme Court on the effect of non-production of record as under:

> *"35. Hon'ble Supreme Court in the case reported in* ***State, Inspector of Police vs. Surya Sankaram Karri,*** *2006 AIR SCW 4576 held that a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the Court of Law, fails and/or neglect to produce the same, an adverse inference may be drawn against him. The law*

gives exclusive discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-à-vis the facts of the particular case. The discretion conferred by Section 114 of the Evidence Act is an inference of a certain fact drawn from other proved facts. The Court applies the process of intelligent reasoning which the mind of a prudent man would do under similar circumstances unless rebutted.

36. Hon'ble Supreme Court in the case reported in ***Ram Das vs. State of Maharashtra*** *AIR 1977 SC 164 reiterated the well settled proposition of law that in the event of non-production of document, adverse inference may be drawn against the failing party. Similar view has been expressed by Orissa and Patna High Courts in the cases reported in* ***Ridhi Karan Ramadhin vs. French Motor Car Co. Ltd.****, AIR 1955 Orissa 60 and* ***Devij Shivji vs. Mohanlal Thacker****, AIR 1960 Patna 223 as well as Calcutta High Court in the case reported in* ***Burn and Co. vs. State,*** *AIR 1976 Cal 389. The Orissa, Patna and Calcutta High Courts constantly held that non production of best illus or withholding of material documents may make out a case to draw adverse inference.*

37. What prompted the respondents, or the authorities concerned, to weed out the record may be inferred from the material on record, i.e. to save their neck, since the order of release from Army seems to be per se bad and not sustainable and power has been exercised without jurisdiction. Burden was on the respondents to establish genuineness of weeding out the

record during pendency of the Writ Petition which they have failed to do (Vide AIR 2006 SCW 6155 ***B. Venkatamuni vs. C.J., Ayodhya Ram Singh)***

38. Presumption of bona fide by the respondents seems to be frustrated because of weeding out of record during pendency of the Writ Petition in the High Court; that too after filing counter affidavit. Allahabad High Court in the case reported in 1991 All. LJ 930, ***Harish Chand vs. State of U.P.****, has held that non-production of documentary evidence in case it could be and was bound to be available, would give rise to adverse presumption that if it was produced, it would have been derogatory for the case of the prosecution."*

22. In the case of *'Union of India and another versus Ex Major Sudershan Gupta*', reported in **(2009) 6 SCC 298,** the Hon'ble Supreme Court has upheld the order of the Delhi High Court. While confirming the order of Delhi High Court, the Apex Court directed to pay all consequential benefits within three months after due compliance of the order passed by the High Court. In the present case, since last about four years, we have been summoning the record and giving opportunity to the respondents to produce the same before us, and it is at belated stage that they have come forward with the plea that the record has been weeded out. It is noteworthy that though the counter affidavit was filed by the respondents long back in the year 2003 in the High Court, but there is no whisper of the incidence of weeding out of record on 18.01.2011.

23. In view of what has been observed above, we have no hesitation to hold that the weeding out of the record is a serious negligence on the part of the respondents or an intentional *modus operandi* to conceal the material facts from the Tribunal. The action on the part of the respondents does not seem to be *bona fide.* It appears to be a deliberate act committed by the respondents or the concerned authorities for extraneous reasons, hence an adverse presumption may be drawn (Section 114 of the Evidence Act) to the effect that the petitioner was dismissed/discharged without following the procedure prescribed by law, which vitiates the trial and punishment.

SERVICE OF ORDER OF PUNISHMENT

24. The material on record shows that in pursuance to DCM, the petitioner was punished with rigorous imprisonment for one year and dismissal from service. The order seems to be not served on the petitioner. According to the petitioner's counsel, the dismissal order was passed on 02.06.1994. Thereafter the petitioner preferred a post-confirmation petition to the Government of India. The Government of India rejected the said petition/appeal vide order dated 05.09.1995, copy of which has been filed as Annexure-1 to the petition. No order was communicated to the petitioner in pursuance to the provisions contained in Section 23 of the Army Act nor a certificate in respect thereof was provided to the petitioner. Thus, according to the learned counsel for the petitioner, the order of punishment dated 05.09.1995 was not served. It was during the course of hearing of the contempt

petition before the Punjab and Haryana High Court that the Hon'ble High Court vide its judgment and order dated 31.10.2002 while dismissing the contempt petition as withdrawn in terms of the undertaking given, directed the respondents to provide a copy of the order dated 05.09.1995 though with a clarification that nothing observed in the order shall amount to acceptance of the claim of the petitioner and left this issue open to be decided in subsequent proceedings. The said order dated 31.10.2002 passed by the Punjab and Haryana High Court in contempt proceedings is reproduced as under:

"COCP 35/2001

Counsel for the petitioner has expressed his inability to file the affidavit as directed by me in my order dated 26.9.2002. He, however, states that he would be satisfied if a copy of letter dated 5.9.1995 referred to in Annexure R-1 is supplied to him to enable the petitioner to take appropriate action on accordance with law. Counsel for the respondents undertakes to supply him a copy today itself.

