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AFR
RESERVED
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Transferred Application No. 31 of 2012

Thursday, this the 19th day of January, 2017

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

2nd Lt. Shatrughan Singh Chauhan r/o village Asar Ki Garhi, Nauner, District-Mainpuri.

……Petitioner

Ld. Counsel for: Petitioner — **Col (Retd) R.N. Singh, Shri V.A. Singh and Shri Bhanu Pratap Singh Chauhan, Advocates.**

Versus

1. Union of India (through Secretary, Ministry of Defence), South Block, New Delhi.

2. Chief of the Army Staff, Army Headquarters, South Block New Delhi.

…Respondents

Ld. Counsel for the Respondents — **Shri Asit Chaturvedi, Ld. Sr. Counsel, Ms Appoli Srivastava, Ld. Standing Counsel assisted by Col Kamal Singh, OIC Legal Cell, Maj Alifa Akbar, MS (Legal) and Maj Soma John, OIC Legal Cell.**

Per Justice Devi Prasad Singh, Member (J).

1. A third generation Army personal, i.e. the petitioner, being aggrieved with Court Martial proceeding and conviction inflicted thereon dated 7th August 1991 by General Officer Commanding-in-Chief vide order dated 4th November 1991 and follow up orders, preferred Writ Petition No. 34918 of 1993 in the High Court of Judicature at Allahabad which has been transferred to this Tribunal in pursuance of provisions contained in Section 34 of the Armed Forces Tribunal Act, 2007 and renumbered as T.A. No. 31 of 2012.

The material, facts and circumstances give a temptation to reproduce a couplet by Mary Oliver,

> "*And now you'll be telling stories*
> *of my coming back,*
> *and they won't be false, and they won't be true*
> *but they'll be real".*

2. We have heard Col (Retd) R.N. Singh, Ld. Counsel appearing for the petitioner assisted by Shri Bhanu Pratap Singh Chauhan and Shri Asit Chaturvedi, Ld. Sr. Counsel and Ms Appoli Srivastava, Ld. Counsel appearing for the respondents assisted by Col Kamal Singh, OIC, Legal Cell, Maj Alifa Akbar, (MS Legal) and Maj Soma John, OIC Legal Cell.

3. According to arguments advanced by Ld. Counsel for the petitioner and pleadings on record the case set up by the petitioner is that he joined the Indian Army and was commissioned to Rajput Regiment on 10.06.1990. After enjoying 20 days of leave, he reported for duty in July 1989. After serving for about 12 days in Battalion he joined 6th Rajput Battalion. The Commanding Officer on 11.04.1990 instructed him for house to house search in Laxmanpura, Batmaloo, Srinagar in pursuit of militant in their hideouts. A soldier namely L/Nk Anil Kumar Singh, having criminal antecedents was also a part of the team. During course of search operation, Company Havildar Major (CHM) Puttu Singh noticed L/Nk Anil Kumar Singh lifting a necklace around 10 A.M. in a house within the combing area. CHM Puttu Singh informed the petitioner. In pursuance thereof body search of L/Nk Anil Kumar Singh was done and an amount of Rs 5,100/- was recovered from his pocket. Constables of Central Reserve Police Force (CRPF) women and ten others were witness of the incident.

4. At about 2.00 pm on the same day petitioner alleged to recover 147 gold biscuits in a house in the presence of CHM Puttu Singh, Sep Rajkumar, CHM Virender Singh, Subedar Ram Swaroop Singh, Havildar Santosh Singh, Havildar Arvind Singh and Sep Arvind Singh. CHM Puttu Singh counted the

gold biscuits and petitioner noted the marking on the biscuits of Johnson Mathews Bank, Bank of London. A person was arrested on the spot having defect in foot and was Imam of Batmaloo Mosque. Petitioner reported to the Commanding Officer who separately questioned civilians and also directed the petitioner to remove the Pakistani Flag flying on a nearby tree. Factum of flying of a flag has been mentioned by L/Nk Anil Kumar Singh during Court of Inquiry on 13.10.1990 but he denied it during the proceeding of Court Martial.

5. Col K.R.S. Panwar, L/Nk Anil Kumar Singh, 2Lt Rajeev Shukla, Havildar Attar Singh and Havildar Rajpal Singh took out the gold biscuits from the bag and displayed on the Bonnet of Col Panwar's Jonga (Jeep) in full public view and in presence of Army personnel/CRPF personnel.

6. During course of celebrations of recovery of gold biscuits in the evening it is alleged that Col K.R.S. Panwar, Commanding Officer was called away between 11 PM and 12 midnight to attend a message sent by GOC, Lt Gen Zaki Mohammad Ahmad's ADC.

7. On the next day, while moving for another search at Nathipura, the Battalion was told not to come empty hand. The petitioner objected and said that on the previous day they had

recovered 147 gold biscuits followed by evening celebrations at the Mess (Supra). At this juncture Col K.R.S. Panwar, Commanding Officer denied recovery of gold biscuits and instructed the petitioner not to speak with regard to said recovery. Ld. Counsel for the petitioner further submitted that the incident of recovery of gold biscuits was never reported by any civilian nor the Commanding Officer lodged F.I.R. and with ulterior motive the petitioner was instructed not to speak regarding it. Ld. Counsel further submitted that this matter was of dispute in a Parliamentary Committee and recommendation was made in petitioner's favour with regard to recovery of gold biscuits.

8. In pursuance to order of Chief of the Army Staff Gen S.F. Rodrigues, Lt Gen Y.S. Tomar, the then Adjutant General, Army Headquarter ordered an inquiry by Maj Gen R.S. Taragi posted in Foreign Ministry. He submitted that this report was forwarded to Army Headquarters on 16.08.1990. Maj Gen Taragi in his report alleged to recommend for further inquiry in the matter and noted the factum with regard to recovery of gold biscuits. One strange feature borne out from the record is that total five Court of Inquiries were ordered by appropriate authorities and the first Court of Inquiry was held on 13.04.1990. It is submitted that though the first Court of Inquiry

was held against L/Nk Anil Kumar Singh, but the statement of L/Nk Anil Kumar Singh as well as other material on record alongwith query made by Presiding Officer of Court of Inquiry shows that whole material collected thereon and findings recorded were against the petitioner, which shall be discussed hereinafter.

9. The second Court of Inquiry was held with regard to removal of Rs. 5,100/- and absence without leave by the petitioner. A number of witnesses were produced, but petitioner's participation was alleged to be restricted.

10. It is further submitted by Ld. Counsel for the petitioner that the Commanding Officer Col K.R.S. Panwar while briefing in the morning on 12.04.1990 for 'Search and Seizure Operation' stated that nothing was recovered on 11.04.1990, hence the Company should be more careful to recover incriminating material and arrest terrorists. Doubting conduct of Col K.R.S. Panwar, petitioner on 13.04.1990 went to the house of Col V.P.S. Chawhan, the erstwhile Colonel G. S., H.Q, 31 Sub Area with 2Lt Rajeev Shukla, but Col Chawhan was not available; hence he apprised the entire incident of recovery of gold biscuits to the wife of Col Chawhan.

11. It is further alleged that in the fateful night of 13.04.1990 when the petitioner was sleeping in his tent, he was allegedly attacked by Lt Col M.S. Rawat, Major Mukesh Sanguri and Captain Anil Hajela in a manner which is termed as 'Kambal Parade'. The petitioner was severely beaten by these three officers asking him to give in writing that no gold biscuits were recovered. On refusal, the petitioner was beaten with snow boots covering his face with a pillow. On account of alleged severe injuries caused by these three persons during 'Kambal Parade' the petitioner became unconscious and was later on shifted to Command Hut situated at a distance of about two kilometers.

12. In pursuance of alleged decision of Col K.R.S. Panwar on 14.04.1990, the petitioner moved to his native place district Mainpuri by using Air Concession Form. On 15.04.1990, the petitioner reached New Delhi from where he reached his village Asar-ki-Garhi, District Mainpuri on 16.04.1990. The entire family was upset. Suffering from mental pain and agony and injury, the petitioner narrated the fact with regard to 'Kambal Parade' in which he was severely beaten. On account of deteriorating condition, the petitioner was admitted in Air Force Hospital, Kanpur (U.P.) on 18.04.1990 and thereafter on 20.04.1990 he was shifted to Command Hospital, Lucknow.

The petitioner was being treated broadly for 'Neurotic Depression and Anxiety'.

13. In spite of the fact that the petitioner was under treatment in Command Hospital, Lucknow, he was transferred to Command Hospital, Udhampur by order of GOC-in-C. It is stated that Command Hospital, Udhamnpur is a relatively small hospital and did not possess experts of all medical disciplines in comparison to Command Hospital, Lucknow. The petitioner arrived at Command Hospital, Udhampur, i.e. on 06.06.1990.

14. Within 24 hours of his arrival at Command Hospital, Udhampur, on 07.06.1990 the petitioner was informed that he shall be shifted to Srinagar accompanied by two officers and seventeen jawans. Two movement orders were issued for shifting the petitioner from Udhampur to Srinagar at 6.00 pm, on 9th June 1990 and at 5.00 am on 10th June 1990. Both the movement orders were alleged to be signed by Col Mukhopadhyay and Commanding Officer, the competent authority designated for the purpose. As discussed hereinafter, during the course of Court Martial proceedings Col Mukhopadhyay denied that he has signed the movement order to shift the petitioner to Srinagar; rather he said that during his lifetime he has never signed any movement order. It shall be relevant to point out at this stage that no movement order was

placed before the Court Martial to testify statement of Col Mukhopadhyay. The petitioner moved for Srinagar along with Lt. Col. M.S. Rawat and 2Lt Rajeev Shukla with seventeen jawans on 9th June 1990 (morning).

15. In the way, a member of the party, namely, Subedar Dharm Pal Singh, after taking the petitioner into confidence communicated that petitioner's life was in danger and he may be killed in the way while moving from Udhampur to Srinagar, therefore, he should escape. With all kindness and for defending the cause of truth, Subedar Dharm Pal Singh handed over relevant documents like identify card of the petitioner and with his help, the petitioner escaped and reached his hometown Mainpuri on 23rd June 1990.

16. It is further stated that in the aforesaid circumstances, Honorary Captain Jagpal Singh, father of the petitioner, who also served in 6th Rajput Regiment, brought the petitioner's case in the knowledge of higher authorities like Adjutant General, Army Head Quarters, New Delhi, Lt General Y.S. Tomar. It was on the recommendation of Adjutant General; the petitioner was again admitted in Army Hospital, New Delhi between 26th June 1996 to 26th September 1990 (for three months) for further treatment. He was discharged from the Army Hospital on 1st October 1990 with lower medical category

from S1 to S3 with note that petitioner should be given sedentary job with remarks that he is not fit for isolated duties. Copy of the Medical Certificate dated 1st October 1990 has been filed as Annexure-3 to the T.A.

17. After release from Hospital, the petitioner was attached with 4th Rajputana Rifles which was one of the Battalion in 68 Mountain Brigade situated in Jammu and Kashmir.

18. In view of communication by petitioner's father, an inquiry was set up by Adjutant General to be conducted by Major General R.S. Taragi of the Army Headquarters, New Delhi who submitted his report to the Adjutant General on 16th August 1990. After receipt of report of Major General R.S.Taragi, the Adjutant General vide letter dated 16th August 1990 instructed the Corps Head Quarter at Jammu and Kashmir that inquiry be done keeping in view the allegations of the petitioner with regard to recovery of gold biscuits and assault on the petitioner while he was sleeping (supra).

19. It may be relevant to take note of the fact that the Adjutant General, prima facie, came to the conclusion that the allegation of the petitioner regarding recovery of gold biscuits was correct, hence it requires detailed inquiry (extract filed at Annexure-4 to the T.A. wherein date has not been mentioned).

Simultaneously, in pursuance of order dated 5th October 1990 passed by Brigade Commander, Headquarter 68 Mountain Brigade (Annexure-5 to the T.A.) another Inquiry Officer was appointed, namely, Brigadier S.S. Vasudeva, who after detailed fact finding inquiry had submitted his report on 25th October 1990 (Annexure-6 to the T.A.). Brigadier S.S. Vasudeva recommended for further inquiry in accordance with rules against five persons, namely petitioner, L/Nk Anil Kumar Singh, Subedar Jatan Singh and Sepoy Janak Singh. However, out of five persons, Summary of Evidence was collected only against the petitioner. The Summary of Evidence was instituted in pursuance of letter dated 3rd October 1990 passed by Major R. Khullar of 4th Rajputana Rifles, who at the relevant time was Officiating Commanding Officer of 4 Rajputana Rifles. Col K.S. Dalal was the Presiding Officer and Major R. Khullar recorded Summary of Evidence (Annexure-7 to the petition), in his own hand writing.

20. It is stated that Major R. Khullar, who recorded the Summery of Evidence/material, as discussed hereinafter, was appointed as defending officer to represent the petitioner during course of Summary General Court Martial, for extraneous reasons.

21. After filing of Summary of Evidence (Annexure-7 to T.A.) with recommendation, no proceeding was recommended as a follow-up action in pursuance of Rule 24 of the Army Rules, 1954 (in short, Army Rules), i.e. to remand petitioner for Court Martial or refer the case to superior Military authority.

22. Rather, the Brigade Commander, Brig Keshav Singh took a decision for second Additional Summary of Evidence. Brig Keshav Singh was not the Commanding Officer of the petitioner and he passed the order in contravention of Rule 24 of the Army Rules on 28.02.1991 appointing Major R. Khullar to record Summary of Evidence. In the Additional Summary of Evidence, petitioner was charged for violation of order (Section 63 of the Army Act, 1950 (in short, the Army Act), absence without leave from Srinagar between 14.04.1990 to 18.04.1990 and again between 09.06.1990 to 26.06.1990. In pursuance of second Summary of Evidence, petitioner was recommended for trial by Summary General Court Martial on 17.05.1991 by GOC, 15 Corps. Convening order was issued under Section 112 of the Act, by Lt Gen Zaki Mohammad Ahmad, GOC, 15 Corps (Annexure-8 to the T.A.).

23. It is further submitted that under Section 118 of the Act, 1950 Summary General Court Martial is convened during emergency, primarily during war time which seems to have

emphasis of expediency. Otherwise also, in view of provision contained in Section 145 of the Army Act, a person suffering from mental or physical illness cannot be directed to face Court Martial, unless cleared by Specialist.

24. In the meantime, on petitioner's letter dated 23.03.1991, the Chief of the Army Staff gave reply, but it was not handed over to the petitioner by Officiating Commanding Officer Col K.J. Singh instead the petitioner was placed under close arrest on 10.04.1991 in violation of Rule 27 of Army Rules, The fact pleaded in para 54 of the T.A. has not been disputed in para-76 of the counter affidavit.

25. When the petitioner was got relieved from Army Hospital, New Delhi on 26.09.1990 by 15 Corps, he was required to appear before the Medical Board on 18.03.1991, but order was violated and the petitioner was not produced before the Medical Board; rather he was arrested and put in custody on 10.04.1991 and on 11.04.1991 he was informed that he will be taken to Srinagar for checkup by Medical Board. In the way to Srinagar, the petitioner was alleged to be assaulted by firing through AK-47 Assault Rifle by Sepoy Suresh Singh from a distance of hardly two yards. The petitioner ran for his life and took shelter in BSF Chowki. The BSF Jawans returned the firing treating the assault to be by terrorists and at that time the

petitioner became unconscious. Petitioner suffered severe bullet injury and was saved miraculously. Related reply has been given in para-81 of the counter affidavit stating that the petitioner shot himself to evade justice and to commit suicide. It may be noted that during the course of Court Martial, it is alleged that CHM Puttu Singh and Sepoy Ajai Pal Singh made a statement that they were instructed to shoot down the petitioner. The specific pleading made in para 60 of the T.A. have not been denied in para-82 of the counter affidavit. The petitioner regained consciousness on 15.04.1991 in 92 Base Hospital, Srinagar where he remained hospitalized from 11.04.1991 to 14.05.1991, i.e. for about one month. Averments as contained in para-62 of the T.A. have not been disputed in para-82 of the counter affidavit. Petitioner's father was not permitted to meet him and only on the directions dated 27.04.1991 issued by Maj Gen Surendra Nath, Chief of Staff (Annexure-10 to the T.A.) father of the petitioner was permitted to meet him (after two weeks) in the hospital, but even then the wife of the petitioner was not permitted to meet him.

26. Father of the petitioner moved Habeas Corpus Writ Petition in the Supreme Court where a statement was made that the relatives of the petitioner would be permitted to meet him. It was also stated before Supreme Court that the

petitioner was in Srinagar though at the relevant time he was in Army custody at Niari. These facts as contained in paras-64 and 65 of the T.A. have not been denied in paras-84 and 85 of the counter affidavit. However, it has been stated that after discharge from Military Hospital, the petitioner was attached at Niari (Kupwara). It is alleged that no information was communicated to petitioner's family during the course of arrest, detention or medical treatment (supra). It was only by stroke of luck the petitioner communicated to his family through Sepoy Kausalendra Singh Chauhan who was on duty in the Surgical Ward. Wife of the petitioner made a complaint to the President of India showing her concern towards damage to the life of the petitioner. On her letter, the Director General, Medical Services vide letter dated 29.08.1991, that too after four months, informed petitioner's wife that the petitioner was on 'dangerously ill list' and information was sent to petitioner's unit on 12.04.1991 (Annexure-14 to the T.A.). No F.I.R was lodged in spite of the fact that the petitioner suffered bullet injury, which has been admitted in para-82 of the counter affidavit stating that it was not required. It is stated that lodging of F.I.R. is necessary in case an offence causing injury is committed.

27. In spite of the fact that the petitioner was not in a fit shape and condition, Court Martial began on 07.06.1991 in utter

violation of Army Rules and Regulations and the opinion of the Medical Board (Annexures-15 & 16 to theT.A.), which has not been disputed in para 89 of the counter affidavit. It is stated that the petitioner was not referred to any psychiatrist by the Court Martial. No certificate or opinion of the Medical Board is on record in terms of Army Order 37/83. It is stated that inspite of the fact that the petitioner raised objection, Major R. Khullar was appointed defence officer for the petitioner, who recorded Summary of Evidence. This fact has been admitted in para 92 of the counter affidavit with the averment that no illegality has been committed.

28. Strange enough, under the memorandum of guidelines for the officers constituting the Court Martial, (mentioned in para-73 of the T.A.) that as a rule, the officer detailed for prosecution will be the officer who has recorded Summary of Evidence, but in the present case, Major R. Khullar, who recorded the Summary of Evidence was not appointed Prosecuting Officer in gross violation of principles of natural justice and seems to suffer from vice of arbitrariness.

29. No decision was taken to hold inquiry with regard to recovery of 147 gold biscuits in spite of order passed by Adjutant General. From the record it also appears that one of the charges against the petitioner was that he committed theft

of Rs. 8,800/- from the houses of civilians during search operation on 11.04.1990 but even then no F.I.R. was lodged though offence was cognizable under the Indian Penal Code.

30. The trial took place at Niari which is about 3-4 kilometers from Indo-Pak border and at a distance of about 110 kilometers from Srinagar and 400 kilometers from Jammu; hence according to the petitioner's counsel, the petitioner could not engage any Counsel. It is also stated that Niari was declared a disturbed area hence it was not possible for the petitioner's lawyer to approach there. This was done in contravention of para 478 of the Defence Service Regulations which permits to engage defence counsel at Court Martial trial. It also provides that defence counsel is to be given by the authorities. In the present case, though Judge Advocate recommended to provide defence counsel to the petitioner, but he was not provided to the petitioner during course of trial as stated in para 85 of the T.A. which has not been disputed in para-99 of the counter affidavit. The Judge Advocate who advised to provide defence counsel, namely, Captain Manveet Singh, was all of a sudden changed and replaced by Captain Javed Iqbal. Captain Javed Iqbal was not a qualified officer of the Judge Advocate Branch and according to Rule 104 of the Army Rules, once Judge Advocate is appointed, namely, Captain Manveet Singh, he

could not have been changed. In any case if it has to be done, then it should be done only on the recommendation of the Presiding Officer for reasons to be recorded, but it was done in contravention of Rule 104 of the Army Rules, by the GOC, Lt General Zaki Mohamad Ahmad. Ld Counsel for the petitioner submitted that Captain Javed Iqbal was attached to the office of Headquarters 15 Corps and was chosen by Lt Gen Zaki Mohamad Ahmad to replace Captain Manveet Singh who was an honest and upright officer. The order was passed by Lt Gen Zaki Mohamad Ahmad on his own as is evident from para 88 of the T.A. It is submitted that order of Adjutant General, Army Headquarters has not been complied with and Lt Gen Zaki Mohamad Ahmad acted hastily. Petitioner's representation sent to Chief of the Army Staff was rejected by Officiating Colonel (A) Colonel K.S. Saghu on behalf of Chief of Staff (Annexure 19 to the T.A.) and not by the competent authority. Submission is that Lt Gen Zaki Mohamad Ahmad had managed the things and petitioner's representation could not reach the Adjutant General or Chief of the Army Staff. For the change of place of trial order dated 13.05.1991 has not been passed on behalf of Chief of the Army Staff in pursuance to Section 124 of the Army Act.

31. According to petitioner's Ld. Counsel everything was done with pre-determined mind to hush up recovery of 147 gold biscuits by some persons of the Army and to silence the petitioner's voice. It is also submitted that four women constables who participated in search operations were not called during course of inquiry in spite of petitioner's request. It is alleged that during Court of Inquiry the petitioner proved recovery of 147 gold biscuits which were handed over to the Commanding Officer of 6 Rajput Regiment, namely, Col K.R.S. Panwar and the petitioner's defence was proved by Sepoy Naresh Singh, Havildar Virendra Singh, CHM Puttu Singh, Sepoy Raj Kumar Singh, Sepoy Ajai Pal Singh, Subedar Ram Swaroop Singh and Sepoy Satendra Singh. In reply to para 100 of the T.A, in para 106 of the Counter Affidavit by a cryptic reply it has been given to be incorrect and denied without elaborating whether these persons appeared as witnesses or not and what was stated by them during course of Court Martial proceedings. The reply is vague and appears to be an effort of concealment.

32. Summary General Court Martial has not recorded any finding keeping in view the statement of aforesaid persons with regard to recovery of gold biscuits and pronounced sentence without assigning reason on 07.08.1991 accusing the petitioner

of all the three charges and sentencing him to seven years' R.I. and also cashiered the petitioner from service. The finding of guilt has been recorded without assigning any reason. In para 108 of the counter affidavit it has been stated that no reply is required. Sentence of Rigorous Imprisonment was pronounced first and thereafter the petitioner has been cashiered from service in contravention to provisions containing under Section 74 of the Army Act.

33. Another startling fact is that during course of trial, the petitioner requested for appropriate action with regard to attempt on his life (supra), but he was informed vide letter dated 22.07.1991 by Colonel K.S. Dalal that Summary General Court Martial has been recommended for the offence of 'attempt to suicide' on 11.04.1991 at Srinagar and the petitioner was required to submit name of his defence counsel. The petitioner replied that he did not require any defence counsel and shall defend himself, but after receipt of petitioner's reply, the matter was dropped and no inquiry was held with regard to alleged attempt on petitioner's life wherein he suffered severe bullet injuries fired upon him by a person (Annexure 22 to the T.A.). Petitioner's father also sent a letter to the Superintendant of Police, Srinagar through registered post (Annexure 23 to the T.A.) with regard to attempt on petitioner's life, but the police

declined to register a case. Petitioner also sent representation dated 01.05.1991 to the Adjutant General, Army Headquarters, New Delhi (Annexure-24 to the T.A.). It is submitted that post confirmation petition under Section 164 (1) of the Army Act moved by the petitioner before the GOC-in-C Northern Command against order dated 07.08.1991 was rejected, confirming the order dated 04.11.1991 by a non-speaking order and without disclosing any reason. However, it is the submission of the respondents that Chief of the Army Staff after considering the post confirmation petition referred it with recommendation to the Central Government whereby sentence awarded to the petitioner was remitted. The petitioner was sent to Srinagar jail on 04.11.1991. The petitioner was committed to civil prison and transferred vide order dated 15.11.1991 to Kanpur Central Jail.

34. While in Kanpur Central Jail, the petitioner was preparing to file Writ Petition in the Jammu & Kashmir High Court against the Court Martial order, which was later on withdrawn with liberty to approach other forum. Chief of the Army Staff passed interim order on 07.07.1992 remitting the sentence awarded to the petitioner of remaining years and also altered the charges leveled against the petitioner from desertion to absence from duty without leave (Annexure-26 to the T.A.). Thereafter the

petitioner moved Writ Petition bearing No. 34918 of 1993 in the Allahabad High Court which has been transferred to this Tribunal under the provisions of Section 34 of the Armed Forces Tribunal Act, 2007 and renumbered as T.A. No. 31 of 2012.

35. The petitioner stated in the T.A. that one of the Members of the Court Martial had voted against sentence awarded to the petitioner. It is further submitted in para-119 of the T.A. that the order of Court Martial does not bear signatures of all the Members. Order dated 07.08.1991 passed by the Court Martial bears signature of the Presiding Officer and signature of Judge Advocate and rest of the two Members have not signed the order. This fact has been admitted in paras 119 and 120 of the counter affidavit stating that under Army Rule 162, only the Presiding Officer and the Judge Advocate are required to sign the proceedings.