In view of the above, counsel for the petitioner prays that he be allowed to withdraw this petition with liberty to challenge the letter dated 5.9.1995 in accordance with law. Allowed to do so with liberty as prayed for. However, it is clarified that nothing observed herein shall amount to acceptance of the claim of the petitioner that he had never received the letter dated 12.9.1995 alongwith letter dated 5.9.1995.

Dismissed as withdrawn.

31.10.2002 *Sd.- N.K.Sud*
Judge"

25. Learned counsel for the petitioner has further invited our attention to supplementary rejoinder affidavit dated 02.08.2010, which states about the defence set up and reply given by the petitioner with regard to communication of the order dated 05.09.1995. The relevant portion of the same is reproduced as under:

> *"Thereafter, the opposite parties again filed a supplementary counter affidavit sworn by Capt. Sanjay Hajara against the amendment application filed by the deponent and tried to supplement their false stand that the order dated 05.09.1995, has been duly communicated to him. In paragraph-7 of the supplementary counter affidavit, it has been stated that '**as there is no proof of dispatch of Registered letter available because as per Para 592 to 596 of Regulations for the Army 1987 (Revised) the same has been destroyed after a stipulated period'** now in the present supplementary counter affidavit, they have come with a stand that the letter, dated 05.09.1995 addressed directly to the deponent, but, failed to explain whether it has been sent to his residential address or forwarded to the 131 AD Regiment, where he was attached till 02.08.1997 and also paid salary."*

26. From the aforesaid undisputed pleadings on record contained in supplementary rejoinder affidavit of the petitioner as well as supplementary counter affidavit of the respondents, it is apparent that the respondents do not have any material to establish that copy of the order dated 05.09.1995 was ever dispatched or served on the petitioner. As we have held supra, weeding out of record was not

understandable on account of pendency of the cases before the Courts, hence the defence set up by the respondents and their commission and omission with regard to service of order dated 05.09.1995 on the petitioner seems to be an after-thought. Section 23 of the Army Act makes it mandatory to serve the order of dismissal or discharge. For convenience, Section 23 of the Army Act is reproduced as under:

> *"**23. Certificate on termination of service**. Every junior commissioned officer, warrant officer, or enrolled person who is dismissed, removed, discharged, retired or released from the service shall be furnished by his commanding officer with a certificate, in the language which is the mother tongue of such person and also in the English language setting forth-*
>
> *(a) the authority terminating his service*
>
> *(b) the cause for such termination; and*
>
> *(c) the full period of his service in the regular Army."*

27. Otherwise also, it is trite law that the order of dismissal or discharge shall not take effect unless the officer/official concerned knows about the said order. The case relied upon by petitioner's counsel i.e. *AIR 1996 SC 1313*, **State of Punjab versus Amar Singh Harika,** seems to squarely cover the whole controversy. For convenience, para 14 of the said judgment is reproduced as under:

> *"(14) Then, as to the reasonable opportunity guaranteed by S. 14 (2) of the Ordinance, it is clear that a copy of the report made against him has not been supplied to the*

respondent, and even when he was heard before the order of dismissal was passed against him, he had no means of knowing what grounds had weighed with the enquiry committee when it made a report against him. Having regard to the procedure adopted by the State authorities in appointing the enquiry committee, in formulating the questionnaire containing the charges against the respondent, in making the report, and in dealing with the recommendations made by the Chief Secretary from time to time, we are satisfied that High Court was right in coming to the conclusion that the respondent had not received a reasonable opportunity to make his defence, and, that the proceedings of the enquiry and the report made by the committee, as well as the final order of dismissal passed against the respondent, have contravened the safeguards guaranteed by S. 14(2) of the Ordinance."