36. Subject to above, Ld. Counsel for the petitioner has invited attention of the Tribunal to a book published under the title 'Lt S.S. Chauhan vs The Indian Army' which has been presented by Shri George Fernandes, the then Member of Parliament, Lok Sabha. Shri George Fernandes, as Member of the Parliament applied his mind and found that the petitioner

was falsely implicated and charged by Army authorities for extraneous reasons.

37. Petitioner's cause was also taken by the Committee on Petitions (Fourteenth Lok Sabha). In its Forty Third Report, the Committee recommended for release of the petitioner recording a finding that the petitioner has been falsely charged. Report/Recommendation of Parliamentary Committee was not complied with on account of pendency of Writ Petition in Allahabad High Court.

38. Subject to above, it shall be appropriate to deal with each event of the present controversy under separate headings which prima facie shows that gross miscarriage of justice has taken place and the petitioner's life and career has been spoiled only for the sake of 147 gold biscuits.

I. PRELIMINARY OBJECTION:

39. Shri Asit Chaturvedi, Ld. Sr. Counsel for the respondents while opposing the present T.A. raised certain preliminary objections and submitted that the T.A. is not maintainable. It shall be appropriate to consider the preliminary objection of Ld. Counsel before entering into merits of the controversy in question.

II. NON JOINDER OF PARTIES:

40. Shri Asit Chaturvedi submitted that the Commandant and the Presiding Officer of the Court Martial have not been impleaded as a party. It is also submitted that impleadment application was filed by the petitioner but it has not been allowed till date. Submission is that since necessary parties have not been impleaded, the T.A. deserves to be dismissed. Arguments advanced by Shri Asit Chaturvedi, Ld. Sr. Counsel seems to be not sustainable for the reason that the petitioner has impleaded Union of India through Secretary Ministry of Defence and the Chief of the Army Staff which seems to fulfill the requirement of impleading necessary parties under Sections 14 and 15 of the Armed Forces Tribunal Act, 2007. Chief of the Army Staff is the head of the Army and the Secretary, Ministry of Defence represents the Government of India. Impleadment of Presiding Officer of Summary General Court Martial seems to be neither necessary nor proper. Proceedings and findings of the Summary General Court Martial are subject to decision of Chief of the Army Staff who heads the Army. Section 20 of the Army Act, 1950 confer power to Chief of the Army Staff to dismiss or remove from service any person subject to the procedure provided under the Act and once Chief of the Army Staff has been impleaded, non

impleadment of any other person seems neither to be necessary nor fatal. Sections 80 and 81 of the Act, 1950 also provide that punishment may be awarded with the consent of the Central Government specified by Chief of the Army Staff. Section 82 of the Act, 1950 provides that Chief of the Army Staff may award additional punishment then what has been provided in Section 80 of the Act, 1950 with the consent of Central Government. Accordingly the petition does not seem to be bad for non joinder of parties.

III. WITHDRAWAL IN J&K HIGH COURT:

41. It is argued by Shri Asit Chaturvedi, Ld. Sr. Counsel that earlier the petitioner approached the Jammu & Kashmir High Court and later on withdrew the petition and preferred another Writ Petition in the Allahabad High Court. In the absence of any liberty granted by Jammu & Kashmir High Court the petition is not maintainable. Ld. Counsel relied upon order 23 Rule 1 of the Code of Civil Procedure. Contention of Ld. Counsel for the respondents does not seem to be supported by decision of Jammu & Kashmir High Court. Ld. Counsel for the respondents relied upon case reported in (1987) 1 SCC 5 ***Sarguja Transport Service vs. State Transport Appellate Tribunal M.P., Gwalior and Ors*** (paras 8 & 9) and AIR (1999)

SC 509 ***M/S Upadhyay & Co. vs. State of U.P. & Ors*** (paras 11,12,13 & 14).

So far as Writ Petitions are concerned, there appears no room of doubt that second Writ Petition shall not be maintainable unless liberty is granted while dismissing the earlier one by the Court. However at later stage Shri Asit Chaturvedi, Ld. Sr. Counsel fairly admitted that liberty was granted by the J&K High Court and in pursuance thereof Writ Petition was filed in Allahabad High Court. Hence we need not deal with this objection initially raised.

IV. MAINTAINABILITY IN ARMED FORCES TRIBUNAL

42. The other submission of Ld. Counsel for the respondents relying upon the case of ***Dinesh Chand Gautam vs. Union of India***, 2001 (2) UPLBEC 127, and raising question of jurisdiction to try the petition in the Armed Forces Tribunal, Regional Bench, Lucknow is not correct in view of the fact that the petitioner is permanent resident of District Mainpuri, U.P. and the petition is very well maintainable in the Armed Forces Tribunal, Regional Bench, Lucknow in view of provision contained in Rule 6 of the Armed Forces Tribunal (Procedure) Rules 2008. For convenience sake Rule 6 (supra) is reproduced as under:

> *"**6. Place of filing application**.- An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction-*
>
> *(i) The applicant is posted for the time being, or was last posted or attached; or*
>
> *(ii) Where the cause of action, wholly or in part, has arisen:*
>
> *Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.*
>
> *2. Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time filing of the application."*

In view of sub-rule (2) of Rule 6 (supra), since the petitioner is permanent resident of Mainpuri, a district within the jurisdiction of State of U.P., the present T.A. is maintainable in the Armed Forces Tribunal, Regional Bench, Lucknow under sub-rule (2) of Rule 6 (supra) followed by Full Bench decision of the Armed Forces Tribunal, Principal Bench, New Delhi. Since much emphasis has been given by respondents' counsel with regard to jurisdiction of Tribunal and applicability of Code of Civil Procedure (supra), we precisely elaborate the law

following from the maxim '*Generalia Specialibus Non Derogant'*.

43. *'Generalia Specialibus Non Derogant'* is the maxim which is well applicable in the present case which means special law shall prevail over the general law in the event of conflict.

44. In ***Bengal Immunity Co. Ltd vs State of Bihar,*** AIR 1955 SC 661 the court held (per Venkatarama Ayyar, J.) :

> *"One of the applications of the rule of harmonious construction is that a law generally dealing with a subject and another dealing particularly with one of the topics comprised therein, the general law is to be construed as yielding to the special in respect of the matters comprised therein."*
>
> *(Per majority)*
>
> *"The principle that particular or special rule must control or cut down the general rule is inapplicable where the two provisions do not relate to the same subject."*

45. In ***J.K. Cotton Spg & Wvg Mills Co. Ltd vs State of 5Uttar Pradesh****,* AIR 1961 SC 117, the Court held:

> *"In cases of conflict between special provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision".*

46. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and

judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large numbers of matters in general and another to only some of them, his intention is that these latter directions should prevail as regards these, while, as regards all the rests, the earlier decisions should have affect. In ***Pretty vs. Solly*** (1859) 53 ER 1032: quoted in Craies on Statute Law (6th Edition) at p. 206 Romilly, M.R., mentioned the rule thus:

> *"The rule is that whenever there is a particular enactment and a general enactment in the same statute and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to effect the other parts of the statute to which it may properly applies."*

47. This principle has been reiterated by Hon'ble Supreme Court in a catena of decisions reported in*:*

(i) ***Anandji Haridas & Co. (P) Ltd vs. S.P. Kasture****, AIR 1968 SC 565;*

(ii) *In* ***Om Prakash vs. Union of India*** *(1970) 3 SCC 942; and*

(iii) ***Ashoka Marketing Ltd Vs. Punjab National Bank****, (1990) 4 SCC 406.*

Accordingly the Armed Forces Tribunal Act, 2007 as well as Army Act, 1950 being special law shall over ride general provisions/general law in the event of conflict subject to applicability provided by Armed Forces Tribunal Act, 2007.

48. By raising the plea of maintainability Shri Asit Chaturvedi, Ld. Sr. Counsel appearing for the respondents gave emphasis to clause (b) of sub-section (2) of Section 34 of the Act, 2007 and submitted that only the cases falling within the four corners of Section 34 of the Act, 2007 may be transferred to this Tribunal and not an appeal preferred against Court Martial proceedings. On the other hand, Ld. Counsel for the petitioner asserted that in pursuance of provision contained in Section 34 and Section 35 of the Act, 2007, all matters pending in other Courts including the High Court shall deemed to be transferred to the Tribunal and shall be dealt with in the manner an application is filed under sub-section 2 of Section 14 of the Act, 2007.

49. One of the other objections raised by Ld. Counsel for the respondents is that the petitioner has not pressed amendment application to implead the Presiding Officer of SGCM proceeding and others. Inspite of objection raised Ld. Counsel for the petitioner has not pressed the amendment application and hence we feel that it shall be deemed to be 'not pressed' since it does not affect merit of the case.

We have also declined to return the SGCM proceeding which according to Ld. Counsel for the respondents, was one of

the copy of the three given to three Members during SGCM proceeding.

50. We have considered the arguments advanced by Ld. Counsel for the parties. For convenience sake Section 34 and Section 35 of the Act, 2007 may be reproduced as under:

> ***"34. Transfer of pending cases****.- (1) Every suit, or other proceeding pending before any court including a High Court or other authority immediately before the date of establishment of the Tribunal under this Act, being a suit or proceeding the cause of action whereon it is based, is such that it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, stand transferred on that date to such Tribunal.*
>
> *(2) Where any suit, or other proceeding stands transferred from any court including a High Court or other authority to the Tribunal under sub-section (1),-*
>
> *(a) the court or other authority shall, as soon as may be, after such transfer, forward the records of such suit, or other proceeding to the Tribunal;*
>
> *(b) the Tribunal may, on receipt of such records, proceed to deal with such suit, or other proceeding, so far as may be, in the same manner as in the case of an application made under sub-section (2) of section 14 from the stage which was reached before such transfer or from any earlier stage or denovo as the Tribunal may deem fit."*
>
> *"35.* ***Provision for filing of certain appeals.-*** *Where any decree or order has been made or passed by any court (other than a High Court) or any other authority in any suit*

> *or proceeding before the establishment of the Tribunal, being a suit or proceeding the cause of action whereof is based, is such that it would have been, if it had arisen after such establishment, within the jurisdiction of the Tribunal, and no appeal has been preferred against such decree or order before such establishment or if preferred, the same is pending for disposal before any court including High Court and the time for preferring such appeal under any law for the time being in force had not expired before such establishment, such appeal shall lie to the Tribunal, within 90 days from the date on which the Tribunal is established, or within 90 days from the date of receipt of the copy of such decree or order, whichever is later."*

51. The Legislature to their wisdom in sub-section (1) of Section 34 use the words, 'it would have been within the jurisdiction of the Tribunal, if it had arisen after such establishment within the jurisdiction of such Tribunal, stand transferred on that date to such Tribunal.' Thus, the provision contained in sub-section (1) of Section 34 of the Act, 2007 by fiction of law provides that 'every suit or other proceeding pending before any Court including a High Court or other authority immediately before establishment of the Tribunal falling within the jurisdiction of the Tribunal shall deemed to be filed within jurisdiction and shall be dealt with accordingly.' Sub-section 2 of Section 34 seems to be explanatory in nature to all cases transferred to the Tribunal. Clause (b) of sub-section (2) of Section 34 of the Act, 2007 provides that 'after receipt of records the Tribunal shall proceed to deal with such

suit, or other proceeding, including proceeding pending in the High Court' as in case of application filed in sub-section (2) of Section 34 from the State it was reached before such transfer or from any other earlier stage or de novo as the Tribunal may deem fit. (Emphasis supplied). Clause (b) of sub-section (2) of Section 34 of the Act, 2007 does not make a distinction between an order passed by the Court Martial proceeding with regard to service matters or an offence which may fall within the ambit of criminal or civil matter. In all such cases the procedure contained in Section 14 may be adopted. Of course where a new case is filed, it may be preferred under Section 14 or 15 of the Act, 2007 in the Tribunal according to the nature of the matter raised.

52. However, it may be noted that every proceeding before the Army authorities, whether it is service matter or criminal matter, is adjudicated by Court Martial proceeding and sometime orders are passed not only awarding punishment affecting service or career of Armed Forces personnel but also convicting and punishing with imprisonment depending on facts of each case. In such situation there may be cases where Section 14 and Section 15 of the Act, 2007 both may be attracted, like the present case where the petitioner has not

only been dismissed from service (service matter) but has also been awarded to undergo imprisonment of seven years.

53. So for as Section 35 of the Act, 2007 is concerned, a plain reading of said provision shows that it relates to any decree or order passed by any Court, other than High Court, and further the cause of action had arisen after establishment of the Tribunal and within the jurisdiction of such Tribunal and pending for disposal before appropriate forum including High Court and if while preferring the petition in the High Court or other forum, limitation under the Act, 2007 has not expired then the appeal may be preferred in the Tribunal within ninety days from the date on which the Tribunal is established. The present controversy is not covered by Section 35 of the Act, 2007.

54. Submission of Ld. Counsel for the respondents with regard to applicability of clause (b) of sub-section (2) of Section 34 of the Act, 2007 and any portion of it seems to be not correct for the reason that while interpreting the provisions contained in Section 34 of the Act, 2007 may not be made redundant. It is well settled principle of law that a statute should be read in its entirety and purported object of the Act should be given its full effect. The entire statute may be read as a whole, then section by section clause by clause, phrase by phrase and word by word. The relevant provisions of the statute should be read

harmoniously. Construction which would lead without any effect to any part of language of statute will clearly be rejected. Accordingly, interpretation of sub-section (2) of Section 34 of the Act, 2007, as argued by Ld. Sr. Counsel appearing for the respondents, if accepted, would negate the effect of Section 34 of the Act, 2007, which is not permissible.

55. In ***Dadi Jagannadhan vs Jammulu Ramulu,*** (2001) 7 SCC 71 Hon'ble the Supreme Court been held that while interpreting a statute the Court must start with the presumption that legislature did not make any mistake and must interpret so as to carry out the oblivious intention of legislature, it must not correct or make up a deficiency, neither add nor read into a provision which are not there particularly when literal reading leads to an intelligent result.

56. In the case of ***Grasim industries ltd. vs. Collector of Custom,*** (2002) 4 SCC 297 it has been held that while interpreting any word of a statute every word and provision should be looked at generally and in the context in which it is used and not in isolation.

57. In ***Deepal Girish Bhai Soni vs. United India insurance ltd.*** (2004) 5 SCC 385 Hon'ble Supreme Court has held that statute to be read in entirety and purport and object of Act to be

given its full effect by applying principle of purposive construction.

58. In ***Pratap Sing vs. State of Jharkhand,*** (2005) 3 SCC 551 Hon'ble Supreme Court has held that Interpretation of a statute depends upon the text and context thereof and object with which the same was made. It must be construed having regard to its scheme and the ordinary state of affairs and consequences flowing there from – must be construed in such a manner so as to effective and operative on the principle of *'ut res magis valeat quam pereat'*. When there is no meaning of a word and one making the statute absolutely vague, and meaningless and other leading to certainty and a meaningful interpretation are given, in such an event the later should be followed.

59. In ***Bharat petroleum Corpn. Ltd. vs. Maddula Ratnavali,*** (2007) 6 SCC 81 Hon'ble Supreme Court has held that Court should construe a statute justly. An unjust law is no law at all. Maxim '*Lex in just non est.*'

60. In ***Deevan Singh vs. Rajendra Pd. Ardevi,*** (2007) 10 SCC 528 Hon'ble Supreme Court has held that while interpreting a statute the entire statute must be first read as a whole then section by section, clause by clause, phrase by

phrase and word by word the relevant provision of statute must thus read harmoniously.

61. This principle has also been reiterated in ***Zakiya Begum Vs. Shanaz Ali,*** 2010 (9) SCC 280 and ***Bondu Ramaswamy Vs. Bangalore Development Authority,*** 2010 (7) SCC 129**.**

62. Accordingly, argument advanced by Shri Asit Chaturvedi, Ld. Sr. Counsel to the effect that the petitioner should have preferred an appeal under Section 15 of the Act, 2007 after withdrawing the Writ Petition, is rejected.

V. LEGAL FICTIONS:

63. Apart from above Sections 1, 2, 3, 4 & 5 read with Sections 14 and 15 of the Armed Forces Tribunal Act, 2007 create legal fiction for adjudication of cases by Armed Forces Tribunal.

64. In the case of ***State of Bombay vs. Pandurang Vinayak,*** AIR 1953 SC 244: Hon'ble Supreme Court has held that, when a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. (para 5)

65. It has been held by Hon'ble Supreme Court in the case of ***Bengal Immunity Co. Ltd. vs. State of Bihar***, AIR 1955 SC 661 that legal fictions are created only for some definite purpose and it is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field.

66. In the case of ***CIT vs. S. Teja Singh,*** AIR 1959 SC 352 Hon'ble the Supreme Court has held that it is a rule of interpretation well settled that in construing the scope of legal fiction it would be proper and even necessary to assume all those facts on which alone the fiction can operate. (para 6)

67. In ***Boucher Pierre Andre vs. Supdt. Central Jail***, AIR 1975 SC 164, Hon'ble Supreme Court has held that, where a legal fiction is created, full effect must be given to it and it should be carried to its logical conclusion.

68. In the case of ***Cambay Electric Supply Industrial Co. vs. CIT***, AIR 1978 SC 1099, Hon'ble the Supreme Court held that legal fictions are created for a definite purpose and they should be limited to the purpose for which they were created and should not be extended beyond the legitimate field. (para 8)

69. In ***Harish Tandon vs. ADM****,* (1995) 1 SCC 537, Hon'ble Supreme Court has held that, when a statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction is to be resorted to. Thereafter full effect has to be given to such statutory fiction and it has to be carried to its logical conclusion.

70. In the case reported as ***State of W.B. vs. Sadan K. Bormal****,* (2004) 6 SCC 59, Hon'ble Supreme Court has held that so far as interpretation of legal fiction is concerned, it is trite that the court must ascertain the purpose for which the fiction is created and having done so must assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. (para 25)

In the present case, the purpose is to transfer all service matters pending in any Court to the Armed Forces Tribunal.

71. Apart from above, clause (b) of sub-section (2) of Section 34 of the Act, 2007 creates a fiction of law to the effect that any matter transferred to the Tribunal either from the High Court or from other authority, shall be dealt with in accordance with the provisions contained in Section 14 of the Act, 2007. Legal

fiction created by sub-section (2) of Section 34 of the Act, 2007 may be given effect to only in case it is literally complied with.

72. In view of above, the legal fiction created by sub-section (2) of Section 34 of the Act, 2007 is to deal with period interregnum to remove any doubt or vacuum while transferring the case from other Courts or authorities, including the High Court. The purpose and object to create legal fiction must be given full effect and it cannot be interpreted in such a manner which may frustrate the aim and objection of the legislative intent. On this ground also the argument with regard to maintainability of the T.A. in the Tribunal pleaded by Shri Asit Chaturvedi, Ld. Sr. Counsel, is rejected.

VI. STATUTORY PROVISIONS:

73. We are relying and reproducing the provisions of Army Act, 1950 and rules framed thereunder from a book published by Government of India containing Hindi translation prepared by Ministry of Law, Justice and Company Affairs (Official Language Wing), New Delhi and Central Translation Bureau, Ministry of Home Affairs, New Delhi as applicable in 1990.

A plain reading of the aforesaid provision may be considered in the manner provided under the Act and Rules, 1950 framed thereunder and in accordance with usages of the service. In case definition is applied, submission of Ld.

Counsel for the petitioner is that he was in custody when be was brought from Command Hospital, Lucknow to Udhampur on 06.06.1990 even in the absence of any order brought on record may not be ruled out. Presence of escort indicates military custody of the petitioner.

74. Section 34 of the Act defines offences. The same is reproduced as under:-

> *"34.* ***Offences in relation to the enemy and punishable with death.-*** *Any person subject to this Act who commits any of the following offences, that is to say,-*
>
> *(a) shamefully abandons or delivers upt any garrison, fortress, post, place or guard, committed to his charge, or which it is his duty to defend, or uses any means to compel or induce any commanding officer or other person to commit any of the said act; or*
>
> *(b) Intentionally uses any means to compel or induce any person subject to military, naval, or air force law to abstain from acting against the enemy, or to discourage such person from acting against the enemy; or*
>
> *(c) in the presence of the enemy, shamefully casts away his arms, ammunition, tools or equipment or misbehaves in such manner as to show cowardice; or*
>
> *(d) treacherously holds correspondence with, or communicates intelligence to, the enemy or any person in arms against the Union; or*

(e) directly or indirectly assists the enemy with money, arms, ammunition, stores or supplies; or

(f) treacherously or through cowardice sends a flag of truce to the enemy; or

(g) in time of war during any military operation, intentionally occasions a false alarm in action, camp, garrison or quarters, or spreads reports calculated to create alarm or despondency; or

(h) in time of action leaves his commanding officer or his post, guard, picquet, patrol or party without being regularly, relieved or without leave; or

(i) having been made a prisoner of war, voluntarily serves with or aids the enemy; or

(j) knowingly harbours or protects an enemy not being a prisoner; or

(k) being a sentry in time of war or alarm, sleeps upon his post or is intoxicated; or

(l) knowingly does any act calculated to imperil the success of the military, naval or air forces of India or any forces co-operating therewith or any part of such forces;

Shall, on conviction by court-martial, be liable to suffer death or such less punishment as is in this Act mentioned.

NOTES

1. Offences under this section should not be dealt with summarily under AA. s. 80, 83 or 84; also see Regs Army para 451.

Because the maximum punishment for offences under this section is death.-

(a) a Summary of Evidence must be taken.

(b) a plea of guilty cannot be accepted (AR 52 (4).
(c) the trial should not take place before a DCM / SCM.

2. 'Subject to this Act': see AA. s. 2.

3. Clause (a): 'Shamefully abandons', etc.- (a) This offence can only be committed by the person in charge of the garrison, post, etc., and not by the subordinates under his command. The surrender of a place by an officer charged with its defence can only be justified by superior's orders or the utmost necessity, such as want of provisions or water, the absence of hope of relief, and the certainty or extreme probability that no further efforts could prevent the place with its garrison, their arms and ammunition, falling into the hands of the enemy.

(b) It must be proved that the accused had no necessity to surrender or abandon the post before a conviction can be obtained. Particulars of a charge under this clause must detail some circumstances which make abandonment in a military sense shameful. 'Shameful' means a positive and disgraceful dereliction of duty and not merely negligence or misapprehension or error of judgment.

(c) 'Post' includes any point or postion (whether fortified or not) which a detachment may be ordered to hold; and the abandonment of a post would also include the abandanment of a seized if there were no circumstances to warrant such a measure. It has not the same meaning as in clauses (h) and (k) or AA. s. 36 (c) or (d), where it has reference to the position of an individual.

4. Clause (b): 'Intentionally'.- As a state of mind (e.g. intention, knowledge) is not capable of positive proof, the court may infer intention from the circumstances proved in evidence. As a general rule, a person is presumed in law to have intended the natural and probable consequences of his act. A court may also presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of events and human conduct. See IEA. S. 11.

5. Enemy-See AA. s. 3 (x).

6. Clause (c): 'Shamefully'.- (a) The particulars of the charge must show the circumstances which make the act in a military sense shameful; see note 3(b) above.

(b) The presence of the enemy must be near at hand and a soldier not in the forward area could not be convicted of an offence if, for example, he casts away his arms during an air raid.

(c) Enemy: see AA.s. 3(x). The term includes any person in arms against whom it is the duty of a person subject to military law to act. A person subject to the AA, therefore who, when a comrade 'runs amok', shows cowardice by refraining from acting against him is liable to trial under this clause. See also Regs Army para 348.

7. 'Misbehaves'.- (a) This means that the accused, from an unsoldier-like regard for his personal safety, in the presence of the enemy, failed in respect of some distinct and feasible duty imposed upon him by a specified order or regulation, or by the well-under-stood custom of the service, or by the requirements of the case, as applicable to the position in which he was placed at the time. Misbehaviour of any kind not evidencing cowardice cannot be charged under the last sentence of this clause.

(b) Where there is evidence that an accused has committed some other offence which is specifically mentioned in the Act as under clausez (a) or (b) or AA. s. 38 (1) such an offence should be charged in preference to a charge under this clause.

8. Clause (d) : 'Treacherously'.- (a) see note 9(a) and (b) below.

(b) If there is no evidence of treachery,the charge should be laid under AA.s. 35(b).

(c) In a charge under this clause, it must be proved that the intelligence did in fact reach the enemy.

9. Clause (f) : 'Treacherously' or 'through cowardice'.- (a) Treacherously implies an intention to assist the enemy and must be carefully distinguished from 'through cowardice' which occur in this clause. The intention to help the enemy is an essential ingredient of the offence or treachery and must be proved before a conviction can be sustained.

(b) The particulars of the charge must show the circumstances which indicate the treachery or cowardice. If there is no treachery or cowardice, the charge should be laid under AA. s. 35(c).

10. Clause (g) : Intentioinally.- see note 4 above.

11. 'Occasions a false alarm.'.- The particulars of the charge must set out briefly the means whereby the alarm was caused.

12. 'Spreads reports.- The particulars of the charge must detail the reports alleged to have been spread, and should indicate how they were calculated to create alarm or despondency. It is not necessary to aver or prove that the reports were false, indeed the truth may increase the offence; nor is it

necessary to show that any effect was actually produced by the reports spread; it would, however, seldom be expedient to tryan officer or soldier under this section for reports which could not be shown to have had some effect. The offence may be committed either with reference to the troops with whom the offender is serving, or with reference to the inhabitants of the country. When the false alarm is occasioned or such reports are spread otherwise than in time of war or during any military operation, the charge should be framed under AA.s. 36(c) which makes punishable such spreading of reports etc., even though through neglect.