28. In the present case, so far as the petitioner is concerned, the case set up by him that he was never communicated or served with the impugned order dated 05.09.1995 and it was only during the contempt proceedings against the respondents in Punjab and Haryana High Court that he could know about such an order, seems to be correct. The respondents have not drawn our attention to any pleading or material on record to indicate as to when the impugned order dated 05.09.1995, as contained in Annexure-1 to the petition, was served on the petitioner. The photocopy of the order filed alongwith the petition does not indicate the mode of service, if at all, on the petitioner. Counter affidavit was filed on 19.07.2004 and it was taken on record after condoning the delay. The record is alleged to

have been weeded out in 2011 (supra). For decades, though a number of affidavits were filed by the respondents, they have not disclosed the manner, mode and date of service of the impugned order dated 05.09.1995 on the petitioner. In the circumstances, we have no option except to form an opinion with inferential process that the impugned order dated 05.09.1995 was handed over to the petitioner during contempt proceedings in Punjab and Haryana High Court on 31.10.2002. Further, failure on the part of the respondents to issue discharge certificate in terms of statutory mandate contained in Section 23 of the Army Act (supra) is fatal and vitiates the order. Accordingly, the order of dismissal/discharge shall be deemed to take effect on 31.10.2002 vide Apex Court judgment (supra).

LOAN

29. The foundation of entire controversy in the present case is the loan of Rs.12000/- alleged to have been advanced by the petitioner to respondent No. 6 Maj Jarnail Singh. From the defence set up by the petitioner and detailed in post-confirmation petition, it appears that because of excessive drinking habit and extravagance, the respondent No. 6 Maj Jarnail Singh was suffering from financial crisis, hence he had obtained loan of Rs.12000/- from the petitioner. In post confirmation petition, while inviting attention to bank account of respondent No. 6 as well as during trial, the petitioner seems to have established the aforesaid fact from continuous debit entries in the account from 1990. From the material on record, it may be inferred

that loan was taken by respondent No. 6. For convenience, it would be appropriate to reproduce the relevant portion of the defence set up by the petitioner and pleaded before the Central Government while submitting post-confirmation petition. To quote relevant portion-

> *"17. That, due to excessive drinking habits and extravagance the financial position of Major Jarnail Singh was in shambles. His saving bank account (Exhibit JJ to JJ-6) brought on record and entries at page 144 of the proceedings showed continuous debit entries during 1990. He was fully exposed at the trial about his shaky financial status against his bald claim of financial soundness and extra sources of income for which he failed to show any proof. To tide over his requirements vis-a-vis his salary, he depended mainly on the money of his Sahayaks to run his household. Lance Naik Ram Surat (DW-2) used to spend about Rs. 400/- to 500/- per month for the same. In August, 1989 Major Jarnail Singh took Rs. 4000/-of his (DW-2) Provident Fund and returned by a cheque only in October, 1989 when DW-2 threatened him of exposure in the unit. Thereafter, he got him posted out of the Unit.*
>
> *18. That the petitioner who became his next Sahayak from October, 1989 to February, 1991, also used to spend money from his own pocket to run the household expenses of Maj Jarnail Singh. This was confirmed by Sepoy Arjun Singh (DW-5) who used to be present at his residence as additional Sahayak. On 01.6.1990 Major Jarnail Singh, after disbursing the salary of Rs. 8000/- himself to the petitioner, took the same as a loan from him on the plea that he had to clear his dues, pay to a civil truck owner and shift his family from Mirthal*

to Chandimandir. Major Jarnail Singh kept on making tall promise of early return of loan when the petitioner proceeded on leave from 15 October 1990 to 04 December 1990 (Exhibit LL). In the meantime, Major Jarnail Singh received an information that his guests would be arriving from Canada on 30.11.1990 and his sister-in-law to be engaged. For this he needed extra financial help. Therefore, he wrote a letter to the petitioner asking him to rejoin duty immediately. This letter was posted by Sepoy Aurjun Singh (DW-5). Accordingly, the petitioner reached Chandimandir on 12.11.1990 and met Major Jarnail Singh at his residence. Major Jarnail Singh asked the petitioner to arrange approximately Rs. 10,000/- for ibid purpose. When the petitioner showed his inability, he suggested him to put up a withdrawal application from his Provident Fund. Accordingly, the petitioner put up an application on 12.11.1990 for withdrawal of Rs. 9,000/- only, the maximum permissible amount, through the concerned clerk named Lance Naik Kapil Dev Prasad (DW-8). Major Jarnail Singh disclosed to DW-6 that he required that money for himself and that the require sanction from the paying authority at Kamplee was required urgently but well before 01 December 1990. Not a single suggestion was put to him in cross-examination on this aspect by the prosecution. Hence the same is absolutely true. Major Jarnail Singh got the application approved from Colonel AK Pahwa (PW-1) personally and sent it by hand to Kamplee through Naik Satbir Singh (not examined) who was proceeding on retirement (Exhibit-NN) with a Demi Official Letter for early release of funds. The same was duly received back and on 01 December 1990 the petitioner was paid Rs.9,000/-. He took this money to the

residence of Major Jarnail Singh, went upstairs and gave Rs. 9000/- to him as a loan. The petitioner was seen going upstairs with money by Sepoy Arjun Singh (DW-5).