13. Camp.- Includes a bivouac and any quarters,shelter or other place where troops are temporarily located.

14. Clause (h) : Commanding Officer. – see AA. s. 3 (v).

15. 'Post'.- (a) When used with respect to an individual as in this clause and clausez (k), means the position or place in which it may be the duty of a person subject to the AA to be, especially when under arms. In determining what, in any particular case is a post, the court will use their military knowledge (AA. s. 134). The place in which the person was posted is material and should be stated in the charge.

(b) When a person is charged with leaving his post, it is always necessary to prove that he had been regularly posted.

(c) This offence can be committed by any member of the guard, picquet etc., even the guard etc., commander but a joint charge cannot be preferred.

16. Without being regularly relieved or without leave.- These words are in the nature of an exception, and the principle laid down in section 105 of the IEA applies. Therefore,

though the charge must aver the absence of regular relief or leave, this need not be proved, and the fact of the accused person having quitted his guard, etc., being established it will be for him to show that he was regularly relieved or had leave to quit his guard; nevertheless, any evidence bearing on this point which is known to the prosecutor should be adduced.

17. Clause (i): 'Voluntarily'.- The term as defined in s. 39 of the IPC relates to the causation of effects and not to the doing of acts from which those effects result. However, here it has been used more in its ordinary meaning e.g. of his own free will rather than in its technical sense ie.e it means merely that the accusezd was willing to do the act in its technical sense i.e. it means merely that the accused was willing to do the act charged; it is not necessary to show that he volunteered to do it, or even that he wished to do it. In the abswence of any evidence that compulsion was applied the court may find that the accused actedvoluntarily; but if from the whole of the evidence given the court think that the accused's will may have been overborne by fear they should acquit him. The test is whether the particular accused was in fact so frightened as to have lost control of his will, not whether the methods used by his captors were such as would causes a reasonably brave man to lose control. Coercion will, therefore, be a defence to such a charge.

18. Clause (j): 'Knowingly'.- Evidence should, if possible, be given that the accused knew the person harboured or protected to be an enemy who is not a prisoner but if the fact of the harbouring or protecting is proved, the court may infer knowledge from the circumstances.

19. 'Harbouring'.- The word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance or the assisting of a

person by any means, whether of the above kinds or not to evade apprehension : IPC section 52A.

20. Enemy.-See AA. s. 3(x).

21. Clause (k) : 'Post'.- As used with respect to an individual in this and other clauses the term refers to the position or place in which it may be the duty of a person subject to this Act to be, especially when under arms. With respect, in particular, to a sentry, it applies (i) to the spot where the sentry is left to the observance of his duties by the officer, JCO or NCO posting him, or (ii) to any limits specially pointed out as his beat. The fact that a sentry has not been regularly posted is immaterial if he is charged with an offence committed while on his post provided evidence is given to prove that he adopted the duty of sentry.

(b) In determining what, in any particular case, is a post the court will use their military knowledge : AA. s. 134.

(c) A sentry found sleeping even a short distance from his 'post' should be charged with leaving his post under clause (h) or AA. s. 36 (d); he cannot be charged with sleeping on his post under this clause. However, where a sentry is found intoxicated, he could be charged under this clause though he is so found at a short distance away from his post as the place where he is found intoxicated is immaterial not being ingredient of the offence.

(d) A policeman on gate duty is not a sentry.

(e) Two or more accused cannot be tried jointly with committing an offence under this clause.

> *(f) The same offence when committed by a sentry in circumstances which do not fall under this clause is triable under clause (c) of AA. s. 36.*
>
> *22. Clause (l) : 'Knowingly'.- See notes 4 and 18 above.*
>
> *A charge under this clause should particularize the actual acts alleged. The act or acts must be shown to have been deliberately done by the accused with the intention of imperiling the success of the said forces. Such intention may be proved in evidence or may be inferred from the circumstances."*

75. Apart from Section 34 of the Act, 1950 Section 35 deals with offences in relation to enemy, Section 36 deals with offences more severely on active service than other times, Section 37 relates to mutiny and Section 38 deals with desertion and aiding desertion. Section 38 of the Army Act, 1950 alongwith notes, for convenience sake, is reproduced as under:-

> *"**38. Desertion and aiding desertion.—**(1) Any person subject to this Act who deserts or attempts to desert the service shall, on conviction by court-martial,if he commits the offence on active service or when under orders for active service , be liable to suffer death or such less punishment as is in this Act mentioned, and if he commits the offence under any circumstances, be liable to suffer imprisionment for a term which may extend to seven years or such less punishment as is in this Act mentioned.*
>
> *(2) Any person subject to this Act who, knowlingly harbours any such deserter shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to*

seven years or such less imprisonment as is in this Act mentioned.

(3) Any person subject to this Act who, being cognizant of any desertion or attempt at desertion of a person subject to this Act, does not forthwith give notice to his own or some other superior officer, or take any steps in his power to cause such person to be apprehended, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to two years or such less punishment as is in this Act mentioned.

NOTES

1. General.- (a) An offence under sub-section (1) of this section when on active service or under orders for active service should not be dealt with summarily under AA. ss. 80, 83 or 84.

(b) When a superior officer directs the case of an offender against whom a charge for desertion has been preferred to be summarily disposed of, he should order the offence to be disposed of as one of absence without leave. See notes to AA. s. 39. See generally AA. ss. 104 and 105 and Regs Army paras 376 to 381.

(c) Under AA. s. 120 (3), a CO can try by SCM a NCO or sepoy under his command, for an offence under this section. As a rule a NCO or OR cannot be attached to another unit for purposes of his trial by SCM; but see REgs Army para 381 for the circumstances when a CO other than the CO of the unit to which a NCO or OR properly belongs, can try him by SCM for an offence of desertion or absence without leave.

2. Sub sec. (1).- Desertion is distinguished from absence without leave under AA. s. 39; in that desertion or attempt to desert the service

implies an intention on the part of the accused either (a) never to return to the service or (b) to avoid some important military duty (commonly known as constructive desertion) e.g., service in a forward area, embarkation for foreign service or service in aid of the civil power and not merely some routine duty or duty only applicable to the accused like a fire picquet duty. A charge under this section cannot lie unless it appears from the evidence that one or other such intention existed; further, it is sufficient if the intention in (a) above was formed at the time during the period of absence and not necessarily at the time when the accused first absented himself from unit/duty station.

3. A person may be a deserter although he re-enrols himself, or although in the first instance his absence was legal (e.g. authorized by leave), the criterion being the same, viz., whether the intention required for desertion can properly be inferred from the evidence available (the surrounding facts and the circumstances of the case).

4. Intention to desert may be inferred from a long absence, wearing of disguise, distance from the duty station and the manner of termination of absence e.g., apprehension but such facts though relevant are only prima facie, and not conclusive, evidence of such intention. Similarly the fact that an accused has been declared an absentee under AA. s. 106 is not by itself a deciding factor if other evidence suggests the contrary.

5. A person subject to the AA charged with desertion may be found guilty of an attempt to desert or of absence without leave, and such a person charged with attempting to desert may be found guilty being absent without leave provided evidence was available to prove the absentee; see AA. s. 139 (1) and (2). When the absence began more than 3 years before the date of trial, the provisions of AA. s. 122 must be borne in mind and complied with. For

instance where an accused person is charged with desertion commencing on a date more than three years before the date of trial, he cannot be found guilty under AA. s. 139 (1) of absence without leave from that date but such absence must be restricted to a period not exceeding three years immediately prior to the commencement of trial; where such a finding and sentence has been wrongly confirmed, the competent authority under AA. s. 163 may substitute a valid finding and pass a sentence for the offence specified or involved in such finding.

6. When a person subject to AA has been absent from his duty without authority for a period of thirty days, a Court of Inquiry is mandatory under AA. s. 106 but even after such a Court of Inquiry has been held, the case can still be disposed of summarily under AA. s. 80, 83 or 84 but the charge should be laid for absence without leave under AA. s. 39. As to inquiring into absence see AR 183 also.

7. AA. s. 122 which prescribes the limitation of time for the trial of offences expressely exclude desertion; but where a person other than an officer has subsequently to the commission of the offence served continuously in an exemplary manner for not less than three years, he cannot be tried for such offence of desertion which was committed before the commencement of such three years other than desertion on active service. For exemplary service see Regs Army para 465.

8. Two or more persons cannot be tried jointly with committing of desertion under this sub sec.

9. AA. ss. 90(a) and 91 (a) read with P and A Regs provide for automatic forfeiture of pay and allowances for every day a person subject to AA is absent on desertion or without leave.

10. As to forfeiture of service for pension or gratuity, which follows upon desertion, and restoration of service so forfeited, see Regs

pension (Part I) Reg 123. The period between desertion and apprehension/surrender does not, under the prescribed conditions of enrolment; reckon as service towards discharge. Service rendered previous to desertion, though forfeited for purposes of pension or gratuity, reckons as service towards discharge. As to a person who absents himself from his corps or department and enrolls again, see AA. s. 43 and notes thereto.

11. (a) While framing charges of desertion or absence without leave care must be taken to ensure that the particulars allege and the prosecution prove, both the date when the absence began, and the date when it ended (by return, surrender, apprehension or re-enrolment). It is not sufficient to allege and prove absence "on or about" a certain date, or "from some date subsequent to……."

(b) Commencement of absence under this section or AA. s. 39 may be proved in the following ways:

(i) orally by a witness who found the accused absent, or

(ii) by production by a witness on oath, who can identify the accused as the person named in :

(aa) the declaration of a Court of Inquiry held under AA. S. 106 as entered in the court-martial book; or

Provided AA s. 106 and AR 183 have been complied with.

(bb) a certified true copy of the above declaration on IAF D-918; or

(cc) an entry in a part II Order; provided the entry is one that is made in Regimenal orders/books in pursuance of military duty and the orders purported to be signed by the CO or by the officer whose duty

it is to make such recod AA a. 142 (3). Such an entry should only be used as evidence where no direct evidence and no declaration of a Court of Inquiry is available and even then it is only prima facie evidence and may be rebutted, or

(dd) a copy of such an order purporting to be certified to be a true copy by the officer having custody of such order; see AA. s. 142(4).

(c) Termination of absence may be proved in the following ways:-

(i) By oral evidence of a witness who apprehended the acused or to whom the accused surrendered; or

(ii) by production by a witness on oath,who can identify the accused as the person named in :

(aa) a certificate on IAFD-910 stating the fact, date and place of surrender or apprehension and the manner in which the accused was dressed and signed by a police officer not below the rank of officer incharge of a police station to whom the accusezd surrendered or by whom he was apprehended AA.s. 142 (6); or

(bb) where the surrender was made to an officer or other person subject to AA or any portion of regular Army or where the accused was apprehended by an officer or other person subject to AA, a similar certificate signed by the 'proper close officer: AA. s. 142 (5) (Also see Regs Army para 378); or

(cc) a Part II Order showing the taking on strength properly signed in accordance with AA, s. 142 (3); or

(dd) a certified true copy of such order in accordance with AA. s. 142 (4); or

(ee) where the absence terminated by fraudulent enrolment in the regular Army, the enrolment paper or certified true copy thereof. AA.s.141 (2).

12. The commencement of an absence cannot be proved by production of an absence report as this is not a regimental book under Regs Army para 610.

13. Attempt to desert.- To establish an attempt to desert, some act which, if completed, would constitute desertion must be proved, e.g., a soldier is arrested in the act of leaving his unit lines without authority,dressed in plain clothes and carrying his personal kit, when the circumstances indicate that he intends to desert. The test is whether the act, or series of acts, in the course of which the offender is apprehended or surrenders, would, if completed, amount to desertion. A mere preparation to desert,if unaccompanied by any such act which if completed would amount to desertion, does not constitute an offence of attempting to desert. But if there is evidence that the offender actually absented himself from the place where his duty required him to be and that he intended to desert, the offence is complete and a charge for desertion, not for an attempt to be desert should be framed.

Attempt to desert is itself made a substantive offence, and a charge for the same should be preferred under this sub-sec and not under AA, s. 65."

76. A plain reading of Note-2 of Section 38 of the Army Act, 1950 shows that <u>desertion is distinguished from absence without leave as defined in Section 39 of the Army Act, 1950</u>. Desertion or attempt to desert the service implies intention on

the part of the accused either (a) never to return back; or (b) to avoid some important military duty. Intention to desert may be inferred from long absence, wearing of disguise, distance from the duty station and manner of termination of absence.

Under Note-11, while framing charges of desertion or absence without leave, the Court must take care to establish by oral evidence of a witness who apprehended the accused or to whom the accused surrendered.

In the present case the petitioner neither surrendered nor was apprehended rather he approached his family and with his father, Honorary Capt Jagpal Singh, contacted Lt Gen Y.S. Tomar, Adjutant General, Army Headquarters, who recommended for his admission in Army Hospital (R.R. Hospital) New Delhi and instituted an inquiry to be conducted by Maj Gen R.S. Taragi. Keeping in view this vital fact, the controversy in question does not seem to be case of desertion.

Punishment for desertion is not only to be cashiered but may be sentenced to death or life imprisonment or imprisonment not less than seven years.

77. Section 51 of the Army Act, 1950 deals with the question of escaping from custody. For convenience sake, Section 51 of the Act is reproduced as under:-

> ***"51. Escape from Custody***.- *Any person subject to this Act who, being in lawful*

custody, escapes or attempts to escape, 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."

NOTES

1. The term 'lawful custody' in this section means not only military custody as defined in AA.s. 3 (xiii) but any lawful custody; so that a person subject to AA may be convicted under this section when escaping or attempting to escape from a police officer who has under AA.s. 105 (2) arrested him as a suspected deserter. Similarly when a person is held by the Provost Marshal or a person legally exercising authority under him or on his behalf under AA.s. 107, he may be charged with an offence under this section.

2. (a) As military custody includes open arrest, a person escaping or attempting to escape while in open arrest could be charged under this section.

(b) A person undergoing field punishment is in lawful custody within the meaning of this section although he is not in arrest. Care therefore must be taken, when framing a charge under this section to ensure that the particulars alleged correspond with the statement of offence.

(c) Confinement to the lines is not lawful custody for the purposes of this section.

3. A person subject to AA, who escapes from arrest and absents himself without leave, may be charged with, and convicted of, both under this section, and of the subsequent desertion or absence without leave; under AA.s. 38 (1) or 39 (a).

> *4. A prisoner is said to 'estape' when he unlawfully goes out of the sight beyond the control of the person in whose custody he is placed.*
>
> *5. Attempt to escape is itself made a substantive offence and a charge for the same should be preferred under this section.*

A plain reading of Section 51 shows that for the offence under this Section, a person must escape from lawful custody without leave and it is a substantive offence for which a charge for the same should be preferred under this Section. In the present case the petitioner has not been tried by framing of charge under Section 51 of the Army Act, 1950.

78. Section 57 of Army Act, 1950 deals with falsifying official documents and false declarations and Section 58 of the Army Act, 1950 refers to signing in blank and failure to report. However, though half heartedly it has been stated that statement has been recorded in SGCM proceeding that petitioner interpolated leave certificate to avail leave, but neither charges were framed nor tried, hence we need not enter into this controversy.

79. Section 59 of the Army Act, 1950 deals with offences relating to Court Martial and Section 60 of the Army Act, 1950, makes it punishable for giving false evidence. Section 63 Army Act, 1950 deals with violation of good order and discipline whereas Section 64 contains miscellaneous offences with

regard to gratification etc. Section 65 of the Army Act, 1950 deals with attempt to commit offence under the Act and Section 66 of the Army Act, 1950 deals with abatement of offences that has been committed. Undoutedly in case charges against the petitioner are found to be incorrect and fabricated one, the officers involved to make out a case against the petitioner by making statement may be charged and tried in accordance with law. Section 71 of the Army Act, 1950 empowers the Court Martial to award the punishment and Section 74 of the Army Act, 1950 empowers to cashiering of officers.

80. The arrest and proceeding of trial is governed by Chapter IX of the Act. Section 101 of the Army Act, 1950 relates to custody of offenders whereas Section 102 of the Army Act, 1950 deals with duty of Commanding Officer in regard to detention. Section 103 of the Army Act, 1950 deals with interval between committal and Court Martial. Sections 101, 102, 103 and 104 of the Army Act, 1950 shall be reproduced at appropriate stage herein after. However we reproduce Section 105 of the Army Act, 1950 which deals with capture of deserters.

> *"**105. Capture of deserters**.- (1) whenever any person subject to this Act deserts, the commanding officer of the corps, department or detachment to which he belongs, shall give written information of the desertion to such civil authorities as, in his opinion, may be able to*

afford assistance towards the capture of the deserter; and such authorities shall thereupon take steps for the apprehension of the said deserter in like manner as if he were a person for whose apprehension a warrant had been issued by a magistrate, and shall deliver the deserter, when apprehended, into military custody.

(2) Any police officer may arrest without warrant any person reasonably believed to be subject to this Act, and to be a deserter or to be travelling without authority, and shall bring him without delay before the nearest magistrate, to be dealt with according to law.

NOTES

1. The section lays down the procedure to be followed for apprehending deserters or suspected deserters and for dealing with persons so arrested. For detailed instructions as to action to be taken by the CO, see Regs Army para. 377.

2. This section is a special application of the powers granted to the civil authorities under AAs. 104.

3. The 'corps'referred to in this section is the corps as defined in AR 187(3).

Department.-See AAs. 3 (ix).

Detachment.-Recruiting parties, including enrolled recruits accompanying them under the orders of a RO or ARO, enrolled personnel forming the establishment for the time being, of AOC establishment or ordnance or clothing factory and enrolled personnel forming the establishment, for the time being, of a military hospital are examples of a detachment.

Civil authorities.- This includes political and police authorities.

4. Sub-sec. (2).- This sub-sec does not make the man's desertion a civil offence punishable by a criminal court."

Keeping in view the mandate of Section 105 of the Army Act, 1950 it is evident from record that the petitioner was not arrested or apprehended rather he was taken into custody after pursuing his release from Army Hospital, New Delhi.

81. Section 108 of the Army Act, 1950 deals with kinds of Court Martial. For convenience sake the same is reproduced as under:

> *"**108. Kinds of courts-martial**.- For the purposes of this Act there shall be four kinds of courts-martial, that is to say,-*
>
> *(a) general courts-martial;*
>
> *(b) district courts-martial;*
>
> *(c) summary general courts-martialp; and*
>
> *(d) summary courts-martial.*
>
> ***NOTE***
>
> *For purposes of easy reference, provisions dealing with the convening, composition etc., of the four types of courts-martial are tabulated below-*

	Convening	*Composition*	*Powers*	*Confirmation*
	AA.s	*AA.s.*	*AA.s.*	*AA.s.*
GCM	*109*	*113*	*118*	*154*
DCM	*110*	*114*	*119*	*155*
SGCM	*112*	*115*	*118*	*157*
SCM	*..*	*116*	*120*	*No confirmation Required but SeeAA.s. 161(2)"*

82. Under Section 112 power to convene a Summary General Court Martial (SGCM) has been conferred on the officer commanding the force in the field or officer empowered under

the Act. For convenience sake Section 112 of the Army Act, 1950 is reproduced as under:-

> *"**112. Power to convene a summary general court-martial**.- The following authorities shall have power to convene a summary general court-martial namely,-*
>
> *(a) an officer empowered in this behalf by an order of the Central Government or of the (Chief of the Army Staff (substituted by Act No. 19 of 1955).*
>
> *(b) on active service, the officer-commanding the forces in the field, or any officer empowered by him in this behalf;*
>
> *(c) an officer commanding any detached portion of the regular Army on active service when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by a general court-martial.*
>
> ***NOTES***
>
> *1. The object of this section is to provide for the speedy trial of offences committed abroad or on active service in cases where it is not practicable, with due regard to the interests of discipline and of the service, to try such offences by an ordinary GCM or DCM. A SGCM can try any offence committed on active service but when troops are not on active service it can only be convened by an officer empowered in this behalf by an order of the Central Government or of the COAS.*
>
> *2. The court can be convened by an officer commanding under clause (c) without a warrant or authorization. For definition of 'regular Army':see AA.s. 3(xxi). Frequently, limitations*

> *are imposed by general orders if the Commander of the Forces as to who shall convene such courts.*
>
> *3. If troops on board a ship are on active service, the OC troops can convene a SGCM for trial of an offender on board.*
>
> *4. For definition of active service, see AA.s. 3(i). Also see AAs 9."*

83. Section 115 of the Army Act, 1950 provides that SGCM shall consist of not less than three officers and Section 118 of the Army Act, 1950 empowers the SGCM to try an officer subject to the Act for any offence in the event of urgency (supra) punishable therein and to pass any sentence authorized thereby.

84. Section 128 of the Army Act, 1950 of Chapter XI provides that the senior most officer shall be the Presiding Officer in the SGCM proceeding and Section 129 of the Army Act, 1950 deals with appointment of Judge Advocate which shall be reproduced hereinafter. Section 131 of the Army Act, 1950 makes it mandatory for oath of members, Judge Advocate and witnesses in the prescribed manner as provided by Rule 47 of the Army Rules. For convenience sake Section 131 of the Army Act, 1950 is reproduced as under:-

> ***"131. Oaths of member, judge advocate and witness**.- (1) An oath or affirmation in the prescribed manner shall be administered to every member of every court-martial and to the judge advocate before the commencement of the trial.*

(2) Every person giving evidence before a court-martial shall be examined after being duly sworn or affirmed in the prescribed form.

(3) The provisions of sub-section (2) shall not apply where the witness is a child under twelve years of age and the court-martial is of opinion that though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation.

NOTES

1. Sub-sec (1). (a) Prescribed form/ manner of oath or affirmation:

(i) for a member of the court, ARs 45, 109 and 155;

(ii) for the JA, officer attending for the purposes of instruction, shorthand writer and interpreter, ARs 46, 109 and 155.

(b) The person to administer oaths or affirmation is prescribed by AR 47.

2. The oath/affirmation taken by the members of the court binds them in their capacity of jurors to find a true verdict according to the evidence (discarding from their minds any private knowledge or information they may happen to possess, and in their capacity of judges to administer justice; and to keep secret the votes or opinions of other members. See note 8 to AR 45 and AA.s. 132 (2).

3. No member can be added to the court after is sworn/affirmed.

4. sub-sec (2).-The prescribed form of oath or affirmation for witness and the person to administer it are prescribed in AR 140.

5. (a) Refusal by a witness subject to AA to take an oath or make an affirmation is punishable under AA.s. 59(b).

(b) Giving false evidence on oath/affirmation is an offence under AA.s. 60.

(c) If a civilian witness refuses to take the oath or make an affirmation or gives false evidence on oath/affirmation, action should be taken by the court as indicated in AR 150(3). See notes to AR 150(3).

6. Sub-sec (3).- This provision is based on the proviso to s. 5 of the Oaths Act, 1873."

(Emphasis supplied)

85. Rule 47 of the Army Rules deals with oaths and affirmations. It provides that oaths and affirmations shall be administered by the Judge Advocate.

86. Section 135 of the Army Act, 1950 deals with summoning of witnesses and empowers the Court to issue notice or summons for production of such witnesses. Under Section 137 of the Army Act, 1950 a commission may be issued to record the statement of witnesses in the manner provided for a trial of warrant case under Code of Criminal Procedure. Section 138 of the Army Act, 1950 deals with examination of a witness on commission.

87. A sentence of SGCM may be confirmed by the convening officer, or if he so directs, by an authority superior to him. Confirming authority under Section 158 of the Army Act, 1950 has got power to mitigate or remit or commute sentence. The

convict has got power to represent his case against his conviction under Section 164 of the Army Act, 1950 to Chief of the Army Staff and Central Government. Section 179 of the Army Act, 1950 (Chapter XIV) empowers the Government to pardon or remit the sentence.

88. Rule 151 of the Army Rules provides that the convening authority shall pass order to convene SGCM in pursuance of Appendix III and the officer who is prosecutor or witness for prosecution shall not be appointed member of Court. For convenience sake Rule 151 of the Army Rules is reproduced as under:-

> ***"151. Convening the court and record of proceedings****.- (1) The court may be convened and the proceedings of the court recorded in accordance with the form in Appendix III, with such variations as the circumstances of each case may require****.***
>
> *(2) The officer convening the court shall appoint or detail the officers to form the court, and may also appoint or detail such officers as waiting members as he thinks expedient. Such officers should have held commissions for not less than one year, but, if any officers are available who have held commissions for not less than three years, they should be selected in preference to officers of less service.*
>
> *(3) The provost-marshal, an assistant provost marshal, or an officer who is prosecutor or witness for the prosecution shall not be appointed a member of the court, but subject to sub-rule (2), any other available officer may be appointed to sit.*

NOTES

1. In the convening order, members and waiting members (if any) may be appointed by name, or only their ranks and units may be mentioned. In the latter event, the ranks, names, etc. of the members of the court as constituted, will be recorded in the proceedings;

2. The convening order must be signed personally by the convening officer.

3. Under sub-rule (2), it is not mandatory that a member of a SGCM must have held a commission for not less than one year. An officer with less than one year's commissioned service can legally sit as a member."

89. Appendix III, the format with regard to Rule 151, is reproduced as under:-

"IAFD-916

PART I (B)

FORMS FOR ASSEMBLY OF COURTS-MARTIALGENERAL AND DISTRICT

Form of order for the Assembly of a General (or District) Court Martial under the Army Act.

Orders by----------
Commanding the----------
Place:---------- Dated:----------

*The detail of officers as mentioned below will assemble at……on the……..day of……for the purpose of trying by a ……Court-martial the accused person (persons) named in the margin (and such other person or persons as may be brought before them)**

The senior officer to sit as Presiding Officer.

MEMBERS
WAITING MEMBERS
JUDGE ADVOCATE is appointed Judge Advocate
INTERPRETER

……...is appointed Interpreter
PROSECUTOR
…….is appointed Prosecutor

***The accused will be warned, and all witnesses duly required to attend.*

NOTE.- The members and waiting members may be mentioned by name, or the number and ranks and the mode of appointment may also be named.

**Any opinion of the Convening Officer with respect to the composition of the Court (see AR 40) should be added here, thus:*

"In the opinion of the convening officer, it is not practicable to appoint officers of different corps or departments"or,

"In the opinion of the convening officer, officers of equal or superior rank to the accused are not, having due regard to the exigencies of the public service, available".

***Add here any order regarding counsel-see Army Rule 96.*

90. A plain reading of the format of convening order shows that the name of accused person shall be mentioned in the convening order itself, but as discussed hereinafter and obvious from the record the convening order shows that the name of the petitioner has not been mentioned. It is mentioned that the name are included in the annexed schedule but the same has not been attached to the convening order. Thus the convening order is not in conformity with the statutory mandate and vitiates the trial. It might have been done to conceal

momentarily the name of petitioner from Army Headquarters, since it is to be forwarded to Army Headquarters.

91. Rule 159 of the Army Rules deals with appointment of defence counsel. It provides that the charge official shall be allowed to make his defence through legal advisor or any other person. In the present case such opportunity has been denied to the petitioner in utter disregard to principles of natural justice.

92. Rule 102 of the Army Rules deals with disqualification of Judge Advocate. It provides that disqualification shall be same as for the member sitting on a Court Martial. For convenience sake, Rule 102 of the Army Rules alongwith notes is reproduced as under:-

> *"Judge-Advocate*
> ***102. Disqualification of judge-advocate.-*** *An officer who is disqualified for sitting on a court-martial shall be disqualified for acting as a judge advocate at that court-martial.*
>
> ***NOTE***
>
> *1. As to the appointment of a JA, at a GCM or DCM. See AA.s 129. Omission to appoint a JA at a GCM will invalidate the proceedings.*
>
> *2. As to disqualification of a JA, see AR 39 (2).*
>
> *3. A JA should be free of all suspicion of bias or prejudice. He should have had experience of the practice and procedure of courts-martial and a knowledge of the general principles of law and the rules of evidence."*

93. In the present case Capt Javed Iqbal has replaced Capt Manveet Singh who was not qualified to be appointed as a Member for SGCM proceeding, hence could not be appointed Defence Officer.

VII. RECOVERY OF 147 GOLD BISCUITS:

94. It is not disputed that the petitioner was commanding No 4 Platoon during search and seizure operation on 11.04.1999. On the fateful day, three things seems to happened viz. (i) alleged lifting of gold necklace around 10 AM; (ii) alleged stealing of Rs 5,100/- by L/Nk Anil Kumar Singh from a house; and (iii) alleged recovery of 147 gold biscuits by the petitioner from a civilian house. According to petitioner said 147 gold biscuits were handed over to Col K.R.S. Panwar which were checked and counted on the bonnet of a jeep in full public view. However Col K.R.S. Panwar did not deposit the gold biscuits in the Kote. The first Court of Inquiry convened on 13.04.1990 was convened by the Commanding Officer Col K.R.S. Panwar against against L/Nk Anil Kumar Singh and not against the petitioner. He did not convene Court of Inquiry with regard to the recovery of 147 gold biscuits and omission on the part of Col K.R.S. Panwar to deposit the same in the Kote (chest) of the Commanding Unit.

95. From the material on record it is evident that the petitioner fearing some foul play on the part of Col K.R.S. Panwar tried to contact Col V.P.S. Chawhan, the erstwhile Colonel General Staff, Headquarters 31 Sub Area with 2Lt Rajeev Shukla and in his absence he explained the entire episode with regard to recovery of gold biscuits to the wife of Colonel V.P.S. Chawan. Thus at the first available opportunity the petitioner tried to bring into notice of another senior Army Officer with regard to recovery of 147 gold biscuits.

96. The factual matrix on record indicates that one way or the other enough material and circumstances brought on the record, which prima facie, affirms with regard to recovery of 147 gold biscuits (supra).

97. During Summary General Court Martial proceeding DW-15 CHM Puttu Singh supported the petitioner's contention with regard to recovery of gold biscuits which were placed on bonnet of Jonga. Relevant portion of statement of SW-15 is reproduced as under:-

> *"After sometime I heard the people saying that gold has been recovered. I went there and saw the bag on the front seat of the jonga. I then heard the Commanding Officer telling that close it, it will be deposited. Thereafter I came back to my Company. After sometime I saw the Commanding Officer's Jonga alongwith the ambulance and a 2 Tonner passing in front of*

> *me. I saw the Commanding Officer sitting in the Jonga and Dr. (Maj) D Paul, in the ambulance."*

98. During Summary of Evidence CHM Puttu Singh appeared as PW-21 and brought on record certain circumstances pointing out towards recovery of gold biscuits, to quote relevant portion of his statement:

> *"I saw 2Lt SS Chauhan come with four civilians and go to the Battalion HQ. He returned after sometime without the civilians. Later, I saw the Commanding Officer go along the same route along with one civilian."*

99. Hav Birender Singh appeared as DW-13 during the Summary General Court Martial proceeding. He is eye witness with regard to recovery of gold biscuits. In his statement this witness stated in his examination-in-chief, to quote relevant portion:

> *"After about 40 minutes the Commanding Officer returned to the Battalion HQ at that time L/Nk Anil Kumar Singh was carrying a leather belt of red colour which he handed over to 2Lt Rajiv Shukla. 2Lt Rajiv Shukla put the bag on the front seat of Commanding Officer's Jonga. When the bag was kept in Commanding Officer Jonga, at that time, some people had gathered there. I remember the names of the following- Commanding Officer, 2IC, 2Lt Rajiv Shukla, Subedar Atar Singh, Subedar Birender Singh, CHM Puttu Singh, Hav Jai Singh, RP Hav Rajpal Singh and Sep Raj Kumar. When 2Lt Rajiv Shukla was closing the bag, I saw that it contained gold biscuits. The Commanding Officer then told that it will be deposited. Thereafter, I saw the bag containing gold*

biscuits being carried away in Commanding Officer's Jonga".

100. During cross examination also Hav Birender Singh (DW-13) supported recovery of gold biscuits, to quote relevant portion:

"At about 2330 hrs, on 11 Apr 90, I went to the residence of Commanding Officer to inquire as he had not taken the dinner. When I reached his residence, the door of his room was open. I wished the Commanding Officer at the door and then went inside. On entering the room, I saw the Commanding Officer standing and Sub Attar Singh sitting on the chair, in the inner room, and also saw the Gold Biscuits lying on the bed of the Commanding Officer. Commanding Officer then told me that he will not have the dinner and also told me not to speak to anyone. Thereafter I came back."

101. Sep Naresh Singh (DW-12) is an eye witness who was present when gold biscuits were placed on the bonnet of Jonga. In his statement he stated, to quote relevant portion:

"I saw the bag. It contained gold biscuits of square size. After sometime, the bag was closed and was taken in the Commanding Officer's Jonga. The Commanding Officer had said that it will be deposited. At about 1400 hrs the Jonga of Commanding Officer returned".

102. Sep Rajkumar Singh appeared as DW-7. He also affirmed recovery of gold biscuits and stated as under, to quote the relevant portion:

"After about 40 minutes Commanding Officer returned with his party and stopped near the Jonga. At that time 2Lt Rajiv Shukla was

> *carrying a leather suitcase. I went there. CHM Puttu Singh was also with me. 2Lt Rajiv Shukla opened the suitcase, removed the red cloth, under which I saw a layer of gold biscuits. The suitcase was kept on the front seat of jonga. At that time Commanding Officer, 2IC, 2Lt Rajiv Shukla, Sub Attar Singh, RP Hav Major Pal Singh, Hav Puttu Singh and some 45 personnel had gathered around the Jonga. I went near from the side of the Jonga. I saw the gold biscuits with my own eyes".*

103. Hav Ram Bahadur Singh appeared as DW-5 during Summary General Court Martial proceeding stood at a short distance from the Jonga of the Commanding Officer. He indicated circumstances which point out towards recovery of gold biscuits.

104. It may be noted that the foundation of the defence set up by the petitioner is of recovery of gold biscuits and specific pleading has been made asserting its recovery in paras 10, 11, 12, 13, 14, 15, 16, 17, 26 and 41 of the petition. In para 41 of petition it has been stated that the petitioner was informed by Adjutant General, Army Headquarters with regard to recovery of gold biscuits in an inquiry held on their part. Copy of the letter dated 16.08.1990 of Adjutant General has been filed as Annexure-4 to the petition. While replying to pleadings made in para 41 of the petition, in para 62 of the counter affidavit the respondents have not denied the contents of Annexure-4 though averments made in para 41 of the petition have been

denied mechanically without assigning any reason. The Adjutant General while communicating his prima facie finding observed in para 3 (L) para 4, para 5 and para 6, as under :-

> *"3 (l). L/Nk Suman Singh Chauhan, also belonging to Sep AK Singh's village, has been in touch with the father of 2/Lt Chauhan. He has assisted in the recovery of Police records against Sep AK Singh, Sub Maj SS Bhadauria is also favourably inclined towards 2/Lt SS Chauhan.*
>
> *4. While 2/Lt Chauhan may have been threatened by the CO as alleged, he was assaulted by Lt Col Rawat, Maj Sanguri and Capt Hajela. As per the officer, the CO was fond of him till this case took place. Overnight he became a bad boy.*
>
> *5. The officer is mortally afraid of going back to the unit. He is apprehensive that he will be eliminated, the moment he reaches there. He is depressed the way he was beaten and humiliated in unit. His is the third generation joining the Regiment and the treatment meted out to him has been most insulting. He can neither show his face to his people back home nor the troops in the Battalion.*
>
> *6. He is willing to face the authorities if he is treated with dignity, assured personal security and provided justice. He feels that no one in the unit will open his mouth under the present situation. He was amenable to the suggestion that his father could accompany him. However, he will be cautious and take his time to decide".*

105. The petitioner, at the time of seizure and recovery or search operation was working in 6 Rajput Regiment but after the incident he was attached to 4 Rajputana Rifles on oral permission of Brigadier. Col K.S. Dalal was the Commanding

Officer who keeping in view the material placed before him proceeded with the Summary of Evidence which is condition precedent to hold Summary General Court Martial in view of provisions contained in Rule 23 and 24 of the Army Rules. Summary of Evidence (SoE), was recorded by Col K.S. Dalal in pursuance to provisions contained in Rule 23 of the Army Rules. The purpose of Rule 23 (supra) and procedure provided therein is like committal proceedings in criminal trial. The report prepared in pursuance to Rule 23 (supra) requires a follow up action under Rule 24 (supra) which is mandatory in nature. For convenience sake Rule 24 of the Army Rules is reproduced as under:-

> *"24. **Remand of Accused.-** (1) The evidence and statements (if any) taken down in writing in pursuance of rule 23 (hereinafter referred to as the "Summary of Evidence"), shall be considered by the commanding officer, who thereupon shall either –*
>
> > *(a) remand the accused for trial by a court-martial; or*
> >
> > *(b) refer the case to the superior military authority; or*
> >
> > *(c) if he thinks it desirable, re-hear the case and either dismiss the charge of dispose of it summarily.*
>
> *(2) if the accused is remanded for trial by a court-martial the commanding officer shall without unnecessary delay either assemble a court-martial (after referring to the officer empowered to convene a district court-martial when such reference is necessary) or apply to*

the proper military authority to convene a court-martial, as the case may require."

106. Respondents were directed to ensure production of entire record but original records have not been made available on the ground that it has been weeded out in spite of the fact that Writ Petition was pending in the High Court since 1993. Order Sheet dated 25.11.2016 indicates that we had specifically requested Ld. Counsel for the respondents as well as OIC Legal Cell as to who took decision and recommended for SGCM in pursuance to provisions contained in Rule 24 of the Army Rules, but the respondents failed to answer the query and also failed to produce any document. The only reply forthcoming during course of arguments was that decision was taken by Corps Commander, Lt Gen Zaki Mohammad Ahmad of HQ 15 Corps. It was the duty of the Commanding Officer (Col K.S. Dalal) to recommend for Court Martial. Decision should have been taken for Court Martial proceeding and thereafter convening order should have been issued. The Summary of Evidence filed as Annexure No 7 to the petition by the petitioner has not been disputed by the respondents. It does show that no recommendation was made by the Commanding Officer (Col K.S. Dalal) for the charges in question. Summary of Evidence filed as Annexure No 7 is a

photostat copy of the hand written note of Maj R. Khullar and it's genuineness has not been disputed by the respondents.

107. A plain reading of the opinion of Col K.S. Dalal shows that prima facie there was allegation of recovery of gold biscuits and the unit was divided for and against the petitioner. Further the petitioner had suffered humiliation and records were fabricated.

108. In total six witnesses as DW-5, DW-7, DW-12, DW-10, DW-13, and DW-15 who during SGCM clearly established recovery of gold biscuits (supra). Apart from these six witnesses one witness PW-19 Sep Arvind Singh appeared during Summary of Evidence who seems to have supported recovery of gold biscuits. Some of the witnesses during alleged ex parte Court of Inquiry are alleged to have retracted to their statement made during SGCM, which shall be dealt with hereinafter, but it has no legal significance for the reason that the said proceedings dated 13.02.1993 of Court of Inquiry was ex parte and one sided without any notice or opportunity to the petitioner at the behest of some superior authority.

109. For the reasons discussed hereinabove it appears that the petitioner was ill treated by the respondents at every stage with mental torture since he had not succumbed to fulfill respondents' wishes. In any case there appears to be enough

material supported by facts and circumstances on record, discussed hereinabove, which indicates and points out towards recovery of 147 gold biscuits for which the Commanding Officer and the Corps Commander persecuted the petitioner and tried to suppress the material.

VIII. BLANKET (KAMBAL) PARADE:

110. After alleged recovery of 147 gold biscuits by the petitioner, spreading of news of recovery of gold biscuits in the vicinity and alleged attempt on the part of Col K.R.S. Panwar it appears that the higher authorities intended to hush up the matter exerting undue pressure on the petitioner. As young officer of less than two years service as commissioned officer, the petitioner noted the marks over the gold biscuits as 'Johnson Mathews Bank, Bank of London, 1890' and arrested the men folk of the house. One of the person arrested was Imam of Batmaloo Mosque. Col K.R.S. Panwar seems to be interested to hush up the matter in spite of the fact that the same were alleged to be displayed on the bonnet of Jonga (Jeep) by 2Lt Rajeev Shukla and in the evening a celebration was made in view of recovery of gold biscuits. It is alleged that it was in the night intervening 13/14.04.1990 the petitioner, while sleeping in the midnight in a sleeping bag was beaten, cushioned by pillows to prevent internal injury, as a result of

which the petitioner began unconscious and suffered grievous injuries. The whole exercise of Kambal Parade alleged to be carried out by Lt Col M.S. Rawat, Major Mukesh Sanguri and Captain Anil Hajela. Having suffered injuries the petitioner was shifted to Command Hut, a house for guests used for Major Generals and kept there on 14.04.1990. Medical treatment was alleged to be provided by Capt Pal. Petitioner's pending application for leave was expedited and he was sent on leave sanctioned earlier. The petitioner was provided air concession form dated 14.04.1990 signed by Capt Anil Hajela. The petitioner was admitted in Government Hospital, Kanpur where treatment was provided by Dr. R.S. Yadav, C.M.O. and Dr. R.S. Pandey. The medical report was placed during Court Martial proceeding. From there the petitioner was transferred to Air Force Hospital, Kanpur on 18.04.1990 and later on was shifted to Command Hospital, Lucknow where the petitioner was declared to be suffering from 'Neurotic Depression and Anxiety' as a result of external injury (supra), which is part of the record.

111. It is argued that the petitioner never suffered from '*Neurotic Depression and Anxiety*' during whole life; it happened because of shock and injury which he suffered because of 'Kambal Parade'.

112. It may be noted that Kambal Parade is a traditional system of punishment in practice since colonial era in the Armed Forces to punish a person off the record. Such practice often abused and sometimes practiced to maintain discipline. The medical statement of the petitioner prepared at Command Hospital, Lucknow (supra) makes out a case to draw inference that the petitioner was beaten up to accept guilt of some offence which he had not committed. Obviously this could have been done to hush up alleged recovery of aforesaid 147 gold biscuits. As discussed (supra) petitioner was brought to Command Hut situated at a distance of 2 Kms from the Transit Camp and provided some treatment after Kambal Parade. Hav Birender Singh attached to Rajput Regiment was an independent witness being Mess Havildar of the Command Hut.

113. The factum of Kambal Parade seems to be evident from certain other factual matrix brought on record. Hav Birender Singh who appeared as defence witness during SGCM proceedings and posted at Transit Camp as Officer Mess Havildar seems to establish Kambal Parade in his statement, to quote relevant portion from the SGCM proceedings:

> *"At about 2300 hrs, 13 Apr 1990, 2Lt Rajiv Shukla came to me and said that 'The 2Lt SS Chauhan has got hurt. Take one more person with you and come with me'. I took Sep Satinder Singh with me.*

> *On entering the room of the accused I saw that he was lying unconscious on the bed of Capt Amit Hajela, there were blood marks on his Kurta and pillow. The belonging of the accused were kept in room. In the room in which the accused was lying unconsciously, there was only one bed and that belongs to Capt Amit Hajela.*
>
> *The pack table in the room was lying on its side and the bed sheet was crumbled, at that time Doctor Major D. Pal, Maj. Mukesh Sanguri, Capt Amit Hajela, 2Lt Rajiv Shukla, were present there. The Commanding Officer arrived after some time.*
>
> *Capt Amit Hajela told me to change the cloth of accused which I and Sep Satinder Singh did and clean the blood stains from the face of the accused".*

114. It may be noted that Hav Birender Singh was the key person to establish injury caused to the petitioner because of Kambal Parade. Argument of Shri Asit Chaturvedi, Ld. Sr. Counsel appearing for the respondents is that since he had retracted in his statement in the Court of Inquiry dated 13.02.1993, it is of no help. Arguments advanced by Shri Asit Chaturvedi, Ld. Sr. Counsel seems to be misconceived for the reason that the alleged Court of Inquiry dated 13.02.1993 was an ex parte Court of Inquiry in which neither the petitioner was summoned nor was present. The Court of Inquiry in view of Rule 180 of the Army Rules loses its significance on account of absence of petitioner and cannot be used for or against the petitioner since no subsequent proceeding took place after said

Court of Inquiry. In any case if the witness had made some false statement and the respondents rely upon the Court of Inquiry dated 13.02.1993, they ought to have prosecuted the witnesses including Hav Birender Singh under Section 56 of Army Act, 1950, which admittedly has not been done. For convenience sake Section 56 of the Army Act 1950 is reproduced as under:-

> *"56. **False accusation.-** Any person subject to this act who commits any of the following offenses, 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 willfully 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".*

115. Since all the seven witnesses including Hav Birender Singh were neither prosecuted under Section 56 of Army Act, 1950 nor the petitioner was present during subsequent inquiry at least its authenticity cannot be taken into account to falsify the statement given during the SGCM proceeding which is quasi judicial proceeding where witnesses make statement on

oath and are duly cross examined by the accused as well as by the Court. Accordingly there appears no reason to disbelieve the statement of Hav Birender Singh and other witnesses (supra) made during SGCM proceeding with regard to recovery of 147 gold biscuits and injury suffered by the petitioner and treatment provided to him in the Command Hut.

116. Inference may be drawn that the Court of Inquiry dated 13.02.1993 was cooked up by ex parte proceeding to defeat the very object of evidence recorded during statutory SGCM proceeding during course of judicial review of the action taken. A non statutory action cannot override a quasi judicial statutory proceeding.

117. A reasonable inference with regard to Kambal Parade, mental pain, agony and disturbance because of it may be inferred by Medical Case Sheet of Army Hospital, New Delhi filed by the respondents during SGCM proceeding (Page 376 of the SGCM proceeding). It may be noted that original SGCM proceeding has not been filed inspite of repeated orders passed. The respondents have filed copy of SGCM proceeding of which every page is not authenticated and for that an application was moved which we declined. It may be noted that the copy filed seems to be photostat copy and annexures are also photostat copies. Documents filed as medical sheet of

Army Hospital, New Delhi seems to be verified by O.S. Shyam Sundar, Capt, RMO, 4 Rajputana Rifles while submitting it during SGCM proceeding. The Medical Case Sheet shows that the petitioner was admitted on 26.06.1990 in pursuance of recommendation of Lt Gen Y.S. Tomar, Adjutant General, Army Headquarters and it further shows that at the time of admission, physical and mental condition of the petitioner as noted by the Doctor was that he (petitioner) was tense, anxious, gloomy and felt wronged and humiliated. During interviews he cried and expressed suicidal ideas and vague persecutory thoughts. Such symptoms from which the petitioner was suffering may reasonably be inferred from 'Kambal Parade' (supra). For convenience sake, Medical Case Sheet of Army Hospital, New Delhi is reproduced as under:-

"CONFIDENTIAL *B8 Ward*
A.F.M.S.F-10

DEPTT OF PSYCHIATRY
ARMY HOSPITAL. DELHI CANTT.A & D No-A-1428 (sic)
DOA-26-6-90
NAME OF THE HOSPITAL :AHDC… *Age-30 yrs*
MEDICAL CASE SHEET

1. Name SS CHAUHAN	*2. Service No IC-48848*	*3. Rank/Rate 2/Lt*
4. Unit/Ship 6 RAJPUT c/o 56 APO	*5. Arms/Corps/Branch/Trade Inf/Offr*	*6. Service Army*

1. Diagnosis-ADJUSTMENT REACTION (309)

31.08.90 *The officer alleges that he was given physical beating on his head on second week of Apr 90 after which he fell dazed and*

perplexed, became very apprehensive and fearful. He left the unit and reached his house in a confused and bewildered state. Officer was taken by his relatives to civil psychiatrist as he (officer patient) was detected to have some abnormal behavior. Later he was admitted in 7 AF Hosp from where he was transferred to CH C.C. Lucknow on 20.4.90. Where he was treated as a case of Depression. On 6.6.90 this officer was transferred to CH, NC. C/O 56 APO for onward transfer to 92 Base Hospital. The Officer apprehended that he would be harmed/killed/eliminated during transit, he slipped away on 8/9 June 90 and reached his home around 21 June 1990. His father brought the officer to Delhi and got him admitted in this Hospital.

At the time of admission physical examination revealed no gross abnormality pulse 84/mt. Palms dry. No digital tremor System. Exam NAD Mental examination revealed a very anxious and tense individual. He was gloomy, felt wronged and humiliated. During the interview he cried and wept relating the circumstances of his escape. He expressed suicidal ideas, vague persumtory – thoughts. Sleep was disturbed appetite was eratic. Officer had lost about 10 Kg weight. He lacked confidence and was depressed. The officer was treated with modified Insulin Therapy, anti depressive and drugs anxiolgatics and sedatives and has improved. He has gained confidence is not grossly depressed in anxious. There is no evidence of any thought disorder perceptional disturbance or cognitive impairment. Officer is a disciplinary case, AFMSF 10 report not received from the unit. This officer manifested depressive and anxiety features closely related to environmental stress in the unit.

(Kambal Parade)

First break down in Apr 90 is associated with emotional trauma of physical beating and subsequent feeling of humiliation. Second break down occurred in early June when he

(Attempt to murder) *apprehended that he will be eliminated/killed. This officer slipped and was roaming for about two weeks in a state of confusion before he was picked up by his relative and taken home. A case of 'Adjustment Reaction' 309, has improved with treatment.*

(**emphasis supplied**)

Recommended to be placed on Med Cat S3 (T-24). To be reviewed. Thereafter with fresh report by his OC Unit.

As per the instructions from the higher authorities the officer is transferred to CH NC C/O 56 APO for onward transfer to 92 BH. To be escorted by guards.

Appendix to AO 37/83 to be filled after receipt of details of the disciplinary charge. AFMSF 10 report from the OC Unit.
Advised

-Tab Imipramine 25 mg
1-1-3
-Tab largactile 25 mg
2-2-4

Placed in …… S3 (T-24) *Temporary/permanent 24 week* *Medical Board 01 Oct 90* *Disability ADJUSTMENT REACTION*
92 Base Hospital *sd/-* *c/o 56 APO* *(AV TK RAO)* *Col* *President Medical Board*

Sd/-x x
(Rajinder Singh)
Colonel
Senior Adviser (Psychiatry)
Army Hospital
Delhi Cantt-10"

118. It may be noticed that according to Photostat copy which is being typed the petitioner was placed under medical category

S3 (T-24) which seems to have been converted to S3 without signature. The petitioner was released not by the Military Hospital on its own but on the instruction of higher authority to be transferred to 92 Base Hospital under escort by guards. It is not understandable as to why during midst of treatment the petitioner was transferred to 92 Base Hospital, Srinagar without completing treatment. However in any case the Medical Case Sheet (supra) indicates that the petitioner was suffering from Traumatic Situation which disturbed his mind and for about a week he was roaming from place to place with undecided and uncontrolled mind and thoughts indicates his plight, humiliation and occurrence because of 'Kambal Parade'.