19. That, during the course of his leave from 19 December 1990 to 06 January 1991 (Exhibit RR), the Petitioner, received an undated letter from Major Jarnail Singh (Exhibit QQ-1) assuring him that his money of Rs 12000/- had been kept safe and asked him to return before 7th by train but not to leak it out to anyone. When confronted with this letter in original (Exhibit QQ-1) in cross examination on 06.06.1994 much against his expectations that the petitioner was not left with any such proof. Major Jarnail Singh test fired as under:-

"On Exhibit 'QQ-1', the signatures which are now encircled in red and marked 'QQ-1a' appear to be mine. The contents of the letter are written, in my hand-writing. I don't want to say anything about this letter but this letter does not imply that I had taken any money from the accused"

"20. That, on 10.1.1991, Major Jarnail Singh gave a receipt (Annexed to Exhibit 'HH') to the petitioner acknowledging the ibid loan of Rs 12,000/- with a promise to return the same by 28.2.1991, failing which to pay interest at the rate 12% per annum. Major Jarnail Singh test fired in examination-in-chief as under (page 119 of the proceedings):-

"On this the signature appears to be mine with are now encircled in red and marked as 'HH-1' but I cannot say till the time I see its original."

From the above, it is a clear documentary proof against his bald verbal denial for any such financial deal."

30. Thus, the foundation of allegation even during the course of trial was based on loan of Rs.12000/-, for which charges were framed and both sides led evidence. During the course of trial by DCM, statement of Lt Col NKD Soni was recorded, copy of which has been filed as Annexure-3 to the petition. He very categorically stated that Gdsm Vinay Kumar (petitioner) met him and while talking to him he learnt that he (petitioner) was going to post a letter/complaint to the COAS. The reason given by Gdsm Vinay Kumar was that Maj Jarnail Singh had taken a loan of Rs.12000/- (Rupees twelve thousand only) from him and later he refused to repay. He further stated that he advised the petitioner not to make any written complaint and that the matter could be resolved within the unit. Lt Col NKD Soni contacted the Commanding Officer Col AK Pahwa to take immediate action for resolving the dispute within the unit. However, it could not be materialised. After waiting for about three weeks, Lt Col NKD Soni reported the matter to Col AK Pahwa in writing. An assurance was given by Col AK Pahwa that Jawan's money would be returned. Relevant portion of the statement of Lt Col NKD Soni is reproduced as under:

> *"5. Approximately three weeks after I reported the matter. Col AK Pahwa was convinced of the correctness of Gdsm Vinay Kumar's statement. Therefore, Col AK Pahwa assured me that the Jawan's money will be returned before Maj Jarnail Singh proceeds on permanent posting. Col AK Pahwa on 09 Oct 91 also, gave me an undertaking in his own handwriting stating that*

compensation will be p[aid to the individual for having physically suffered and that offrs to pay back money to Jawans. CTC of the extracts is attached at Appx A. Since I was convinced of Col AK Pahwa's sincerity, on his personal request I gave him my word that I shall keep this letter to myself and shall not show it to anyone. But Col AK Pahwa today stands posted out of the unit and Gdsm Vinay Kumar's career is at stake. To put fwd the facts, I have no option left. Therefore, I am enclosing only the extracts of Col AK Pahwa's handwritten undertaking at para 5 since this is related to the case. Although I am constrained to produce the extracts, yet my conscience tells me that this is now the right thing for me to do."

31. Lt Col NKD Soni further stated that Col AK Pahwa asked him to forward the complaint. However, Col AK Pahwa assured him that money of the petitioner shall be returned to him before 09.11.1991. He has narrated the subsequent events as under:

"6. Therefore, I left the matter to Col AK Pahwa. Then on 04 Nov 91, Col AK Pahwa wrote a letter to me. In his letter no. 1720/Offrs/144/ASC Dt. 04 Nov 91, he has stated that this matter was verbally reported to him by me. Col A.K. Pahwa asked me to forward if I had any written complaint from the individual. Xerox copy of the letter attached at Appx 'B' vide my letter No. 27995/NKES/Pers dt. 04 Nov 91, I replied that OC B Coy may be instructed to forward the application as the individual was posted in that coy. However, vide para 2 of my letter under reference, I have clearly stated that Col AK Pahwa had assured me that the money of the individual will be returned before 09 Nov 1991 which is the day when Maj Jarnail Singh was to proceed on permanent posting. CTC of this letter is att at Appx. Since

Col AK Pahwa made no further correspondence on my letter nor did he refuse the text of para 2 of my letter, it implies Col AK Pahwas's acceptance of the facts stated therein.