IX. FIRST COURT OF INQUIRY:

119. During search operation and recovery of 147 gold biscuits L/Nk Anil Kumar Singh was found to have lifted gold necklace of a lady and in pursuance to petitioner's direction, when search was made, an amount of Rs 5,100/- was found to be in his possession stolen from some house. He was reprimanded by Commanding Officer Col K.R.S. Panwar who disallowed from further search operations. A Court of Inquiry was convened by the Commanding Officer and order was communicated by Adjutant, Capt Salim Asif, the convening order is reproduced as under:-

"CONFIDENTIAL

CONVENING ORDER

1. A Court of Inquiry composed as under will assemble on the date and time to be fixed by the Presiding officer for the purpose of investigating the circumstances where in No 2980621M L/Nk Anil Kumar Singh attempted to lift a Gold Necklace during the house –to-house search in Laxmanpura Batmaloo, Area, Srinagar (J&K) at approx 1300h on 11 Apr 90:-

Presiding Officer -IC-24410P Lt Col MS Rawat

Members 1. -IC-41985P Maj M Sanguri

2. -IC-49393L 2Lt Rajeev Shukla

2. Proceedings of C of I duly completed will be submitted to the Commanding Officer personally by the Presiding Officer by 15 Apr 90.

Sd/- x x x
(Salim Asif)
Capt
Adjt
for CO

32/SC/A
6 RAJPUT
C/O 56 APO
13 Apr 90

Distribution

Presiding Officer.
Office copy."

120. The Court of Inquiry recorded a finding holding the petitioner guilty of manhandling of men & women, molesting of a girl, damaging of private property and lifting of money and valuables during the house to house search on 11.04.1990 in connivance with L/Nk Anil Kumar Singh. The opinion expressed by the Court of Inquiry is reproduced as under:-

> *"1. The Court has the following opinion:-*
>
> *(a) No. 2989621M L. Nk. Anil Kumar has indulged in the lifting of money and other valuables, damaging a private property and acts of moral turpitude during the house to house search in Laxmanpura Batmaloo Srinagar on 11 Apr 90 in connivance with 2 Lt SS Chauhan.*
>
> *(b) IC-488448K 2 Lt SS Chauhan acting in close connivance with L Nk Anil has indulged in the manhandling of man and women, molesting a girl, damaging of private property and lifting of money and valuables during the house to house search on 11 Apr 90. No. 29877317 Nk Kailash has failed in his duty to inform anyone about the money given to him by 2 Lt SS Chauhan for safe keeping.*
>
> *(c) That this money was recovered from the person of Nk Kailash points to his involvement in the case however little.*
>
> *(d) Nb Sub RSS has repeatedly stated falsehood to the court and in one instance has even abetted the dishonest possession of a camera by 2 Lt SSC. This arouses suspicion of a larger involvement by him in the case.*
>
> *(e) Sep Janak Singh has abetted in the commission of the offence by 2 Lt SSC by willfully hiding the fact that the camera lifted during the house to house search and handed over to him by the latter was in his possession.*

(f) Sub Jattan Singh made a false statement that the camera was handed over to him by Sep Janak Singh on 14 Apr 90. He has also failed in his duty to bring the matter to the notice of h is Coy Cdr and illegally retained the camera in his personal custody.

2. The Court recommends that disciplinary proceedings be initiated against the following personnel for their involvement in the case.

(a) No-2980621M L Nk Anil Kumar

(b) IC-488482 Lt SS Chauhan

(c) Nk Kailash Chand

(d) Nb Sub Ram Swarup Singh of HQ Coy

(e) Sep Janak Singh

(f) Sub Jatan Singh of B Coy

Presiding Officer Sd/- x x x

(Lt Col MS Rawat)

Members (Maj M Sanguri)
2.IC049393L Lt Rajeev Shukla"

121. A plain reading of the record of the Court of Inquiry dated 13.04.1990 shows that it was directed to be completed by 15.04.1990 and the petitioner at no stage was permitted to participate in the Court of Inquiry in compliance of Rule 180 of the Army Rules, which is mandatory in view of law settled by Hon'ble Supreme Court in the case reported in Military Law Journal 2013 SC 1 ***Union of India vs. Sanjay Jethi & Anr*****.** A finding has been recorded against the petitioner's conduct which affects his reputation. For convenience sake Rule 180 of Army Rules is reproduced as under:

> *"**180. Procedure when character of a person subject to the Act is involved.** - Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his rights, under this rule."*

122. Apart from above according to convening order the Court of Inquiry was to be held within two days against L/Nk Anil Kumar Singh who possessed bad antecedents and was involved in a case under Section 395 and 397 of the Indian Penal Code.

123. Attention of the Tribunal has been invited to para 15 of the Court of Inquiry, Committees, Boards of Officers and Courts of Inquest.

124. From the aforesaid fact it is obvious that the Court of Inquiry was convened with regard to allegations against L/Nk Anil Kumar Singh but it travelled beyond the terms of reference i.e. the convening order for extraneous reasons, hence seems to vitiate. Apart from the fact that the Court of Inquiry travelled

beyond the terms of reference of convening order it appears that statement against the petitioner was made by Capt Amit Hajela against whom there is allegation to be member of the party involved in Kambal Parade. He was questioned by the Court and permitted to be crossed examined by L/Nk Anil Kumar Singh who declined to cross examine him. No opportunity was given to the petitioner. L/Nk Anil Kumar Singh himself appeared as witness No 2 and leveled allegations against petitioner 2Lt SS Chauhan, as he then was, with regard to manhandling a girl, assault on civilians. He shifted the allegation of theft on the petitioner. He was questioned by the Court of Inquiry and almost all questions related to condemning the conduct of the petitioner and not L/Nk Anil Kumar Singh against whom Court of Inquiry was convened. Of this witness, who was an accused, statement was recorded without any cross examination by the petitioner. Similarly Naik Kailash Chand Gujar also made statement against the petitioner with the allegation of cash recovery. He was questioned by the Court itself and crossed examined by L/Nk Anil Kumar Singh. Witness No 4 Sep Lakhan Lal also made statement against the petitioner with regard to recovery of certain cash amount. Witness No 5 Naib Subedar Ram Swarup Singh imputed certain allegations against the petitioner but also stated that

L/Nk Anil Kumar Singh lifted gold necklace from a house during search operation. He is not an eye witness. However he denied that he had seen the petitioner molesting a girl. Sepoy Janak Singh appeared as witness No 7, Subedar Jattan Singh appeared as witness No 8 and Adjutant, Capt Salim Asif appeared as witness No 11. They all imputed the petitioner. Neither the petitioner was present during Court of Inquiry proceedings to cross examine the witnesses nor ever the Court of Inquiry called the petitioner to make a statement but a finding has been recorded against him.

125. Thus the Court of Inquiry causes serious miscarriage of justice while recording finding arbitrarily acting one sided, prima facie seems with intention to indict the petitioner by an ex parte proceeding. A collective reading of the report of Court of Inquiry shows that prima facie it intended to record a finding against the petitioner and not to unearth the truth with regard to allegations against L/Nk Anil Kumar Singh against whom convening order was passed. Thus, the power was blatantly abused seems for extraneous reasons. The whole inquiry vitiates because of non compliance of statutory provisions. Irony is that accused L/Nk Anil Kumar Singh and Naik Kailash Chand were the star witnesses as well as accused.

126. However, Shri Asit Chaturvedi, Learned Sr. Counsel made a statement at Bar on behalf of the respondents that the report of First Court of Inquiry (supra) was not acted upon. Why not proceeded further? It is not a case where report of Court of Inquiry dated 15.04.1990 was dumped and not acted upon.

127. The SGCM proceeding shows that the Commanding Officer Col K.R.S. Panwar appeared as PW-39 in support of his allegation against the petitioner. He has brought on record ex parte report of Court of Inquiry dated 15.04.1990 (supra) which has been filed Exhibit-37. Thus the finding recorded by the SGCM seems to be partially influenced by ex parte Court of Inquiry dated 15.04.1990.

X. LEAVE OR ABSENCE WITHOUT LEAVE (DESERTION)

128. It is borne out from the arguments advanced by Ld. Counsel for the parties that after the alleged Kambal Parade the petitioner was detained in Command Hut of 4 Rajputana Rifles. It is not disputed that leave was sanctioned to the petitioner on 06.04.1990 for the period from Apr 1990 to Jun 1990 as is evident from leave certificate filed during SGCM proceedings as Exhibit-N. The leave certificate has been duly signed by Maj R Khullar of 6 Rajput Regiment. It appears that on 15.04.1990 the petitioner was dispatched to Airport where he boarded Indian Airlines Flight in pursuance to Air Ticket and

concession form placed on record during SGCM proceeding as Exhibit-BP and Exhibit-B. The leave application of the petitioner has also been placed on record as Exhibit-AM during SGCM proceedings which shows that annual leave was applied for 60 days from 09.04.1990 duly signed by Adjt, 6 Rajput Regiment. The certificate issued by the office of the Air India which is on record as Exhibit-BQ also indicates that the petitioner travelled in Air India Flight on 15.04.1990 from Srinagar to Delhi. The ticket was issued on confirmed concession form. Another leave certificate issued by Adjt, Capt Salim Asif on behalf of Commanding Officer duly signed by Maj R. Khullar has been filed by the prosecution during SGCM proceeding as Exhibit-Q. No material record has been placed by the prosecution during SGCM proceeding which may establish that annual leave granted and sanctioned to the petitioner was ever cancelled by appropriate authority. In such situation there appears to be no illegality or misconduct committed by the petitioner to avail the leave, that too when he was dispatched to the Airport by the staff in official vehicle as alleged by the petitioner on Air Ticket and concession form signed by the competent authority during curfew hours. It may be noted that a copy of the leave certificate placed on record as Exhibit-Q by the prosecution was allegedly handed over by the

petitioner to Sep Brij Pal Singh which indicates that leave sanctioned to the petitioner from Apr 1990 to Jun 1990. However in the copy filed by the prosecution as Exhibit-Q the date as 12 (June) seems to be added at later stage by hand.

129. Letter of 7, Air Force Hospital, Kanpur dated 24.08.1990 (Exhibit-X and Exhibit-X1) to the SGCM proceeding establishes that while being admitted in the 7, Air Force Hospital, Kanpur, the petitioner had submitted leave certificate which was forwarded by it duly received by Maj R. Khullar. The certificate forwarded by 7, Air Force Hospital, Kanpur to 6 Rajput Regiment in response to their letter shows that leave was sanctioned from 08.04.1990 to 06.06.1990 and it was to commence and terminate to 213 Transit Camp and the petitioner was directed to leave from 16 Transit Camp. The genuineness of this leave certificate has not been disputed. Hence there is no question of desertion or absence without leave.

130. The respondents set up a case that leave certificate was tempered but it seems to be an afterthought for the reason that when the entire material on record i.e. Leave Certificate, Air Ticket and Concession Form signed by competent authority and from the statements on record looked into collectively there appears to be no room of doubt that the petitioner was

despatched from Srinagar on 15.04.1990 in pursuance to hasty decision taken by the Commanding Officer. From the statements and material on record, it seems that there was curfew in Srinagar, hence petitioner could not have travelled to Airport without official support and vehicle. However later on it appears that the authorities under the fear that the petitioner may approach the Court or higher authority with regard to recovery of 147 gold biscuits and it may result into disclosure of certain material facts, on account of change of mind declared the petitioner as deserter on 15.04.1990 in contravention to Army Rules discussed hereinafter. Though the petitioner was attached to HQ 15 Corps at 2330 hours on 15.04.1990 but his leave was never cancelled and he was permitted to board the Indian Airlines Flight and was sent to board the Air India Flight in pursuance to sanctioned leave, Air Ticket and Air Concession Form. We do not feel any doubt to hold that the petitioner was forced to proceed on leave on 15.04.1990 by Air India Flight. The Air Concession Voucher was signed by Maj Amit Hajela apart from leave sanctioned by appropriate authority from time to time (supra). Thereafter the petitioner was admitted in 7, Air Force Hospital, Kanpur on 18.04.1990 and transferred to Command Hospital, Lucknow on 20.04.1990 where he remained admitted till 05.06.1990.

131. There is yet another aspect of the matter which shows change of mind to frame the petitioner by the Commanding Officer for some unforeseen reasons. On 15.04.1990 the petitioner went to the Airport in military vehicle with military escort at 06 PM (during curfew hours) and boarded the Air India Flight for New Delhi which seems to be affirmed by DW-7, DW-10, DW-13 and DW-15 and the documentary evidence (supra). In spite of this glaring material on record the Commanding Officer Col K.R.S Panwar declared the petitioner as a deserter on 15.04.1990. During SGCM proceeding letter dated 15.04.1990 has been brought on record by the prosecution marked as Exhibit-R which contains declaration signed by Maj R. Khullar that the petitioner is missing. In the letter dated 15.04.1990 the petitioner has been treated as officer under arrest and he was not allowed to go outside. It also shows that the petitioner was attached by the HQ, 15 Corps to 4 Rajputana Rifles under arrest. Para 2 of the letter dated 15.04.1990 (Exhibit-R) speaks volume. For convenience sake the same is reproduced as under:-

> *"1. ….*
>
> *2. As informed by Col 'A' HQ 15 Corps since the offr was not under arrest, no formal guard was placed at the place of his stay. However, Capt BS Srivastava and the Mess Staff, Sub Maj and persons of RP Section were told to keep an informal watch on the offr and*

that he should not be allowed to go outside Unit lines".

132. The aforesaid material on record shows that though the petitioner was not under arrest but he was directed orally to remain in room of 4 Rajputana Rifles and was not allowed to go outside the lines. Hence at the face of record it is evident that no written order was passed but the petitioner was virtually under detention/arrest. The letter dated 18.04.1990 of Capt Adjt, 4 Rajputana Rifles (Exhibit-S) sent to HQ, 15 Corps indicates that the petitioner was held to be missing with effect from 15.04.1990 who was attached to 4 Rajputana Rifles in pursuance to Movement Order No 112-A dated 14.04.1990. After receipt of copy of the leave certificate dated 06.04.1990 it was by telegram dated 27.04.1990 that 7, Air Force Hospital, Kanpur was informed that the petitioner is involved in disciplinary case for absence without leave and tampering of leave certificate. For convenience sake telegraphic communication to 7, Air Force Hospital, Kanpur by Maj R. Khullar officer record of 15 Corps is reproduced as under:-

"OP IMMEDIATE In lieu of msg form

From : 6 RAJPUT

DTG:271130

To :Comd Hosp (CC) Lucknow UNCLAS

Info :7 Air Force Hosp Kanpur A-0367

68 Mtn Bde (By Originator)

---

hosp adm army offr (.) ref 7 A F H sig No MO 109 Apr 20 (.) IC-48848 2Lt SS CHAUHAN is involved in discp case and is AWL wef Apr 15 (.) dates tempered in lve cert with offr (.) confirm AFMSF 10 required to be initiated in AWL case (.) 68 Mtn Bde only (.) copy of 7 A F H Kanpur sig No MD 109 Apr 20 is fwd

---

Col KRS Panwar *CO*
Case File No 42/48848/SC *Col Sd/- x x x x x*
Dated 27 Apr 90 *TOR 270745"*

133. The fact that the petitioner was treated as deserter on 15.04.1990 is evident from the statement of Col K.R.S. Panwar, the Commanding Officer, recorded during proceeding of 'Additional Summary of Evidence'. Relevant portion of the statement is reproduced as under:-

> *"Apprehension roll for the officer was issued by the unit on 17 April 1990 but the same was cancelled on receipt of the intimation that the officer was admitted in 7 Air Force Hospital, Kanpur. A fresh apprehension roll was issued by the unit on 17 Jun 1990 after the officer escaped from the custody on 09 Jun 1990. However this too was cancelled on receipt of the information that the officer was admitted in the Army Hospital, Delhi Cantt vide their letter No 2808/Psy/Docu/90 dated 27 Jun 1990. I hereby produce the letter in original alongwith its CTC. (the CTC is compared with the original and found correct. Attached as Exhibit X)."*

134. The step to declare the petitioner deserter, prima facie, seems to be hasty since it was done in violation of Section 106 of Army Act, 1950. A person should have been declared deserter only after expiry of thirty days followed by Court of

Inquiry as soon as practicable. For convenience sake Section 106 of the Army Act, 1950 is reproduced as under :-

> *"**106. Inquiry into absence without leave**.- (1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a Court of Inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any, and the commanding officer of the corps or department to which the person belongs shall enter in the court-martial book of the corps or department a record of the declaration.*
>
> *(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter."*

135. A plain reading of Section 106 of the Army Act, 1950 (supra) shows that if a person is declared absent from duty and does not surrender or is apprehended within thirty days, for the purpose of Army Act, he or she shall be deemed to be deserter keeping in view the mandate of sub-section (2) of Section 106 (supra).

136. The petitioner was declared deserter after two days, i.e. before 30 days. Why the petitioner was declared deserter on

17.04.1990 itself and was requisitioned from the Command Hospital, Lucknow is not understandable? Under what authority the Commanding Officer or the Corps Commander, 15 Corps had directed to bring the petitioner to Srinagar on 09.06.1990 when he was admitted in Command Hospital, Lucknow running under treatment, that too under escort party consisting of persons lower in rank i.e. soldiers and JCOs in contravention of para 349 of the Regulations for Army speaks volume with foul smell and pre-decided mind. Petitioner being a commissioned officer should have been informed to come back instead of bringing him under virtual detention/arrest through escort party to Command Hospital, Udhampur.

137. It appears that the petitioner was treated as deserter right from 15.04.1990 and declared to be involved in disciplinary case and held to be absent without leave keeping in view the communication by Maj R. Khullar (supra) though till then no Court of Inquiry was held to ascertain the facts. 15 Corps seems to be in haste to keep the petitioner within their own custody and proceed against him with pre-decided mind without taking note of the fact that Air Ticket, Air Concession Form and Leave Certificate all were signed by the competent authorities. At no stage they were cancelled. Attention of the Tribunal has not been invited to any material on record which may indicate

that the petitioner had forged the documents (supra) while leaving the Unit. In case the petitioner had forged any document including Air Concession Form or Leave Certificate, then it was incumbent on the appropriate authority to charge the petitioner for such alleged actions which were serious one. In the absence of any such action and rebuttal the petitioner seems to have been permitted to proceed on leave by the authorities themselves but later on they changed their mind and started to trap the petitioner, again for unforeseen reasons. Pressure on Commanding Officer Col K.R.S. Panwar may be noticed from the fact that no detention or arrest order was passed but the petitioner was orally directed to be confined in a room and not permitted to go outside the living area, but leave sanctioned earlier stand as tool charge for leaving the unit. Hence it is neither desertion nor absence without leave.

XI. SECOND COURT OF INQUIRY (05 Oct 1990 to 03 Nov 1990)

138. In pursuance of order dated 05.10.1990 GOC-in-C, Northern Command the petitioner was attached to 4 Rajputana Rifles in pursuance of Army Instruction 30/86 as staff Court of Inquiry was convened by the Commander, 56 Mtn Bde at Niari where the petitioner was brought from 92 Base Hospital, Srinagar. Though original records were summoned but the respondents failed to produce them on the ground that the

documents were weeded out. Copies of the original Court of Inquiry have been filed through affidavit asserting it to be true copies. Ld. Counsel for the petitioner asserted that the copy of the Court of Inquiry filed does not contain signatures of the persons who made statements. It is further argued that the findings recorded in the Court of Inquiry in view of Army Rule 180 may be used only during course of examination before 16.12.1993 in view of SAO 17 dated 16.12.1993. There appears no room of doubt to the arguments advanced by Ld. Counsel for the petitioner that the finding and material collected during Court of Inquiry is not a substantive piece of evidence; rather it is only an attempt to collect material at pre-trial stage and can be used to confront witnesses in the event of any falsity (Sec 145 of Evidence Act). But the fact remains that during course of inquiry the provisions contained in Rule 180 of Army Rules must be adhered to in view of settled proposition of law. The Staff Court of Inquiry dated 05.10.1990 was convened prior to SGCM. So far as statement of Ld. Counsel for the respondents that the provisions of Rule 180 (supra) could not be made applicable since it was added through amendment dated 16.12.1993, in view of Section 145 of the Evidence Act, the witnesses could have been confronted keeping in view the

enabling provision contained in Section 133 of the Army Act, 1950.

139. In all statement of 29 witnesses were recorded during course of inquiry which commenced on 07.10.1990 and the petitioner cross examined seven witnesses though according to Court of Inquiry the petitioner himself declined to cross examine the witnesses but it was asserted by the petitioner that he was not permitted to cross examine the remaining witnesses.

140. However on one count the petitioner seems to be correct that the witnesses were cross examined by the Court and to witness No 1, 21 questions were asked by the Court itself but the petitioner was not asked to put questions subsequent to cross examination by the Court itself. A perusal of inquiry made by Court of Inquiry during the proceeding shows that almost every witness was examined by the Court and some of the questions seems to be leading one which seem not fall within the purview of the Presiding Officer. The Presiding Officer of the Court of Inquiry or in any quasi judicial proceeding, authority may ask certain questions but only to clarify certain things which borne out during Court of Inquiry, but not to ask leading questions substituting itself to the place of prosecuting counsel. The action of the officers constituting the Court of Inquiry seems to be against the letter and spirit of

policy dated 02.02.2010 and is against Army Rule 180. Thus it appears that the Court of Inquiry proceedings and collected material substituting itself at the place of prosecuting counsel and asked questions accordingly which seems to be violative of principles of natural justice and pre-decided mind. It must be borne in mind that while functioning as presiding officer or member of the Court of Inquiry the officers are supposed to be impartial in letter and spirit and cannot associate themselves to the controversy or dispute placed before them with regard to which they have to collect material. The statements should be recorded plainly In terms of information communicated by the witnesses without posing such questions which suit the prosecution and are leading one (Sections 141, 142 and 143 of the Indian Evidence Act, 1872).

141. Apart from above the documents asked for by the petitioner which were twelve in number seem to be relevant relating to occurrence at Srinagar and other places during which period the petitioner was admitted in the hospital under treatment and maltreated at the Command Hut. The documents were relevant and should have been provided to the petitioner during Court of Inquiry in view of demand raised through letter to the presiding officer. There appears to be non compliance of principles of natural justice (Rule 180 of the Army

Rules) during Court of Inquiry, that too when the petitioner was under arrest/detention right from 25.05.1990.

XII. TREATMENT AT KANPUR/LUCKNOW/UDHAMPUR:

142. The petitioner was admitted to 7, Air Force Hospital Kanpur on 18.04.1990 and on 20.04.1990 keeping in view the seriousness of disease of neurotic depression he was transferred to Command Hospital, Lucknow where he was kept under treatment till 06.06.1990. During course of treatment in Command Hospital, Lucknow by an order with effect from 20.05.1990 he was put under close arrest by General Officer Commanding 15 Corps, Lt Gen Zaki Mohammad Ahmad on the charges of moral turpitude and absence without leave. It may be noted that till 25.04.1990 no Court of Inquiry was held except the first one dated 13.04.1990 which was convened against L/Nk Anil Kumar Singh with all the material collected against the petitioner in utter disregard to Rule 180 of the Army Rules. Ld. Counsel for the petitioner asserted that the first Court of Inquiry dated 13.04.1990 was ante-dated prepared sometime in the month of July and fabricated to trap the petitioner to create pressure and swallow the 147 Gold Biscuits. It is also stated that 2Lt Rajiv Shukla was following the escort party and was seen at Railway Station, Lucknow and later on his absence was converted to overstaying leave for four days

and he was reprimanded. The petitioner was brought to Command Hospital, Udhampur and on 08.06.1990 was scheduled to proceed for Srinagar. Strangely enough two movement orders were prepared; one was produced by Col B.K. Mukhopadhyay, Registrar of the Hospital indicating there in the purpose and despatch movement time as 05:00 PM on 10.06.1990, and the second movement order was produced by 6 Rajput Regiment indicating movement time as 06:00 PM on 09.06.1990. The petitioner was removed from hospital at 04:00 AM on 09.06.1990. Another anomaly on record is telegram from 68 Mtn Bde whereby it was indicated that the petitioner was brought to Transit Camp to proceed to Srinagar on 08.06.1990 afternoon which was conveyed to 15 Corps, but strangely the petitioner was not proceeded on 08.06.1990 or 10.06.1990 (supra). He was removed from Command Hospital, Udhampur on 09.06.1990 at 04:00 AM. The movement order was signed by Col Mukhopadhyay. How Col Mukhopadhyay signed the movement order on the same day at 04:00 AM seems to be not understandable and speaks volume. Why the petitioner was removed from Command Hospital, Udhampur on 09.06.1990 at 04:00 AM in the morning creates doubt over the motive and fairness of the authorities concerned while taking the petitioner to Srinagar in pursuance of movement order of

the same day. It was one Sub Dharm Pal Singh who gave the petitioner his Identity Card and enabled him to escape. However, later on Sub Dharm Pal Singh denied the assistance provided by him.

143. When the petitioner was relieved from Command Hospital, Lucknow he was found to be unfit for active duty. The medical report at the time of release along with escort party issued by Command Hospital, Lucknow dated 05.06.1990 is reproduced as under:-

"COMMAND HOSPITAL (CC) LUCKNOW MEDICAL CASE SHEET

1. Name: *S.S. CHAUHAN*	*2. Service No:* *IC-48848*	*3. Rank/ Rate:* *2 Lt*
4. Unit/Ship: *6 RAJPUT C/O 56 APO*	*5.Arms/Corps/Branch/ Trade: Inf/Offr*	*6. Service:* *11 yrs Army*

1. Diagnosis :NEUROSIS (DEPRESSION) 300 (d)

04 Jun 90. This 30 ½ yrs old infantry officer with about 1 years commissioned service (total service 10 years) was admitted to 7 Air Force hospital on 18 April 90. The officer was said to be on annual leave and as he behaved aggressively throwing utensils, beating up his children he was taken to hospital for treatment by his relations.

On examination by the MO at Air Force hospital he was found to be depressed and unkempt. No physical abnormality was recorded. For his behavioural abnormality he was thought to be a case of MDP and for further psychiatric investigations he was transferred to this hospital.

> *Pt was admitted to this hospital on 20 April 90. He was brought with escort. The history revealed by the patient that he was maltreated in his unit and was given blanket parade for none of his fault. He was made to proceed on A/L on 15 April 90. He arrived to Delhi by Indian Air Lines flight and from Delhi he took civil bus to his village where he reached on 16 April 90. At the bus stand he lost his baggage viz. one suitcase.*
>
> *Pt gave history of having been taken to civil psychiatrists by his relations who later advised him to be taken to service hospital.*
>
> *On arrival at Command Hosp (CC) Lucknow on Psychiatric examination and observation in the ward did not reveal any evidence of psychosis (Instantly). However he was guarded, depressed and highly apprehensive. He was aggrieved and wanted to seek justice for the mal treatment met to him in his unit. His sleep was disturbed. Pt was investigated with battery of psychometric tests which revealed inner tension and emotional instability arising out of situational anxiety as he perceived the external environment as hostile one. Mild reactive depression too was evident. No physical abnormality or neurological deficit could be found. He was reassessed and given the benefit of tranquilizers with improvement in his condition. He started acting well and sleep also improved.*

1. Name: *S.S. CHAUHAN*	*2. Service No:* *IC-48848*	*3. Rank/Rate:* *2Lt*
4.	*5.Arms/Corps/Bran*	*6.*

Unit/Ship: *6 RAJPUT C/O 56 APO*	*ch/ Trade: Inf/Offr*	*Service:11 yrs*

1. Diagnosis :NEUROSIS (DEPRESSION) 300 (d)

He developed confidence to face the challenge of the environment. Now looks less depressed & less anxious. No suicidal ideation/tendencies found.

His unit was asked to forward AFMSF-10 report. In response to this his unit intimated that the officer is involved in disciplinary case and HQ 15 Corps directed to transfer the patient under escort to Command Hosp, Udhampur in case he is medically fit for above purpose.

Pt is fit for transfer to Command Hosp (NC) Udhampur. Fit to travel in entitled class with escort and one sick attendant (PNA). Escort and sick attendant have been explained the nature of patient's illness and briefed to take adequate precaution to ensure safe and comfortable journey of the patient.

Following treatment be administered enroute and on arrival at Command Hosp (N.C.) Udhampur by the P.N.A. sick attendant.

1. Tab Largectil 25 mgm 1-1-4.

2. Tab Nortreptiline 25 mgm 1-0-2.

3. Tab Calmpose 5 mgm 1/2-0-1/2.

NEUROSIS (DEPRESSION)-300 (d)

Sd/- x x x x	*sd/- x x x x*	*sd/- x x x x*
(Officer-in-Charge	*(B Sitharaman)*	*(GR Colechha)*
Psychiatric Wing	*Maj Gen*	*Col AMC*
(CC) Lucknow	*Commandant*	*Senior Adviser*
CH (CC) Lucknow		*(Psychiatry)*

05.06.90"

144. Keeping in view the aforesaid contention of the petitioner and the material on record, prima facie the respondents do not seem to be justified in forcing the petitioner under detention for transfer to Command Hospital, Udhampur or Military Hospital, Srinagar where expert facilities of disease Neurosis is much less than Command Hospital, Lucknow.

XIII. COMPULSIVE DESERTION OR ESCAPE:

145. Petitioner was brought to Command Hospital, Udhampur on 07.06.1990 from where he was supposed to be taken to Military Hospital, Srinagar. Conflicting movement orders communicated to him by Sub Dharm Pal Singh created doubt in his mind that too because of beginning of journey on 04:00 AM in the morning of 09.06.1990. Being relieved from Command Hospital, Udhampur for Srinagar is alleged to have created doubt in his mind that the conspiracy was hatched to eliminate him to end the controversy flared with regard to regard to controversy of recovery of 147 gold biscuits (supra). Doubt created in the mind of petitioner appears to be reasonably based on genuine grounds. Capt Salim Asif, Adjt to Commanding Officer, 6 Rajput Regiment wrote a letter dated 17.05.1990 (Exhibit-AA) to the Command Hospital, Lucknow indicating that petitioner is wanted for moral turpitude being involved in lifting money from houses during house to house

search in Srinagar besides tempering leave certificates and made a query as to whether AFMSF-10 format is required to be filled up by the unit. It may be noted that this form is filled up and maintained in the record with regard to officer who is suffering from physical or mental ailments. In the present case the release order of Command Hospital, Lucknow itself indicates petitioner's serious mental condition of neurosis depression. The letter of the Army HQ dated 07.06.1990 (Exhibit-AA) shows that petitioner was suffering from neurosis depression followed by telegram on record as Exhibit-AB shows with regard to report in format AFMSF-10 in triplicate.

146. The movement order issued by Command Hospital, Udhampur for the escort party consisting of Sub Dharm Pal Singh on record is Exhibit-AL which indicates that the petitioner along with escort party shall leave the hospital on 10.06.1990. For convenience sake movement order Exhibit-AL on record is reproduced as under :-

"MOVEMENT ORDER

1. On completion of temp duty, the undermentioned pers of 6 Rajput are directed to proceed to their parent unit through 261 T/Camp (Udhampur) for permt duty:

---

1. JC-172569 Nk SUB Dharam Pal
2. 2973821 Nk Bijender Singh
3. 2984805 L/Nk Rajendar Singh
4. 2979644 Sep Gian Sing

---

2. They will leave this hosp on 10 Jun 90 at (AN) and SORS 11 Jun 90.
3. They are in possession of their Identity Card.
4. They will strictly observe military discipline.
5. They are moving with Arms and Amn.

Sd/ x x
(PK Panda)
Maj
1310/Coy/90 *Duty Medical Officer*
For Commandant
Command Hospital
Northern Command
C/O 56 APO

Date: 10 Jun 90
Distribution
1. Individual Concerned.
2. 6 Rajput
3. Case File"

147. Apart from above the movement order issued by Command Hospital, Udhampur there is one another order issued by Registrar of the Command Hospital, Udhampur instructing Sub Dharm Pal Singh and party dated 07.06.1990 which shows that the petitioner was leaving hospital on 10.06.1990 at 05:00 AM. The order seems to be signed by Col B.K. Mukhopadhyay, Registrar dated 09.06.1990. The same is on record as Exhibit-AK.

148. It has been stated by Ld. Counsel for the petitioner that these two movements orders; one signed and produced by Col B.K. Mukhopadhyay, Registrar of Command Hospital, Udhampur giving proposed dispatch movement time as 05:00

AM on 10.06.1990 and the other indicating 06:00 AM on 09.06.1990 apart from telegram from Lt Col Taneja of 68 Mtn Bde that the petitioner was brought to Transit Camp on 07.06.1990 in order to proceed to Srinagar on 08.06.1990 (AN). This shows how things were moving fast to ensure petitioner's safe custody at Srinagar under the control of same Corps.

149. Subject to above strange circumstances, when the petitioner was discharged from Command Hospital, Udhampur at 04:00 AM in the morning of 09.06.1990 under stress and strain running from severe neurosis depression under S-3 category the petitioner under apprehension and threat to life, escaped from Udhampur on his own and reached to his home town alleged to be in depressed state of mind on 21.06.1990. The petitioner's father on 22.06.1990 apprised the Rajput Regiment Centre, Fatehgarh with regard to mental condition of his son. Lt Gen Y.S. Tomar, Adjutant General Army Headquarters gave an interview to the petitioner's father and petitioner on 26.06.1990 and according to the petitioner on his recommendation the petitioner was admitted in Army Hospital, New Delhi on 26.06.1990 and in view of request made, he was discharged on 29.09.1990 after three months long treatment and was handed over to Maj R. Khullar of 4 Rajputana Rifles to move for 92, Base Hospital, Srinagar where the petitioner was

again examined by medical board on 01.10.1990 and placed under category S-3 for 24 weeks. For convenience sake, the confidential interim report of Col Rajinder Singh, Sr. Advisor, Psychiatry, Army Hospital, New Delhi dated 31.07.1990 is quoted as under:-

"Interim Report of Army HQ
CONFIDENTIAL

IC-48340 2/LT SS Chauhan of 6 Rajput C/o 56 APO, was admitted in Army Hospital Delhi Cantt on 23.6.90 at 1850 Hrs. He was brought from home by his father, Examination revealed a very anxious and acutely depressed individual who wept and cried while relating the circumstances of his admission and escape from the custody of the guards. He was apprehensive and fearful and apprehended death by his unit people. His sleep was disturbed and appetite was erratic.

History revealed that the officer was on "house to house search duty" in Srinagar during Apr 90 and after the search the officer told something to his CO which the later did not like. The officer alleges that Commanding Officer threatened the individual (2 Lt Chauhan) to kill him if he talked about what was found during the "house to house search". The officer further states that he was beaten by three officers at the behest of the Commanding Officer. Thereafter the officer probably became dazed perplexed and bewildered/sent on annual leave, he reached his home (near Kanpur) on 16.4.90.

At home he was observed to show abnormal behavior, was taken to civil Psychiatrist, CHO and later got admitted in 7 Air Force Hospital (Kanpur) from where he was transferred to CH (CC) Lucknow on 20.6.90.

He remained under treatment at SH (CC) Lucknow till 06.6.90 when the officer was transferred to CH (HC), C/o 56 APO (Udhampur). Later, the officer was transferred to 92 Base Hospital (Srinagar) under arrest guards. The officer was still tense and apprehended that he will be eliminated any time. He absconded on 08.6.90 and again reached home on 21.6.90. Officer's father brought him to Delhi and he was admitted in Army Hospital, Delhi Cantt on 26.6.90.

This hospital has been receiving repeated signals from XV Corps about the officer being in disciplinary case and to be transferred for trial of offence "moral turpitude and others".

In spite of numerous requests this hospital has not received old medical documents/AFMSF-10 report. The officer was not transferred as he was not in a fit state for travel/trial.

He has been treated with anxiolytic and antidepressant drugs, modified Biculin Therapy and supportive measures and has improved. Knowledge of details about the patients conducts in the unit is AFMSF-10 report and the treatment already given 1.0 old medical documents will help us make the treatment measures more effective. The detailed information is also required in a disciplinary case as per AO 37/83.

Dated: 31 Jul 90 *sd/- x x*
(Rajinder Singh)
Col.
SeniorAdvisor (psychiatry)
Army Hospital Delhi Cantt"

150. The stage at which the petitioner found himself to be insecure and apprehended threat to his life should be looked into from the mental condition which he was possessing at that time while he was brought from Command Hospital, Lucknow to

Command Hospital, Udhampur. Col V.P. Singh, Medical Officer, Command Hospital, Lucknow appeared before the Tribunal on 27.07.2016 and stated that the petitioner was admitted in the Command Hospital on 20.04.1990 on being transferred from 7, Air Force Hospital, Kanpur. According to him the petitioner was suffering from neurosis depression when he was released from the hospital. Col S.K. Saxena, Doctor of Command Hospital, Lucknow while appearing before the Tribunal on 01.09.2016 drew attention of the Tribunal to the Glossary and guide of classification of mental disease, 9th revision under the title 'International Classification of Diseases (World Health Organization, Geneva, 1978' (in short International Classification of Diseases). A perusal of International Classification of Diseases shows that the neurotic disorder or neurotic depression has been classified into different forms like Anxiety Depression, Depressive Reaction, Neurotic Depressive State and Reactive Depression. Neurotic disorder may be based on different symptoms and conditions on account of excessive anxiety, hysterical symptoms, fatigue irritability, headache, depression, insomnia etc. Neurotic disorders classified by International Classification of Diseases is provided in the booklet supplied by Col S.K. Saxena, Doctor of Command Hospital, Lucknow which are as under:-

*"**Neurotic disorders***

The distinction between neurosis and psychosis is difficult and remains subject to debate. However, it has been retained in view of its wide use.

Neurotic disorders are mental disorders without any demonstreable organic basis in which the patient may have considerable insight and has unimpaired reality testing, in that he usually does not confuse his morbid subjective experiences and fantasies with external reality. Behaviour may be greatly affected although usually remaining within socially acceptable limits, but personality is not disorganized. The principal manifestations include excessive anxiety, hysterical symptoms, phobias, obsessional and compulsive symptoms, and depression.

Anxiety States

Various combinations of physical and mental manifestations of anxiety, not attributable to real danger and occurring either in attacks or as a persisting state. The anxiety is usually diffuse and may extend to panic. Other neurotic features such as obsessional or hysterical symptoms may be present but do not dominate the clinical picture.

Anxiety:	*Panic:*
neurosis	*attack*
reaction	*disorder*
state (neurotic)	*state*

Excludes: neurasthenia (300.5)
Psychophysiological disorders (306.-)

Hysteria

Mental disorders in which motives, of which the patient seems unaware, produce either a restriction of the field of consciousness or disturbances of motor or sensory function which may seem to have phychological advantage or symbolic value. It may be characterized by conversion phenomena or dissociative

phenomena. In the conversion form the chief or only symptoms consists of phychogenic disturbance of function in some parts of the body, e.g., paralysis, tremor, blindness, deafness, seizures. In the dissociative variety, the most prominent feature is a narrowing of the field of consciousness which seems to serve an unconscious purpose and is commonly accompanied or followed by a selective amnesia. There may be dramatic but essentially superficial changes of personality sometimes taking the form of a fugue (wandering state). Behaviour may mimic psychosis or, rather, the patient's idea of psychosis.

Astasis-abasia, hysterical	*Dissociative reaction or state*
Compensation neurosis	*Ganser's syndrome, Hysterical*
Conversion hysteria	*Hysteria NOS*
Conversion reaction	*Multiple Personality*

Excludes: adjustment reaction (309.-)

Anorexia nervosa (307.1)

Gross stress reaction (308.-)

Hysterical personality (301.5)

Psychophysiological disorders (306.-)

Neurotic states with abnormally intense dread of certain objects of specific situations which would not normally have that effect. If the anxiety tends to spread from a specified situation or object to a wider range of circumstances, it becomes akin to or identical with anxiety state, and should be classified as such (300.0).

Agoraphobia	*Claustrophobia*
Animal phobia	*Phobia NOS*

Anxiety-hysteria
Excludes: anxiety state (300.0)
Obsessional phobias (300.3).
300.3 Obsessive-compulsive disorders

States in which the outstanding symptom is a feeling of subjective compulsion-which must be resisted to carry out some action, to dwell on an idea, to recall an experience, or to ruminate on an abstract topic. Unwanted thoughts which intrude, the insistency of words or ideas, ruminations or trains of thought are perceived by the patient to be inappropriate or nonsensical. The obsessional urge or idea is recognized as alien to the personality but as coming from within the self. Obsessional actions may be quasi-ritual performances designed to relieve anxiety e.g., washing the hands to cope with contamination. Attempts to dispel the unwelcome thoughts or urges may lead to a severe inner struggle, with intense anxiety.

Anankastic neurosis

Compulsive neurosis

Excludes: obsessive-compulsive symptoms occurring in:

Endogenous depression (296.1)

Schizophrenia (295.-)

Organic states, e.g., encephalitis

300.4 Neurotic depression

A neurotic disorder characterized by disproportionate depression which has usually recognizably ensued on a distressing experience; it does not include among its features delusions or hallucinations, and there is often preoccupation with the psychic trauma which preceded the illness, e.g., loss of a cherished person or possession. Anxiety is also frequently present and mixed states of

anxiety and depression should be included here. The distinction between depressive neurosis and psychosis should be made not only upon the degree of depression but also on the presence or absence of other neurotic and psychotic characteristics and upon the degree of disturbance of the patient's behavior.

Anxiety depression — *Neurotic depressive state*

Depressive reaction — *Reactive Depression*

Excludes: adjustment reaction with depressive symptoms (309.0)

Depression NOS (311)

Manic-depressive psychosis, depressed type (296.1)

Reactive depressive psychosis (298.0)

300.5 Neurasthenia

A neurotic disorder characterized by fatigue irritability, headache, depression, insomnia, difficulty in concentration, and lack of capacity for enjoyment (anhedonia). It may follow or accompany an infection or exhaustion, or arise from continued emotional stress. If neurasthenia is associated with a physical disorder, the latter should also be coded.

Nervous debility

Excludes : anxiety state (300.0)

Neurotic depression (300.4)

Psychophysiological disorders (306.-)

Specific nonpsychotic mental disorders following organic brain damage (301.-)

300.6 Depersonalization syndrome

A neurotic disorder with an unpleasant state of disturbed perception in which external objects or parts of one's own body are are experienced as changed in their quality, unreal, remote or automatized. The patient is aware of the subjective nature of the change he experiences. Depersonalization may occur as a feature of several mental disorders including depression, obsessional neurosis, anxiety and schizophrenia; in that case the condition should not be classified here but in the corresponding major category.

Derealization (neurotic)

300.7 Hypochondriasis

A neurotic disorder in which the conspicuous features are excessive concern with one's health in general or the integrity and functioning of some part of one's body, or, less frequently, one's mind. It is usually associated with anxiety and depression. It may occur as a feature of severe mental disorder and in that case should not be classified here but in the corresponding major category.

Excludes: hysteria (300.1)

Manic-depressive psychosis, depressed type (296.1)

Neurasthenia (300.5)

Obsessional disorder (300.3)

Schizophrenia (295.-)

300.8 Other neurotic disorders

Neurotic disorders not classified elsewhere, e.g., occupational neurosis. Patients with mixed neuroses should not be classified in this category but according to the most prominent symptoms they display.
Briquet's disorder
Occupational neurosis, including writer's cramp
Psychasthenia
Psychasthenic neurosis
300.9 Unspecified

To be used only as a last resort.
Neurosis NOS Psychoneurosis NOS"

151. It is not disputed that before 11.04.1990 the petitioner was hale and hearty and in fit condition to discharge duty and why he suffered from neurotic disorder at later stage could not be explained by the respondents. It is also not disputed that while suffering from neurotic disability the petitioner was placed in '**dangerously ill state'** and forbidden for remote posting or in isolation cell, but even then ignoring the medical advice he was not dealt with sympathetically and was brought to Udhampur from where early in the morning at 04:00 AM the escort party on 09.06.1990 started journey from Srinagar Base Hospital in such hectic travelling condition ignoring medical advise, the petitioner seems to have left the Transit Camp and reached his house on 16.06.1990 from where he alongwith his father met Adjutant General, Army Head Quarters, New Delhi, Lt General Y.S. Tomar on whose instructions the petitioner was admitted in R.R. Hospital, New Delhi. No effort was made by the respondents as to what was the mental condition of the petitioner when he left Transit Camp and where he was roaming between 09.06.1990 to 16.06.1990 under neurotic disability. Without waiting for thirty days as provided by Section 106 of the Act, the petitioner was declared deserter and hasty proceeding was initiated against him at distant place ignoring

the opinion of the Doctor of the Command Hospital, Lucknow as well as Doctor of the R.R. Hospital, New Delhi.

Whether the petitioner was in a mentally fit condition and left Transit Camp with conscious, healthy mind is one important question which should have been looked into by the respondents before charging the petitioner for the offence in question, keeping in view Army Orders, Regulations and Rules. The same has not been done. Inference may be drawn that the petitioner left Transit Camp feeling reasonable threat to his life under abnormal mental condition (neurotic disability), hence he could not have been charged for desertion (or absence without leave) in the absence of *mens rea,* (supra, Section 38 of Army Act).

XIV. SUMMARY OF EVIDENCE:

152. In pursuance to Court of Inquiry (supra) Maj R. Khullar who was Officiating Commanding Officer of 4 Rajputana Rifles on 19.11.1990 ordered for Summary of Evidence. Summary of Evidence was dictated by Col K.S. Dalal and written in own hand writing by Maj R. Khullar at the relevant time. Recording of Summary of Evidence was concluded on 21.12.1990. However in pursuance to decision taken by Brig Keshav Singh, additional Summary of Evidence was convened on 28.02.1992 which was concluded on 05.03.1992. Col K.S. Dalal, the

presiding officer of Summary of Evidence has given his opinion in terms of Army Rule 24. A copy of the Summary of Evidence written in his own hand writing by Maj R. Khullar as provided to the petitioner has been filed as Annexure-7 to the petition. A close scrutiny of Summary of Evidence filed as Annexure-7 to the petition which contains comments of Col K.S. Dalal reveals that prima facie, no charges (under trial) were established against the petitioner, rather records held to be fabricated.

It further appears that the additional Summary of Evidence was recorded which does not assign any reason as to why some key witnesses were recalled though it shows that it was done under order passed by Col K.S. Dalal and recorded by Maj R. Khullar. No written order has been brought on record containing reason for convening and recording additional Summary of Evidence. It may be noticed that while filing counter affidavit, the respondents have stated that records have been weeded out. However at the end copy of the additional Summary of Evidence provided to the petitioner was filed through affidavit dated 06.01.2015 which has not been disputed by either side. At the end of additional Summary of Evidence it has been certified that the total Summary of Evidence including additional Summary of Evidence contains 156 pages, out of which additional Summary of Evidence contains 125 pages as

brought on record through affidavit. The opening page of the additional Summary of Evidence contains following remarks:-

> *"ADDITIONAL SUMMARY OF EVIDENCE IN CASE OF IC-48848K SECOND LIEUTENANT SS CHAUHAN OF 6TH BATTALION THE RAJPUT REGIMENT ATTACHED TO FOURTH BATTALION THE RAJPUTANA RIFLES (VIDE HEADQUARTER NORTHERN COMMAND LETTER NO 22001/779/DV-3 DATED 03 OCTOBER 1990) BY THE ORDER OF COLONEL K.S. DALAL COMMANDING OFFICER FOURTH BATTALION THE RAJPUTANA RIFLES ON 28 FEBRUARY 1991 RECORDED BY MAJ R KHULLAR*
>
> *28 February 1991*
> *(Assembled at 0930 hours)*
> *Witness No 16 Recalled."*

153. It appears that respondents tried to fill up the vacuum/lacuna while calling for additional Summary of Evidence keeping in view the inference drawn from the fact that no reason has been assigned which seems to be not permissible under the Rules. A perusal of Summary of Evidence shows that the petitioner had confessed orally of possessing Rs 6,000/- on 11.04.1990 though on 13.04.1990 only Rs 5,100/- were recovered from him. The statement of alleged recovery made is contrary to letter No 42/48848/SSC dated 11.04.1990 (Exhibit-AA) to the Court of Inquiry which indicates that the petitioner was found in possession of Rs 5,100/-. Some of the major contradictions which seem to be raised during the Summary of Evidence may be noted as under :-

"(l) The CO in his statement in the S of E (page 2 sub para (h) has stated that "No claim certificates" were not obtained for 11 Apr 90. In the Bde C of I he has further clarified that this was not done because it was our first operation. (Q. 17, page 33), This is false. This was our fourth operation. We had already done Tral, Magam and Khor operations. The fact is that I had personally obtained the "No Claim Certificate" on 11 Apr 90. Why is the CO trying to hide this fact by stating that it was the first operation?

(m) Why Capt M Sanguri has stated in the S of E that he learnt of my involvement in the case on 12 Apr 90 after returning from the search and 2Lt R Shukla has stated in the S of E that he learnt of the case only on 13 Apr 90 when the CO briefed all the officers, on the other hand in a reply to a question Capt Amit Hajela has said that the CO had briefed all officers regarding my misdeeds on 11 Apr 90 during his next day's briefing (Q.5, page 47 Bde C of I).

(n) While Capt Amit Hajela has said that Sub Jattan was commanding a separate group, Sep Zile has said that Sub Jattan was in my group.

(o) Capt Amit Hajela has stated that he apprehended L/Nk Anil Kumar Singh around 1330 hours and the search finished at 1400 hours. L/Nk Anil Kumar says that he was caught in the fifth house. Does it mean that throughout the day my group searched only 5 to 6 houses?

(p) No one is coming forward to recognize any of the civilian houses or civilians concerned in the incident."

154. Apart from above in additional Summary of Evidence Col K.R.S. Panwar had placed on record the previous antecedents of L/Nk Anil Kumar Singh as under:-

"(a) The individual has one red entry. (28 days Rigorous Imprisonment awarded by me while I was posted at the Rajput Regiment Centre and the individual was absent without leave).