7. Later, sometime in Nov. 91, a court of inquiry was ordered. Maj Balwinder Singh was the Presiding Officer of this court of inquiry. The outcome of this court of inquiry is not known to me.

8. I was posted out of the unit in Feb. 92. Subsequent events are not known to me. It is only recently that I learnt that Gdsm Vinay Kumar has not been repaid but was being charged instead, when I was asked to give my statement."

32. Learned counsel for the petitioner has invited our attention to the comments of Col AK Pahwa, the Commanding Officer, who ordered for compensation to be paid to the petitioner because of his injury and also directed the officers to pay back money to Jawans. Copy of the said order has been filed as Annexure 3-B to the amended petition. Attention has also been invited by petitioner's counsel to a letter written by Col NKD Soni to the Commanding Officer Col AK Pahwa, copy of which has been filed as Annexure 3-C to the amended petition. The same is also reproduced as under:-

"Appx C

(Ref to para 6)

CONFIDENTIAL

Maj NKD Soni
Coy Cdr

17 GUARDS (ATGM)
C/O 56 APO

27995/NKIS/Pers *04 Nov 91*

My Dear Col,

1. Please refer to your letter 1720/Offrs/144/ASC dated 04Nov 91.

2. As an offr of the bn, I have being bringing to your notice certain adm pts/lapses in the unit. One of these pt was that Maj Jarnail Singh owes Rs 12,000/- (Rupees twelve thousand only) to Gdsm Vinay Kumar, as per the individual's statement. You have assured me that the money of the individual, will be returned before 09 Nov 91 which is the day when Maj Jarnail Singh proceeds on point posting.

3. Since this matter is now made official, OC B Coy may be instructed to fwd the required appln.

With well regards,

Yours sincerely,

sd/-x x x x x x

Col AK Pahwa
CO
17 GUARDS (ATGM)
C/O 56 APO"

33. Learned counsel for the petitioner has submitted that the action taken against the petitioner was the outcome of the complaint submitted to the Commanding Officer. While preferring the writ petition, the petitioner had filed copy of an undertaking dated 10.01.1991 given by respondent No. 6 Maj Jarnail Singh to pay back the amount Rs. 12,000/- by 28.02.1991. It says that in case he (Maj Jarnail Singh) fails to pay this amount before/by 28 Feb. 91, he shall pay the amount alongwith interest calculated at the rate of 12% per annum. The undertaking given by respondent No. 6, contained in Annexure-3 to the petition, is reproduced as under:

"I, IC-2980 1-K Major Jarnail Singh had taken a loan of Rs. 12000/- (Rupees twelve thousand only) from No. 13686872 G/M Vinay Kumar. I undertake to pay this amount by 28 Feb. 91. In case I failed to pay this amount before/by 28 Feb. 91. I shall pay the amount alongwith interest calculated at the rate of 12% per annum.

Dated 10 Jan. 91

Sd./- Illegible
(Jarnail Singh)
Major
Second-in-Command.
17, Guards (ATGM)."

34. The petitioner has also placed on record a letter/communication by Maj Jarnail Singh, giving assurance to the petitioner for return of the amount of Rs.12000/. Copy of the said communication has been filed as Annexure-4 to the amended petition. For convenience, the same is also reproduced as under:

"Dear Vinay,

आपका खत मिल गया है। आपको यहॉ पर मिल जायेगा। 12,000/– रखा हुआ है। बाकी किसी बात से नहीं डरना Sub HN Pandey वहॉ पर भेज रहा हूँ पर किसी को leak out न करे। जाली का काम जरूरी था जो आप नहीं कर पाये। शीशा यहॉ से लेकर जाना है और 7 तारीख से पहिले आना है । 12 Rum का cost भिजवा देना है । आप 7 तारीख को By Train आ जाना है । बाकी देख लेगें। और खास नहीं है ।

Yours sincerely,
Jarnail"

35. It may be noted that Annexure-4 is hand-written letter/slip of respondent No. 6. An inference may be drawn that Annexures-3 and 4

are genuine documents, since the respondents have not denied the same. The respondent no. 6 has not disputed the loan received by him from the petitioner. The statement of Lt Col NKD Soni recorded during the course of DCM in unequivocal terms establishes that an amount of Rs.12000/- was given by the petitioner to respondent no. 6 Maj Jarnail Singh. In this view of the matter, we are of the considered opinion that the amount of Rs.12000/- was given to respondent no. 6 and the charges against the petitioner are based on unfounded facts; they were framed without application of mind, arbitrarily and for extraneous reasons to save the prestige of an officer, who because of his bad habits and being in financial crunch, took loan from his own Jawan but declined to repay the same.

DISABILITY PENSION

36. By means of supplementary affidavit as well as counter affidavit, the respondents have brought on record that on account of accidental injuries suffered by the petitioner, his case was processed for grant of disability pension, which has been granted by PCDA (P), Allahabad vide PPO No. D/2 11/2005 dated 17.05.2005. According to the respondents, while finally settling the account, balance of Rs.52,973/- has been paid to the petitioner. Discharge book has also been issued to the petitioner and all the entitlements have been paid to him. However, the petitioner's discharge has been treated from 05.09.1995 holding that since the petitioner has served for 10 years, 02 months and 24 days and hence has not completed minimum qualifying service of 15 years, he would not be entitled for regular pension.

37. Submission of learned counsel for the petitioner is that since the order of discharge was served on the petitioner on 31.10.2002, he shall be deemed to have served the Army for 18 years, 04 months and 19 days, hence he shall be entitled for regular pension. It has been vehemently argued by petitioner's counsel that in Court of Inquiry, the provisions contained in Army Rule 180 have not been followed; the petitioner was not allowed to remain present during DCM proceedings and cross-examine the witnesses. It is also submitted by petitioner's counsel that during DCM proceedings, Army Rules 22 and 34 have not been complied with. However, in the absence of original record relating to Court of Inquiry and DCM proceedings, we are not recording any finding on this issue in spite of petitioner's pleading aforesaid. Moreover, since we are satisfied that the allegation against the petitioner is based on unfounded facts and charge (supra) framed against him was without any substance, we have no hesitation in holding that it is a case of blatant abuse of power, hence the order of punishment is liable to be set aside with all consequential benefits on this ground alone and it is not necessary to look into other grounds raised by the petitioner.

MALICE

38. From the material on record, we have no doubt that the amount of Rs.12000/- was given by the petitioner as loan to respondent No. 6. Virtually, the receipt of aforesaid loan from the petitioner has been admitted by respondent No. 6 by admitting his signatures over the two letters (supra), which are in his own handwriting, coupled with the

statement of Lt Col NKD Soni and the letter written by him to Col AK Pahwa. In the present case, the Commanding Officer Col AK Pahwa seems to have not proceeded promptly in accordance to rules to settle the dispute. However, since he has not been made party, we refrain from making any observation against him. But so far as respondent No. 6 Maj Jarnail Singh is concerned, we are sorry to observe that he has not maintained the standard expected from an officer of the Army, which has pained us. Even if the respondent No. 6 was suffering from financial crisis, he should have been fair to a soldier (petitioner), the lowest rung of the Indian Army. Whole action of respondent No. 6 seems to suffer from bias.

39. As per government legal glossary the word 'bias' means; "a one sided inclination of mind, any special influence that sways the mind". As per law lexicon by P. Ram Nath Aiyer the word 'bias' means; "leaning of mind: prepossession: inclination: propensity towards an object, bent of mind a mental power, which sways the judgment: that which sways the mind toward one opinion rather than another; as, bias of arbitrator, of judge, or jury or witness".

40. In the case of **Ratan Lal Sharma Vs Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others**, reported in (1993) 4 Supreme Court Case, Page 10, the Hon'ble Supreme Court has classified three kinds of bias namely, (i) personal bias (ii) pecuniary bias and (iii) official bias. The present case relates to the personal bias as well as official bias because of political pressure.

41. In case of **Ratan Lal Sharma** (supra), Hon'ble Supreme Court has held that in case the inquiry is challenged on the ground of bias and malafidies, the petitioner is required to establish the real likelihood of bias not the likelihood of bias. The Hon'ble Supreme Court in this case has considered a number of its earlier judgments on the points in issue. The Hon'ble Supreme Court has relied on **R.V. Sussex Justices,** 1924 (1) KB. 256, wherein it has been held that "answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done". 255. The Hon'ble Supreme Court also relied on Halsbury's Laws of England, 4th Edn., Vol.2, para 551 in its judgment wherein it has been indicated that "the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances would feel a serious apprehension of bias".