> *(b) The individual has been awarded one black ink entry for being absent without leave.*
>
> *(c) A non bailable warrant from 111 Additional Munsif Magistrate Mainpuri dated 30 April 1990 was received by the unit on 06 May 1990. We informed the magistrate vide our letter No 43/A dated 09 May 1990 that since the individual was involved in a disciplinary case he could not be spared. The magistrate was also requested to forward the details of the case against the individual. Inspite of one reminder no reply has been received as yet."*

155. Col K.S.R. Panwar while making his statement during Summary of Evidence as witness No 1 as 29.11.1990 with regard to recovery on 11.04.1990 and complaint received had made the following statements, to quote:-

> *"The only complaint received by the unit regarding lifting of cash/valuables from Batmalu area on 11 April is from Shri Ajaz Ahmad, Personal Assistant to Col Q Headquarter 31 Sub Area vide Headquarters 79 Mountain Brigade letter No PC-414/GSI (ii) dated 21 Jul 1990. I hereby produce the above letter in original along with its CTC. (the CTC is compared with the original and is found correct. Attached as Exhibit-AH)."*

156. From the statement (supra) it appears that allegations came out on 11.04.1990 during search was with regard to lifting of cash and valuables by L/Nk Anil Kumar Singh as alleged to be informed by Shri Ajaz Ahmad, Personal Assistant to Col Q, Headquarters 31 Sub Area. <u>There was no allegation or confession by or against the petitioner as added and stated by Lt Col M.S. Rawat at later stage. It reveals that the original</u>

allegations were only against L/Nk Anil Kumar Singh and Nk Kailash Chand. It may be noted that recovery from Nk Kailash Chand was made on the same day but was attributed to the petitioner. It may reasonably be inferred from the fact that Hav Shishupal Singh, witness No 25 in spite of being in the group at the initial stage does not know anything. L/Nk Anil Kumar Singh was recalled as witness No -6. He stated that the petitioner had broken T.V. set and ordered to molest woman by Sep Lakhan Lal. He stated that apart from breaking T.V., the petitioner removed a wad of notes from a woman's bosom from second house and from third house he had taken two wads of notes from a young man's pocket and from the fourth house he removed one was of notes from an old man. Strangely enough the alleged recovery was of a meager sum of Rs 5,100/-. It has however been stated by L/Nk Anil Kumar Singh that he alone witnessed the conduct of 2Lt SS Chauhan in the second to fourth house. Whether others were present is not borne out from his statement though he was alleged eye witness on record. None of the witnesses in additional Summary of Evidence indicated where were the four lady constables of CRPF when the incidents happened. Statement of L/Nk Anil Kumar Singh and Kailash Chand are contradictory to each other.

157. Lt Col M.S. Rawat appeared as additional witness No 2. In his statement he stated that thorough search was carried out in the dining hall on 11.04.1990 (supra) during return to Transit Camp at about 08:00 PM and man to man search was done. For the purpose of search, it was alleged by him that Company Commanders were interchanged and all ranks were made to move out from front door in a single file and search thoroughly. To quote relevant portion;

> *"For the purpose of the search the company commanders were interchanged and All Ranks were made to move out of the front door in a single file and searched thoroughly".*

158. It is strange enough that all ranks were searched, that too in a disciplined force in a locked room, then why nothing was recovered from the petitioner during such search? The alleged statement of L/Nk Anil Kumar Singh was believed to the affect that the petitioner was held in his pocket a sum of Rs 6,000/- and from the pocket of Nk Kailash Chand an amount of Rs 3,700/- was recovered which keeping in view his statement it was forcibly handed over by 2Lt SS Chauhan. The case seems to be cooked up at the face of record for the reason that in case petitioner was in possession of Rs 6,000/- then he could have also retained the meager amount of Rs 3,700/- In spite of Rs 6,000/- only Rs 5,100/- was alleged to have been recovered from him, that too on third day i.e. on 13.04.1990 from the room

and the seizure memo does not contain petitioner's signature, which we shall deal hereinafter. The recovery was alleged to have been made from petitioner's room during his presence by Lt Col M.S. Rawat along with Maj Mukesh Sanguri and Capt Amit Hajela. Where Rs 900/- had vanished is not understandable. On the same day a Court of Inquiry was ordered by Commanding Officer Col K.R.S. Panwar against L/Nk Anil Kumar Singh (supra) but no Court of Inquiry was ordered against the petitioner by any officer of the Battalion including Commanding Officer though it is alleged that recovery was made on 13.04.1990. No immediate communication was made to the higher authorities after recovery. To his all fastness the Commanding Officer was waiting for Brigade Commander who reached there on the second day. To quote relevant portion from the statement of Lt Col M.S. Rawat is reproduced as under:-

> *"On 13 April 1990 the Battalion was not employed on any operation. At about 1030 hours the Commanding Officer in the presence of 2Lt SS Chauhan asked me to search 2Lt SS Chauhan's belongings in the latter's presence. He also asked me to take two other officers with me. Accordingly I along with Maj Mukesh Sanguri and Capt Amit Hajela accompanied 2Lt SS Chauhan and came to the block where we were staying. 2Lt SS Chauhan was already in his room when we entered. He confronted us with a wad of notes in his hands and stated that this was the amount we had lifted from one of the houses during search. He handed over the*

same to Capt Amit Hajela who in turn handed it over to me. On counting the amount it came to be Rs 5,100/-. When queried by me as to the discrepancy between the amount earlier confessed as having been lifted by him and now handed over ie Rs 900/-, 2Lt SS Chauhan stated that this was the only amount that was lifted by him. Thereafter I asked 2Lt SS Chauhan to open his boxes and he kit which he did. After a thorough search in which nothing incriminating other than a few private items of other officers was recovered. I came back and reported the recovery of Rs. 5,100/- to the Commanding Officer and deposited this sum with the Adjutant. I hereby produce the CTC for the recovery. (The witness claims that the original copy has been handed over to the Presiding Officer of the Court of Inquiry and hence the CTC cannot be compared with it being unavailable. Attached as Exhibit AP). The same day ie 13 April 1990 at approximately 1115 hours the Commanding Officer ordered a Court of Inquiry with me as the Presiding Officer, to investigate the circumstances under which L/Nk Anil Kumar attempted to life a gold necklace during the house to house search on 11 April 1990. When during the day it became evident that there was a clear involvement of 2Lt SS Chauhan in not only lifting of valuables but also other instances of moral turpitude, I reported this to the Commanding Officer. He in turn decided to report the matter to our Brigade Commander who was to arrive in the Transit Camp with Brigade Headquarters the following day."

159. From the statement of Lt Col M.S. Rawat it appears that though the petitioner was informed that he was not placed under arrest as per directions of Headquarters 15 Corps Signal Regiment but he was informed that he was placed under close watch and not permitted to go outside. Yet another strange fact is that a lunch was allegedly hosted on 14.04.1990 where

Brigade Commander Madan Das was present. In the said lunch petitioner also participated as is evident from the statement given by Lt Col M.S. Rawat, to quote relevant portion:-

> *"The next day ie 14 April 1990, the Brigade Commander Brigadier Madan Das along with the Brigade Major, Maj SS Bajuwa, Brigade Education Officer, Officer Commanding 68 Mountain Brigade Signal Company, Officiating Commanding Officer, 4 RAJ RIF, Commanding Officer 5 DOGRA and Commanding Officer 2/11 GR came to the Officers Mess and had lunch with us at about 1400 hours. 2Lt SS Chauhan was also present during the lunch. The Commanding Officer had in the meantime reported the matter officially to the Brigade Commander".*

160. It is strange that from a person, from whom recovery was made on 13.04.1990, was permitted to participate in lunch on 14.04.1990 along with Brigade Commander without taking any action immediately after recovery.

161. <u>All these materials on record show that till 13.04.1990 no recovery was made from the petitioner</u>. Things were manipulated at a later stage and the petitioner seems to have been persuaded to suppress the recovery of <u>147 gold biscuits</u> followed by movement order to avail leave from 15.04.1990. It appears that keeping the aforesaid and other material evidence with full of contradiction on record Col K.S. Dalal gave a finding that prima facie no case is made out to the extent of charges

framed against the petitioner which is on record as Annexure-7 to the petition and has not been disputed. Col K.S. Dalal to all his fairness dictated to record the real story under the heading 'actual story' recorded by Maj R. Khullar in own hand writing apart from making serious allegations in the original Summary of Evidence indicating his doubt with regard to fabrication of record to frame the petitioner. Col K.S. Dalal while recording his finding under the heading 'actual story' recorded, to quote, as under :-

"Actual Story

1. Cordon and search on 11 Apr 90.

2. Anil found lifting gold by Chauhan. Matter reported.

3. Rec of gold reported by the officer Chauhan.

4. Nk Kailash lifted money caught during the search of unit cert signed.

5. Lakhan implied in rape case.

6. Officer spoke to an acquaintance on 13th afternoon. Till then no action by the unit.

7. C of I records one witness/Hajela-No mention of any other event but gold recovery. Only 2IC. Matter taken lightly. Only OR involved.

8. CO learns of reporting by Chauhan.

9. Anti CO group threaten Chauhan to report matter. Chauhan beaten. Taken to command hut. Mentally off.

10. CO and other gp join hand at this stage and fabricate story.

11. Matter reported on 14th.

12. Chauhan att and removed to sig regt.

13. Chauhan whisked off. Necessary that he should not open his mouth.

14. Chauhan admitted hospital. Returns.

15. Udhampur mental pressure again runs. offr identity card handed over.

16. Readmitted".

162. A perusal of Summary of Evidence submitted by Col K.S. Dalal further reveals that undue favour was given to L/Nk Anil Kumar Singh by Commanding Officer Col K.R.S. Panwar who stood by him during the entire proceeding. There were ten charges for which Summary of Evidence was recorded but half heartedly two or three charges were found to be partially established subject to certain conditions. The ten charges with regard to which Summary of Evidence was convened according to report are as under:-

(i) Willfully damaging a TV Set.
(ii) Outraging the modesty of a woman.
(iii) Illegally recovering from civilians.
(iv) Giving illegal recovered money to a NCO for safe keeping.
(v) Absenting himself without leave from Srinagar.
(vi) Tempering with leave certificates.
(vii) Escape from lawful custody.
(viii) Absenting himself without leave from Udhampur.
(ix) Making false allegation.
(x) Not deposing before Court of Inquiry.

163. However it appears that Col K.S. Dalal seems to be firm and upright officer while recording findings in Summary of Evidence with all precautions and presence of mind seems to ensure that Summary of Evidence be recorded by Maj R. Khullar, who himself also seems to be involved to suppress matter with regard to recovery of 147 gold biscuits. However nothing could be done by Maj R. Khullar since he was only a recording officer during Summary of Evidence. For convenience sake para 13 of the Summary of Evidence is reproduced as under:-

> "*13. CO has in C of I made a statement that one of the reasons for officer to run away was to exert political influence (He does not repeat this at the S of E) In Sp of his statement he has produced a letter written by Chauhan to a MP on 13 April along with a stamped envelope. In the letter officer has requested the MP to come by air to Srinagar because the officer was in trouble. Why did the officer not post the letter on 14. Did something happen to prevent him from doing so?*
>
> *(a) Anil does not know Chauhan.*
>
> *(b) Anil is apparently a civil chargesheeter.*
>
> *(c) CO has taken pains to hide the fact that Chauhan has barely served for 15 days in the unit in 1989.*
>
> *(d) Officer was allowed to apply for change of arm.*
>
> *(e) No one other than there who have given evidence have come forth to say that they were in the search*

party i.e. Anil was present for houses, Lakhan for one, Kailash for one.

(f) Two other facts which are not directly connected with the case are follows:-

(a) Rajeev Shukla was on leave till 05 Jun but was out till 08 June. The officer claims to have seen him on 06 June. It is denied based on official record of i.e. upto 05 June.

(b) L/Nk Anil was promoted by the present CO after the former had lost his rank Appt being AWL."

164. Some of the peculiarities recorded by Col K.S. Dalal during Summary of Evidence required to be placed on record in the present order, and the same are reproduced as under:-

"Other peculiarities of the case:

(a) CO has made a mention in C of I of an unposted letter to a MP by the offr. In S of E he does not mention it. The letter is dated 13 Apr. The offr has asked the MP to air dash to Srinagar. Why does he call the MP when he is planning to run away? Why did the offr leave the letter in Transit Camp and not post it/take it with him to sig regt?

(b) Why did Anil in the first two statements give time a start of ops as 1200 h?

(c) The Unit C of I done on 13 Apr was not done with the seriousness it deserves i.e. an offr was involved. Only Lt. Col MS Rawat took down the statement. Only two statements were taken.

(d) In the offrs searched gp only the names of HQ Coy pers figure besides Kailash and Lakhan who are not from this pl.

(e) Strangely both these ORs claim that they were earmarked for Chauhan's gp at the Transit Camp whereas the Coy Cdr and the Pl Cdrs say that other gps were distributed at the search place.

(f) LNK Anil, the main witness claims NK Kailash was not a part of his gp but was with Jatan. Lakhan who claims to be in Chauhan's gp and also claims to have been in the protection gp says he did not see Kailash. Is it possible in a gp of 10 OR working for 6 hours together? Was Kailash there?

(g) Witnesses except for offrs have all along changed their statements.

(h) NK Kailash has added a new dimension to his S of E statement by saying he saw the offr on 14 Apr. Earlier he had made no mention.

(j) Lack of corroboration.

(k) Witnesses have taken pains to avoid CRPF woman police.

(l) Anil cannot remember any house or person.

(m) Kailash introduced a new element 'Masjid' in S of E probably to recognize the house.

(n) Anil does not know Chauhan.

(o) Anil is apparently a civil charge sheeter.

(p) CO has taken pains to hide the fact that Chauhan has barely served for 15 days in the unit i.e. 1989.

(q) Offr was allowed to apply for change of arm.

(r) No one other than those who have given evidence have come forth to say that they were in the search party i.e. Anil was present for five houses, Lakhan for one, Kailash for one.

165. Aforesaid material brought on record during Summary of Evidence shows how the petitioner has been framed by the Commanding Officer and some higher ups which seems to suppress recovery of 147 gold biscuits. Col K.S. Dalal could not restrain himself to record, to quote. '***Officer was involved***'. He further noted that CRPF women police were avoided and L/Nk Anil Kumar Singh does not remember any house of person and one of the witnesses Sep Lakhan who claims to belong to Chauhan's group has not seen Nk Kailash Chand from whom amount of Rs 3,700/- was recovered. With regard to escaping from Udhampur in Summary of Evidence it has been recorded that the officer was mentally depressed and in fearful condition. The officer has no intention to run away. One more observation in Summary of Evidence is required to be placed on record under the caption 'General approach', to quote:-

"*General Approach*

1. *Officer disliked*

   (a) Away for six months

   (b) Change of arm

> *(c) Sep Bhupal Singh given leave from 10 Nov to 12 Nov 87 Later given 11 days RI which was subsequently cancelled.*
>
> *2. Matter officially reported only on 14 Apr.*
>
> *3.* ***Case fabricated, people who had actually been apprehended for offences committed on 11 Apr were made witnesses with the only differences that those offences were now put on Lt. Chauhan. L/Nk Anil was caught red handed lifting money and so he played the main role Nk Kailash was apprehended with stolen money. It was put on Lt. Chauhan Sep Lakhan was involved in molestation he put the blame on Lt. Chauhan. However as the days passed stories were fabricated and evidence inters cover****. However discrepancies remain discrepancies which cannot be explained. Evidences of two witnesses do not match with one another's. Evidence of witnesses themselves differences. The* ***truth has got buried in the numerous statements and contradictions between witnesses"****.*
>
> *(Emphasis supplied)*

166. A plain reading of aforesaid observation of Col K.S. Dalal shows that case was fabricated to fix the petitioner. L/Nk Anil Kumar Singh was caught red handed but he was made a crucial witness against the petitioner. Nk Kailash Chand who was apprehended with stolen money was not charged and let off and the allegation was shifted on the petitioner. The discrepancies could not be explained and the truth has been buried. These observations in the Summary of Evidence not only speak volumes but shows the that by fabrication, concoction and manipulation of record the petitioner has been

framed, naturally to suppress recovery of 147 gold biscuits. It is unfortunate that GOC 15 Corps Lt Gen Zaki Mohammad Ahmad for reasons best known to him closed ears, eyes and mind to the observations made by Col K.S. Dalal in Summary of Evidence (supra) and issued the convening order to hold the petitioner guilty. The first Court of Inquiry dated 15.04.1990 was apparently intended to create grounds against the petitioner and charge him for the allegations in question, though it seems to be based on unfounded ground from the material on record.

It requires appropriate and indepth high level inquiry on the part of Chief of the Army Staff. The matter gains seriousness for the reason that alleged theft was during operation and murderous assault on the life of a commissioned officer (petitioner) was made and it was attempted to be converted into attempt to suicide, that too without any investigation.

XV. VALIDITY OF SUMMARY GENERAL COURT MARTIAL

167. Subject to aforesaid backdrop a question cropped up whether it was open to hold SGCM? Rule 22 of the Army Rules empowers the Commanding Officer to record Summary of Evidence. This is done in pursuance to report of Court of

Inquiry subject to compliance of Rule 180 of the Army Rules. Sub rule (2) of Rule 22 of Army Rules empowers the Commanding Officer to dismiss charges brought before him in case no offence under the act has been committed by an incumbent. The only rider is whether an urgent trial is required in SGCM. For convenience sake Rule 22 of Army Rules is reproduced as under :-

> *"22. **Hearing of Charge**.- (1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:*
>
> *Provided that where the charge against the accused arises as a result of investigation by a Court of Inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).*
>
> *(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with:*
>
> *Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.*
>
> *(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time-*

(a) dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary court-martial:

Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless-

(a) the offence is one which he can try by a summary court-martial without any reference to that officer; or

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

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

168. While filing affidavit dated 05.12.2016 Ld. Counsel for the respondents stated that the Commanding Officer made a reference under para 459 of Defence Service Regulations to Deputy Judge Advocate General's Department,

Command/Corps in format i.e. Appendix –III Part-1A which shows that while forwarding the recommendations the Commanding Officer shall forward tentative charge sheet in duplicate along with statement of accused as to whether or not he desires to have an option signed by the convening officer to represent him at the trial. Neither the recommendation of the Commanding Officer nor the statement of the petitioner with regard to choice relating to defend him during Court Martial proceeding has been brought on record. In para 5 of the affidavit attention has been invited to Regulation 459 of Defence Service Regulations. In para 6 of the affidavit it has been stated that the convening authority i.e. GOC 15 Corps made a reference through Service Note dated 23.03.1991 making recommendation for Summary General Court Martial to the Deputy Judge Advocate General Headquarters 15 Corps. The Deputy Judge Advocate General 15 Corps sent his recommendation for the Court Martial proceedings. The convening order has been filed as Exhibit-K to the SGCM proceedings in para 6 of the affidavit (supra) with regard to record, respondents stated as under:-

> *"It has been intimated by HQ 15 Corps JAG Branch vide Sig No 5415/SSC/22/JAG dated 05 Dec 16 that the file pertaining to 2nd Lt SS Chauhan was destroyed being obsolete by the Board of Officers (IAFD 931) assembled on 27 Oct 2008. A copy of Board of Officers dated 17*

Nov 2008 is being annexed as Annexure No SA 5 to this Supplementary Affidavit."

169. Thus, it is evident that record was weeded out in Nov 2008 during the pendency of present controversy in a hasty manner. The Parliamentary Committee also deprecated the conduct of the respondents with regard to weeding out of the records. The affect of weeding out of the record during pendency of proceeding in the Court or in Parliament seems to be a hasty decision to suppress the truth. The letter of Deputy Judge Advocate General is available and placed on record as SA-2 to the affidavit (supra) dated 05.12.1916 and certain other records have also been filed selectively. The reason to weed out other documents is not understandable. The affect of weeding out of the record entitles to draw adverse inference against the conduct of the respondents. It may be noted that the Deputy Judge Advocate General while submitting his opinion (supra) expressed his views that tempering with leave certificate, outraging modesty of a woman and certain other charges are not substantiated, hence dropped, but for few charges the petitioner may be directed to face SGCM proceedings. The Deputy Judge Advocate General further stated that he shall detail a Judge Advocate for the trial but was not requested to do so.

170. In the absence of any material which may reveal recommendation of Col K.S. Dalal for SGCM proceeding an inference may be drawn that no recommendation in pursuance to Army Rule 24 was given by him for petitioner's trial for the charges for which the petitioner was sentenced, hence it would be non compliance of statutory mandate and the subsequent SGCM proceeding vitiates and is non est in law.

171. The bar created by sub-section (2) of Rule 22 (supra) is mandatory. Unless the Commanding Officer is of the opinion that the charge ought to have proceeded with, only then he shall refer the same to higher authority for appropriate trial. In the present case the Commanding Officer Col K.S. Dalal seems to hold that petitioner had not committed misconduct and allegations is based on fabrication of record. The mandatory power provided under sub rule (2) of Army Rules seems to vitiate the entire subsequent action with regard to SGCM proceeding which goes to the root of the procedure prescribed to convene SGCM as condition precedent. In any case if the GOC 15 Corps was not in agreement with Col K.S. Dalal, he should have assigned reason, which has not been done.

XVI. ATTEMPT TO MURDER OR SUICIDE:

172. The petitioner was placed under dangerously ill list keeping in view the report of RR Hospital, New Delhi and letter of Medical Board report of 92 Base Hospital, Srinagar. In medical re-examination, a decision was taken to bring back the petitioner from the location of 4 Rajputana Rifles to 92 Base Hospital for medical re-categorization. While doing so, order was passed on 10.04.1991 for permanent arrest of the petitioner. Petitioner reached Srinagar at about 07:00 PM. He was brought in a Two Ton vehicle as admitted in the counter affidavit. He was sitting on the co-driver seat. The vehicle was parked adjoining the footpath and the driver had gone out for some unknown reason. According to petitioner, though he was earlier placed under close arrest by Headquarters 15 Corps vide Signal No A-1659 dated 25.05.1990 (Exhibit AY of SGCM proceeding) of Command Hospital, Central Command, there was no occasion to pass order of close arrest on 04.04.1991. On account of close arrest it was not open to the petitioner to carry a weapon with him on the fateful evening of 11.04.1991. As admitted in para 79 of the counter affidavit (page 54) filed by Maj R.K. Saha of 6 Rajput, the respondents alleged that instead of firing from outside, the petitioner himself tried to commit suicide. Then where is the weapon?

173. Attempt to commit suicide is an offence and serious misconduct under Army Rules, but the respondents neither lodged FIR nor Court of Inquiry, Summary of Evidence or Court Martial proceedings were held with due compliance of Rule 180 of the Army Rules. This material on record shakes theory of attempt to commit suicide. It has been stated in the petition that the petitioner was fired from outside near to CRPF unit located at the parking place. It was because of CRPF personnel that petitioner's life was saved and it were they who brought the petitioner lying on the ground in military uniform to 92, Base Hospital. The evidence on record shows that the Commanding Officer K.R.S. Panwar visited Srinagar the same day to the hospital but he did not visit the petitioner. It has been alleged by petitioner that Commanding Officer Col K.R.S. Panwar came in the same convoy to Srinagar and returned back in a helicopter on the next day. Going back in a helicopter from Srinagar seems to be established from material on record of the SGCM proceeding. According to the petitioner, the question posed by the petitioner with regard to use of helicopter by Commanding Officer Col K.R.S. Panwar on 12.04.1991 was not allowed by the Presiding Officer of the SGCM and question posed was also not allegedly allowed to be recorded. According to petitioner similar question was asked by Maj

Abhay Singh, member of the SGCM proceeding and a heated exchange of words took place, but without any fruitful result. One of the omissions done by the respondents is that the clothes which the petitioner was wearing at the time of gunshot injury were neither sealed nor retained for forensic examination. No injury report was prepared by the Doctors of 92 Base Hospital, Srinagar, and in case prepared, it was not brought on record by the respondents during the course of Summary of Evidence or SGCM proceedings. During course of present proceedings in the Tribunal, the petitioner has brought the clothes which he was bearing on the fateful day and also showed injury sustained by him. We have noticed the injury which appears to be sustained by the petitioner on the fateful evening. It was rightly argued that the bigger mark shows exit point which seems to be on the right side.

174. During course of treatment the petitioner was placed in dangerously ill list (D.I. List) from 11.04.1991 to 18.04.1991 but his next of kin were neither informed by 92 Base Hospital nor by HQ 15 Corps or 6 Rajput Regiment which was imperative and necessary in view of Special Army Order (SAO) 8/S/85. He was discharged from the hospital on 14.05.1991 (a copy is attached as Annexure-5 to the rejoinder affidavit. Lt Col Valdiya of 92 Base Hospital made an endorsement on the

discharge slip which indicates that the petitioner shall not be posted to isolated area.

Brig B.B. Mathur, Commandant 92 Base Hospital made an endorsement, to quote:-

> *"unfit for duty in high altitude, combat during action hostilities and Counter Insurgency".*

175. In spite of such endorsements the petitioner was kept in isolation in Niari at a distance of 110 Kms from Srinagar where no psychiatric expert was available. The plight of the petitioner may be noticed from the fact that the family members of the petitioner were not informed or permitted to meet him. The petitioner preferred a Habeas Corpus petition in the Supreme Court where a statement was made by the Union of India that members of the petitioner's family shall be permitted to meet him as evident from order of Supreme Court passed in Writ Petition (S)/Crl No 791/91 dated 03.06.1991 filed as Annexure No-11 to the petition.