42. In case of **Union of India and others Vs Prakash Kumar Tandon** reported in (2009) 2 Supreme Court Cases 541 the Hon'ble Supreme Court found that the raid against the respondent was conducted by the vigilance department and the Chief of the vigilance department was appointed as Inquiry Officer. Keeping in view of this fact Hon'ble Supreme Court held that the inquiry was not fair. The appointment of Chief of vigilance department as Inquiry Officer should have been avoided. The Tribunal as well as High Court held the inquiry to be vitiated. The Hon'ble Apex Court confirmed the judgment of the High Court. In view of above, it is settled that the Inquiry Officer should be fair and impartial. It is not necessary that he would have

been witness in the inquiry or he would have in any way interested in the subject matter of the inquiry. If the Inquiry Officer has prejudices against the employee, he cannot be said to be fair and impartial. The bias of Inquiry Officer may not relate to subject under inquiry. It may relate to different matter too which really causes apprehension that charged person will not get justice from him.

43. Hon'ble Supreme Court in the case of **State of Punjab Vs. V.K. Khanna & others** *(2001) 2 SCC 330*, has examined the issue of bias and mala fide and observed as under:

> *"Whereas fairness is synonymous with reasonableness-- bias stands included within the attributes and broader purview of the word 'malice' which in common acceptation means and implies 'spite' or 'ill will'. One redeeming feature in the matter of attributing bias or malice and is now well settled that mere general statements will not be sufficient for the purposes of indication of ill will. There must be cogent evidence available on record to come to the conclusion as to whether in fact, there was existing a bias or a mala fide move which results in the miscarriage of justice... In almost all legal inquiries, 'intention as distinguished from motive is the all-important factor' and in a common parlance a malicious act stands equated with an intentional act without just cause or excuse."*

44. Apart from the above, it appears that the authorities have acted maliciously to abuse the process of law. The State is under obligation to act fairly without ill will or malice- in facts or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an

act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. It is an act which is taken with an oblique or indirect object mala fide exercise of powers does not imply any moral turpitude. It means exercise of statutory power for "purposes foreign to those for which it is in law intended." It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts. (Vide **Jaichand Lal Sethia Vs. The State of West Bengal & Others**, AIR 1967 SC 483; **A.D.M. Jabalpur Vs. Shiv Kant Shukla**, AIR 1976 SC 1207; **State of A.P. Vs. Goverdhanlal Pitti**, AIR 2003 SC 1941).

45. We are satisfied that it was the collective abuse of powers by some Army officers to suppress the truth and save the prestige of an officer, their colleague. The action against the petitioner, thus, suffers from bias, based on unfounded facts, which vitiates the trial. The officers forget that truth persists in midst of lies. It neither can be suppressed permanently nor can it be burnt with fire or quench with water. Truth comes with all its vigour on a day to show its immortality to establish its divine existence.

COSTS

46. It is our considered opinion (supra) that the loan of Rs.12000/- was given by the petitioner to respondent No. 6 Maj Jarnail Singh, who

was alleged to be suffering from bad habits and financial crisis; the aforesaid fact is proved from the statement of an officer of the rank not less than Lt Colonel (NKD Soni) during trial; the allegation against the petitioner has been found to be without any substance; the petitioner was tried and punished on unfounded grounds and the record has been weeded out during the pendency of cases in Courts. We have not found even an iota of truth in the allegation levelled against the petitioner. He has suffered mental pain and agony immensely, that too for no fault on his part. In the circumstances, we feel that he must be compensated for the agony suffered by him due to high-handed treatment given by the respondents.

47. In view of what has been discussed above and keeping in view the mental agony and humiliation suffered by the petitioner, it is a fit case where the petitioner should be awarded exemplary compensatory cost and the relief may be moulded accordingly. 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 Court 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**.

48. 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".

49. 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 field. 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 neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court".

50. Hon'ble Supreme Court in the case of **Union of India and Ors Vs. Charanjit S. Gill and ors** (supra) referred with approval Justice Black's observation in the case of **Reid v. Covert,** 354 US 1: 1 L Ed 2d 1148 (1957), to reproduce:-

> "Courts martial are typically ad hoc bodies appointed by a military officer from among his subordinates. They have always been subject to varying degrees of command influence'. In essence, these tribunals are simply executive tribunals whose personnel are in the executive chain of command. Frequently, the Members of the Court Martial must look to the appointing officer for promotions, advantageous assignments and efficiency ratings-in short, for their future progress in the service. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the Members of a Court Martial, in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian Judges".

51. Unfortunate part in India is that considered and thoughtful judgment keeping in view the future of the country or the system is ignored by the executive without correcting itself and adhering to old

junk system. Gross injustice done to the petitioner is a case of such mind set. It requires hammering by administration of justice so as to obey and respect law and remains within the four corners of empire of law.

52. 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.

53. 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.

54. Apart from aforesaid judgments of Hon'ble Supreme Court, under Section 18 of the Armed Forces Tribunal Act, 2007, Tribunal has been conferred statutory power to impose cost while deciding

application under Section 14 and an appeal under Section 15 of the Armed Forces Tribunal Act, 2007 as it may deem just, to quote :-

> "**18. Cost.-** While disposing of the application under section 14 or an appeal under section 15, the Tribunal shall have power to make such order as to cost as it may deem just."

55. The purpose of statutory provision seems to compensate Armed Forces personnel who is representing his grievance keeping in view facts of each case depending upon the gravity of injustice caused to an officer or soldier, as the case may be. Keeping in view the humiliation suffered by the petitioner on account trial on unfounded grounds and the mental pain and agony suffered by him, being the lowest rug of the Army, we assess the cost at Rs.5,00,000/-, which shall be paid by the respondents to the petitioner.

56. Though on the one hand, the petitioner has suffered on account of serious misconduct committed by respondent No. 6 Maj Jarnail Singh with an intention to suppress the truth and swallow a little sum of Rs.12,000/- given to him as loan by the petitioner, which was not expected of an officer of Armed Forces, on the other, we greet the efforts and persuasion made by Lt Col NKD Soni for getting the amount of Rs.12000/- returned to the petitioner. We place on record our appreciation for the courage and fairness shown by the then Lt Col NKD Soni to uphold the truth for the cause of a soldier, the lowest rug of Indian Army.

57. To part with, we have noticed that sometimes the treatment by the officers to their subordinates while maintaining the command and control over the structure of the Army is not respectful. They do not care for the sufferings of their subordinates. They should never forget that once a matter comes for judicial review before the Court or Tribunal, then it shall be obligatory for such officers/higher authorities to uphold the truth, which is the foundation of our civilisation. According to Brihadaranyakopanishad, the law or Dharma or truth is superior to all and it must be protected. To quote:

"Tadetat kshatrasya kshatram yaddharmah,
Tasmaaddharmatparam Naasti,
Atho abaleeyan baleeyaansamaashansate dharmen
Yatha raagya evam."

English translation of above Mantra is:

Law is the king of kings;
Nothing is superior to law;
The law aided by the power of the king
Enables the weak to prevail over the strong.

Commenting on the above provision, Dr. S. Radhakrishnan, in his book "The Principal Upnishads" observes- "*Even kings are subordinate to Dharma, to the Rule of law."*

58. In the present context, while performing the duties of a king, the courts, authorities or tribunals are conferred with powers to adjudicate a dispute. Kautilya said that a dispute be decided in accordance to rules without being influenced by personal bias, liking or disliking. In view of above, it is the solemn duty of Armed Forces Tribunals or

courts that they, without being influenced by the authorities howsoever high they may be, uphold the truth and do justice to the aggrieved.

ORDER

59. In view of above, the TA deserves to be allowed and is hereby allowed with following directions:

(1) The impugned order of punishment dated 02.06.1994 pursuant to DCM as well as the impugned order dated 05.09.1995, contained in Anneuxre-1 to the petition are set aside with all consequential benefits and full salary to the petitioner of the rank he was holding at the time of dismissal/discharge from service.

(2) The petitioner shall be deemed to be in service for full tenure in the rank he was holding at the time of dismissal/discharge from service and be paid arrears of salary with interest at the rate of 10% per annum, with notional continuity of service for the purposes of post-retiral dues and regular pension in accordance with rules.

(3) Cost is quantified to Rs. 5,00,000/-, which shall be paid to the petitioner by the respondents.

(4) Entire arrears of salary and cost be paid to the petitioner expeditiously, say, within a period of four months from today. The cost shall be deposited in the Registry of this Tribunal and the same shall be released in favour of the petitioner through cheque.

(5) It shall be open to the respondents to adjust the amount, if any, already paid as arrears to the petitioner.

(Air Marshal Anil Chopra)
Member (A)

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

Dated: 09 August, 2017
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