176. Apart from above, in case the petitioner had attempted to commit suicide, it was incumbent upon the respondents to hold an inquiry, Summary of Evidence and proceed with his trial since it was unbecoming conduct for an Army officer under Section 69 of the Army Act. The petitioner's father had sent a registered letter dated 03.05.1991 to Superintendent of Police

Srinagar raising allegation with regard to attempt to murder of his son but no action was taken by the police. Why the SP did not take cognizance of the registered letter sent by petitioner's father is not understandable. During course of inquiry no reasonable time was granted to the petitioner to bring an advocate to assist him. Interestingly enough, the petitioner himself made a request vide letter dated 11.04.1991 that the matter with regard to attempt on his life should be inquired into and he is ready to face trial. **However the petitioner was informed vide letter dated 22.07.1991 by Col K.S. Dalal, Commanding Officer 4 Rajputana Rifles that the SGCM has been recommended for his trial on offence of attempt to commit suicide and with regard to injury caused to the petitioner at Srinagar on 11.04.1991 and the petitioner should give the name of defence counsel. In reply to said letter the petitioner informed that he does not intend to engage any defending officer and he will defend himself**. Copy of the letter dated 22.07.1991 has been filed as Annexure-22 to the petition. The same is re-produced in its entirety as under:-

"(Copy)

4 RAJ RIF
C/O 56 APO
22 July 91

A 8/2/SSC 2/(i)
2 Lt SS Chauhan

<u>REQUEST FOR A COUNSEL/OFFR AT THE TRIAL</u>

1. A SGCM has been recommended for the offence of having attempted to commit suicide by you at 1930 h on 11 Apr 91 at Srinagar.

2. Please intimate (with names where applicable) whether you to wish to be represented by a counsel/offr for the above trial if convened.

Sd/- x
(KS Dalal)
Colonel
Commanding Officer"

177. **Strangely, no Court Martial proceeding was convened with regard to attempt on petitioner's life and it could not see the light of the day to unearth the truth for the reason best known to Lt Gen Zaki Mohammad Ahmad, GOC, 15 Corps**. Either the respondents were frightened and apprehensive that if the truth was unearthed it would disrepute the Army or some pressure must have been exerted to save some one's neck.

178. So far as injury caused to the petitioner is concerned, in spite of the orders passed by the Tribunal the injury report and the FIR with regard to injury (supra) was not produced as is evident from Order Sheet dated 10.11.2016. Relevant portion of the Order Sheet dated 10.11.2016 is reproduced as under :-

"*Earlier we had passed orders for production of injury reports/medical reports with regard to injuries caused to the petitioner. A defence has been set up that the petitioner attempted to commit suicide from his own weapon. He was allegedly admitted in hospital at Srinagar and*

> *remained under treatment for a week or ten days or more, but no injury report has been filed so far in spite of orders passed by the Tribunal. The respondents have also not brought on record any FIR from which inference may be drawn that the petitioner had taken amount in question for which he has been charged, from civilians. Respondents shall apprise the Tribunal whether any civilian or any other person had lodged FIR with regard to taking away amount of Rs 8,000/- by the petitioner. Whether any report was communicated to the police has also not been brought on record".*

179. From the Order Sheet dated 11.11.2016 it is further evident that in spite of consistent efforts made on judicial side directing the respondents to produce the injury report, seizure memo of currency notes possessing signature were not produced. Even AFMSF-10 (prescribed format) which contains details of physical ailment prepared after gunshot injury was not produced before the Tribunal. Relevant portion of the Order Sheet dated 11.11.2016 is reproduced as under :-

> "*During the course of her arguments, a query made by Tribunal to Mrs Appoli Srivastava as to whether injury report or for that matter the record of treatment provided to the applicant on 11.04.1991 at 92 Base Hospital Srinagar is available or not. In reply to the aforesaid query, Maj Soma John, OIC Legal Cell made a statement across the bar that no injury report is available in the record which has been received by her. She also submits that the record relating to treatment provided to the applicant has also not been made available to her by the concerned authorities.*

During course of hearing, our attention has been invited by the OIC Legal Cell to photograph of the vehicle marked as Exhibit B which according to the OIC Legal Cell Maj Soma John is a 4-Ton vehicle bearing No. 87073756 X marked over the left side of the door. On the other hand, counsel for the applicant invited attention to Para 79 of the counter affidavit wherein it has been admitted that the vehicle in which the applicant was brought to Srinagar was a 2-Ton vehicle.

Respondents shall provide photocopy of the seizure memo which was required to be prepared in the event of recovery of money or materials, medical guidelines whether report with regard to injury is to be prepared i.e. injury report and medical treatment provided for. The respondents shall also provide the relevant procedure prescribed for issuance of Air Lines concession form, AFMSF-10 and preparation of technical report and repairing of vehicle in the event of damage caused to it. The Respondents shall also provide Army Orders, Army Rules relating to procedure for SGCM, duty of medical officer while inspecting and providing treatment to patient or injured.

Since neither injury report nor the record relating to treatment provided to the applicant at 92 Base Hospital Srinagar has been produced as the same is said to be not available with the respondents hence, to understand the things, we direct Command Hospital Lucknow to examine the applicant with regard to bullet injury caused to him as far as possible, entry and exit point, curve or angle of the bullet injury caused to the applicant, who was then 2nd Lt S.S. Chauhan in the Indian Army".

180. During course of trial we had directed the Command Hospital to examine the petitioner in Command Hospital, Lucknow. The Command Hospital submitted report with endorsement that petitioner had scar marks and could not give opinion with regard to entry and exist wound. Dr. Sanjay Dutta made a statement that he is not in a position to give exact opinion with regard to the bullet used or what is the exit or entry point of the bullet. However he submitted that the injury caused to the petitioner is on the left side of lumber region four degree downwards on left flank. In pursuance of order passed by the Tribunal the respondents had produced a vehicle of 2.5 Ton, however they have failed to produce 4 Ton vehicle or the vehicle which contains bullet marks in view of photograph on record. The relevant portion of the Order Sheet dated 18.11.2016 is reproduced as under :-

> "*According to Dr. Sanjay Dutta injury caused to the petitioner is on left side of lumbar region. The injury is about four degree downwards on left flank. However according to Dr. Dutta he is not in a position to give exact opinion with regard to nature of the bullet used or what is the exit or entry point of the bullet. Only scar is present.*
>
> *The photocopy of injury report is placed on record. The original medical report shall be filed by OIC Legal Cell during the course of the day.*

> *In case the injury report is not filed during the course of the day, it shall be filed on 22.11.2016.*
>
> *So far as the vehicle is concerned, the dents have produced vehicle to understand the things. The vehicle is of 2.5 ton. They have failed to produce vehicle of 1x4 tons, a photograph of which is on the record of the case. Col (Retd) R.N. Singh, Ld. Counsel for the applicant submits that the vehicle in which the applicant was sitting when firing took place in Jammu & Kashmir was of 1x2 tons. Ld. Counsel for the applicant also invited attention to the averments made in the counter affidavit whereby the respondents have indicated that the vehicle mark was 1x2 tons vehicle. According to OIC, Legal Cell the Army at the relevant time had got vehicles of 1x1 ton, 1x3 tons and 1x4 tons".*

181. The medical board proceeding of 92 Base Hospital Srinagar was produced co-relating to incident of 11.04.1991. It may be noted that the medical board proceeding seems to be held after one month from the date of injury caused to the petitioner. It shows that the wound suffered by the petitioner on 11.04.1991 was on the left of umblicus and two existed on the left flank. **This medical board proceeding was convened when the injury was already healed and the petitioner was discharged from Hospital**.

182. During SGCM proceeding two witnesses from 92 Base Hospital were present viz. Maj Ajay Kumar as PW-9 who treated the petitioner on 11.04.1991, and Lt Col BM Nagpal as PW-10 who operated the petitioner for gun shot injury. Lt Col

BM Nagpal stated that he operated petitioner 2Lt SS Chauhan who suffered two close range injuries on the left of ambilicus and two exit wounds on left flank. He stated that visceral injury was found. Gunshot fire was made from close range. Statement given by him does not inspire confidence as PW-10 for the reason that **no injury report was produced by him or any other doctor of 92 Base Hospital, Srinagar during SGCM proceeding**. Report of the Medical Board placed on record was prepared after one month of the incident dated 11.04.1991. Operation took place on 19.04.1991. According to Regulations for the Medical Services of Armed Forces-2010 (Revised Version) whenever an individual or army personal is medically examined it shall be ensured to prepare a report and send it unit concerned. For convenience sake para 74 of the aforesaid Regulations is reproduced as under:-

> *"74. **Injury Report.**- Will ensure that a report to the unit concerned is made on IAFY-2006, as soon as possible after the date on which an individual of the Armed Forces has been examined/treated by a MO of the Hospital whether in the hospital or in quarters, in consequence of having been maimed, mutilated or injured (except in case of "battle accidents") whether on or off duty, in order that a Court of Inquiry, may, if necessary, be assembled".*

183. Even otherwise also under medical jurisprudence, all circulars and orders of Government as well as Army

Orders, Doctor who conducts post mortem or gives treatment to injured person must prepare injury report and send it to the unit concerned. Commission and omission at 92 Base Hospital with regard to preparation of injury report and not placing it on record **supports the observation made by Col K.S. Dalal that things were fabricated to frame the petitioner.**

184. With regard to psychiatric treatment, para 446 (a) of the Guidelines provides that treatment of such person shall be done by the specialist of the field and shall send the individual to Authorized Medical Attendant alongwith escorts for admission to a hospital with a psychiatric centre alongwith medical evaluation report for observation and treatment. **The petitioner was not provided such treatment while staying at Niari. Maj Ajay Kumar and Lt Col BM Nagpal had not produced injury report during Summary of Evidence or SGCM which was material fact to unearth the truth. There appears no room of doubt that Maj Ajay Kumar as well as Lt Col BM Nagpal had tried to conceal material facts during SGCM proceeding and injury report was not placed on record and seem to have made false statement. They**

require to be dealt with for their conduct in accordance to law.

185. In the absence of medical report prepared at the time of examination of the petitioner at 92 Base Hospital, Srinagar, a careful examination of the Medical Board report shows that injury was caused from gun fire from outside, i.e. left side of the body and exit of the wound was on the right side keeping in view the widening of the injury.

186. Apart from above, in spite of repeated directions issued by the Tribunal, the respondents have not produced the weapon, i.e. AK-47 and the weapon (AK-47) produced during course of trial by the respondents is not foldable. OIC, Legal Cell stated that at the time of the incident, AK-47 used was foldable. **In case any weapon was available in the hands of the petitioner at the time of incident of attempt to commit suicide, then from where the weapon came into his possession is a question mark and seems to be a missing link**.

If any attempt to commit suicide would have been made by the petitioner himself and the weapon (AK-47) was foldable one, **then blackening and tattooing should have been present around the wound suffered by the petitioner which**

could have proved the case of attempt to commit suicide. There appears to be an attempt on the part of the officers of the Amy to convert the incident of firing upon the petitioner from outside the vehicle into attempt to commit suicide. The factum of attempt to commit suicide would have been proved by producing the injury report, forensic report of the clothes, members of Border Security Force (BSF) unit and by producing the weapon by which the applicant allegedly attempted to commit suicide. No man of common prudence will commit such gross illegality while charging a young officer of the Army of less than two years service.

187. In view of the above we are of the opinion that it is not a case of attempt to commit suicide and gun fire must have been done from outside the vehicle which is inferred in view of the observations made hereinabove as well as presence of BSF personnel because of whom petitioner's life was saved. It is a case of gross injustice and bias on the part of the Commanding Officer and Corps Commander which is a misconduct of highest magnitude unpardonable and requires independent indepth inquiry by high level Committee.

XVII. OTHER COURTS OF INQUIRY

188. Shri Asit Chaturvedi, Ld. Sr. Counsel and Ms Appoli Srivastava appearing for the respondents advanced their arguments with regard to Court of Inquiry by filing written arguments. They invited attention of the Tribunal to the following alleged courts of inquiry.

(i) Court of Inquiry convened by 6 Rajput on 13.04.1990 to investigate with regard to attempt to lift gold necklace by L/Nk Anil Kumar Singh (supra). In this Court of Inquiry neither statement of the petitioner was recorded nor he was present during the entire inquiry with liberty to cross examine the witnesses in utter disregard to Rule 180 of Army Rules.

(ii) Court of Inquiry dated **05.10.1990** convened to inquire into the alleged removal of amount of Rs 5,100/- by petitioner and desertion from Udhampur on 08/09.06.1990 as well as 'Kambal Parade' (supra). In pursuance to said Court of Inquiry the GOC, 15 Corps vide order dated 16.11.1990 directed to initiate disciplinary action and thereafter Summary of Evidence and SGCM proceeding were

held (supra). The Court of Inquiry was held in pursuance of directions issued by the General Officer Commanding 15 Corps. In this Court of Inquiry also neither the statement of the petitioner was recorded nor he was present during the entire inquiry with liberty to cross examine the witnesses in utter disregard to Rule 180 of the Army Rules.

(iii) Alleged Court of Inquiry convened by HQ 15 Corps vide convening order dated 11.04.1991 with regard to bullet injury sustained by the petitioner on 11.04.1991 when he was from 4 Rajputana Rifles to 92 Base Hospital for medical treatment. Directions were issued by GOC, 15 Corps on 22.05.1990 to take disciplinary action treating the bullet injuries as attempt to commit suicide. However no disciplinary action, Summary of Evidence of Court Martial proceeding was held and things were buried for the reason best known to the respondents, in spite of the fact that the incident made out a cognizable offence; whether it was attempt to murder or attempt to commit suicide.

(iv) In Court of Inquiry alleged to be held by GOC, 15 Corps by convening order No 2200/349/A-3

dated 27.04.1991 to find out the truth of the complaint submitted to the Chief of the Army Staff by the petitioner vide letter dated 23.03.1991. Direction was issued to take disciplinary action by GOC, 15 Corps on 21.04.1991 with regard to false accusation, but nothing was materialized.

(v) Another Court of Inquiry was alleged to be held convened by HQ 15 Corps vide order dated 13.02.1993 to investigate the alleged ill treatment and recovery of 147 gold biscuits recovered by the petitioner and handed over to Col K.R.S. Panwar as well as threat to petitioner's life. The Court of Inquiry submitted report finding the allegations devoid of merit. In this inquiry also neither the petitioner was present nor he was permitted to cross examine the witness in utter disregard to Rule 180 of Army Rules.

189. Courts of inquiry dated 13.04.1990, 11.04.1991, 27.04.1991 and 13.02.1993, prima facie, seem to be eyewash to strengthen the case against the petitioner by unfair practice. In none of these four courts of inquiry at any stage neither the petitioner was called to participate throughout the inquiry nor he was permitted to cross examine the witnesses, to defend

himself or lead evidence in his defence or cross examine witnesses though his reputation was involved. These inquiries were held in utter disregard to Rule 180 of Army Rules. Rule 180 provides to grant full opportunity to accused or charged officer to remain present throughout during course of Court of Inquiry, to enable such person to make statement and to cross examine witnesses as well as to lead evidence in defence. Conduct of Court of Inquiry is a *sine qua non* for a Court Martial and when the Court of Inquiry is convened, Rule 180 (supra) is to be followed. (vide ***Lt Col Prithi Pal Singh Bedi v. Union of India***, 1983 SCR (1) 393, ***Maj Gen Indrajit Kumar v. Union of India***, 1997 (9) SCC 1 and ***Major G.S. Sodhi v. Union of India***, 1991 (2) SCC 382.

190. The report of Maj Gen R.S. Taragi was ignored and perusal of convening order with regard to Court of Inquiry dated 13.04.1990 shows that copy of the convening order was forwarded to the Presiding Officer and one copy was retained, i.e. office copy. 2/Lt Rajiv Shukla in his statement on oath during SGCM proceeding as PW-35 and Summary of Evidence stated that he was not aware with the Court of Inquiry till July-August 1990. Similarly Maj M. Sanguri as PW-8 during SGCM proceeding stated that he did not remember the name of second member of first Court of Inquiry though on record he

has been stated to be second Member. During Summary of Evidence recorded on 19.04.1990 though Capt Anil Hajela and Lt Col M.S. Rawat were alleged to be present in the inquiry, but they stated that Nk Kailash Chand was not present and they did not ask any question to L/Nk Anil Kumar Singh. Nk Kailash Chand though was alleged to have cross examined L/Nk Anil Kumar Singh but he was not aware with regard to Court of Inquiry held on 13.04.1990. Sub Ram Swarup during Summary of Evidence stated that he was not called to Srinagar but his statement is found to be mentioned in the Court of Inquiry dated 13.04.1990; the inquiry for the first time came into light in May, 1990. Statement of Sep Janak Singh is said to be recorded on 29.04.1990. According to Lt Col M.S. Rawat he recorded statement of three witnesses on 15.04.1990. Missing of 2/Lt SS Chauhan came into his knowledge at 08:00 PM but he did not put question to the three witnesses that 2/Lt SS Chauhan was missing from 15 Corps Operating Signal Regiment.

191. During SGCM proceeding L/Nk Anil Kumar Singh could not demonstrate keeping of two bundles of 100-50 currency notes in the bullet proof jacket hence the Court observed that the witness did not know how to put currency notes in the bullet proof jacket. This shows that L/Nk Anil Kumar Singh was accused himself and was picked to frame the petitioner. The

Court of Inquiry commenced on 13.04.1990 and concluded on 15.04.1990 seems to be ante dated and farce.

192. It may be noted that according to material on record that fact finding inquiry initiated and held by Maj Gen R.S. Taragi recorded statements of five witnesses and gave his confidential report in July 1990 but it was not taken into account for any further proceedings by the authorities concerned. This seems to be unjustified.

XVIII. CUSTODY AND ARREST:

193. Section 101 of the Army Act, relates to arrest and detention. In the present case the petitioner was arrested by order dated 10.04.1991 and also deemed to be placed under arrest and detention under escort of Junior Officers. While bringing him from Command Hospital, Lucknow to Command Hospital, Udhampur (supra) it appears that Section 101 of the Army Act, has not been complied with as is borne out from perusal of the order placed on record in SGCM proceeding. For convenience sake Section 101 of Army Act, is reproduced as under:-

> *"101. **Custody of offenders.-** (1) Any person subject to this act who is charged with an offence may be taken into military custody.*
>
> *(2) Any such person may be ordered into military custody by any superior officer.*

> *(3) An officer may order into military custody any officer though he may be of higher rank, engaged in a quarrel, affray or disorder".*

194. A perusal of order by which the petitioner has been placed under arrest does not disclose the reason for arrest and detention. SGCM proceeding began on 07.06.1991 and charges were framed on 01.06.1991. Thus no arrest could have been done before the framing of charges since a person shall be deemed to be charged for an offence only after framing of charges or at the most on the date the convening order is passed. Right from 10.04.1991 the petitioner was kept under detention or close guard and every effort was made to ensure that he did not go away from the eyes of 15 Corps Engineering Signal Regiment from where the controversy arose in contravention of Rule 27 of Army Rules. Such action on the part of officers of the respondents seems to be unlawful detention on account of abuse of power and they may be charged to pay appropriate penal action or pay damages in accordance with law. Moreover Section 102 of the Army Act, further provides that the officer detained shall be immediately produced before the Commanding Officer. For convenience sake Section 102 of Army Act, 1950 is reproduced as under:-

> *"102. **Duty of commanding officer in regard to detention**.- (1) It shall be the duty of every commanding officer to take care that a person under his command when charged with an offence is not detained in custody for more than*

> *forty-eight hours after the committal of such person into custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having regard to the public service.*
>
> *(2) The case of every person being detained in custody beyond a period of forty-eight hours, and the reason thereof, shall be reported by the Commanding Officer to the General or other officer to whom application would be made to convene a general or district court-martial for the trial of the person charged.*
>
> *(3) In reckoning the period of forty-eight hours specified in sub-section (1), Sundays and other public holidays shall be excluded.*
>
> *(4) Subject to the provisions of this Act, the Central Government may make rules providing for the manner in which and the period for which any person subject to this Act may be taken into and detained in military custody, pending the trial by any competent authority for any offence committed by him".*

195. In the present case no material has been placed on record that after passing of the order dated 10.04.1991 of arrest the petitioner, the petitioner was placed before the Commanding Officer with regard to detention. Otherwise also it is not borne out from the record as to why the petitioner was placed under close guard and confined to Officers Mess of 4 Rajputana Rifles without passing a speaking and reasoned order with regard to detention of the petitioner. It has been done in utter disregard to provisions contained in Section 101 read with Section 102 of the Army Act. The officers of the

respondents had tried to keep the petitioner within their eye range for unforeseen reason by written or unwritten orders virtually meaning to keep him in detention (supra). For this they may be charged for penal action or may be held personally responsible by the process of law and also to pay damages. The liberty provided under Article 21 read with Article 19 of the Constitution cannot be flouted without due process of law, which is the pulse beat of our Constitution.

196. It may be noted that for the persons who are not on active service protection has been granted under Section 103 of the Army Act, read with Rule 27 of Army Rules to explain in case custody is of more than eight days without a Court Martial. Analogy and spirit of Section 102 applies with more vigor to the serving officers on combined reading of Section 101, 102 and 103 (supra). For convenience sake Section 103 of the Army Act, is reproduced as under:-

> *"103. **Interval between committal and court-martial.-** In every case where any such person as is mentioned in section 101 and as is not on active service remains in such custody for a longer period than eight days, without a court-martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner prescribed, and a similar report shall be forwarded at intervals of every eight days until a court-martial is assembled or such person is released from custody".*

197. Gross injustice has been done to the petitioner and the action of the respondents is an instance of high handedness to a commissioned officer of the Indian Army, having less than two years of service.

XIX. RECOVERY:

198. In the present case, the petitioner has been charged for recovery of Rs. 5,100/- from his own room and transferred amount of Rs. 3,700/- which were later on recovered from Nk Kailash Chand (Exhibit ME-1) to SGCM proceeding). A perusal of Exhibit ME-1 brought on record by the petitioner (respondents alleged that record has been destroyed shows that statement of Nk Kailash Chand has been recorded and duly signed by three officers as witnesses i.e. Adjt Capt Salim Asif, Sub Maj Surendra Singh Bhadauria and Sub Ram Hari, Offg SA. For convenience sake seizure memo of Nk Kailash Chand is reproduced as under in its true copy:-

"CERTIFICATE

> *Certified that a sum of Rs 3,700/- (Rupees three thousand and seven hundred only) lifted from various houses in Laxmanpura & Batmalu-Srinagar (J&K) during the house to house search on 11 Apr 90 has been recovered from No 1977317X Nk Kailash Chand of B Coy at 2000h on 11 Apr 90".*

199. It may be noted that recovery was allegedly made from Transit Camp from a person who himself seems to be

associated with L/Nk Anil Kumar Singh an accused of the case. On the other hand recovery of Rs 5,100/- is alleged to be made from the petitioner. Copy of the recovery memo is Exhibit ME-2 to the SGCM proceeding (page 269 of SGCM proceeding) and is reproduced in its true copy as under:-

"*CERTIFICATE*

Certified that a sum of Rs 5,100/- (Rupees Five thousand one hundred only), being the sum lifted from various houses in Laxmanpura, Batmalu, Srinagar (J&K) by IC 48848K 2Lt Shatrughan Singh Chauhan during the house to house search on 11 Apr 90 has been recovered from him at 1030h on 13 Apr 1990.

Place-216 Transit Camp Sum received by *Sd/- x x*
(IC-24410P
Lt Col
Dated-13 Apr 90 *MS Rawat)*

Witness No 1 *Sd/- x x*
(IC-41983P
Maj
M Sanguri)
Dated-13/04/90

Witness No 2 *Sd/- x x*
(IC-42768W
Capt
Salim Asif)
Dated-13/04/90

Witness No 3 *Sd/- x x*
(IC-43494H
Capt
Amit Hajela)
Dated-13/04/90"

200. A perusal of the seizure memo with regard to recovery of Rs 5,100/- from the petitioner's room does not contain petitioner's signature (supra) hence does not inspire confidence. In such situation there is no reason to believe that

amount of Rs 5,100/- was recovered from the petitioner; rather it is a fabricated fact where record of seizure memo has been unilaterally prepared by two officers at the behest of some higher officer as observed in Summary of Evidence.

XX. PLACE OF TRIAL:

201. A perusal of the Court Martial proceedings indicates that admittedly the petitioner had been in dangerously ill list. The doctors have cautioned that the petitioner should not be given active duty and he shall not be kept in isolation or at a lonely place (supra). Apart from this Srinagar was disturbed area including Niari where the respondents convened the trial. On account of disturbed area and on account of non co-operation of the advocates of Srinagar, the petitioner could not engage a counsel in terms of statutory right (supra). Capt Navmeet Singh, Judge Advocate who seems to be cautious of petitioner's right and was a qualified person was replaced by Capt Javed Iqbal by GOC, 15 Corps Lt Gen Zaki Mohammad Ahmad that too without any recommendation of Judge Advocate Branch in accordance with provisions of Section 129 of Army Act. The petitioner wrote letter dated 07.04.1991 to the Adjutant General, Army HQ, South Block, New Delhi, a copy of which has been brought on record through affidavit as

Annexure No 18-A. For convenience sake, the same is reproduced as under:-

"2Lt SS Chauhan
6 Rajput (4 RAJ RIF)

RAJ RIF
c/o 56 APO
07 Apr 91

48848/SSC/Pers

Adjutant General
Army Headquarter
South Block
New Delhi (Through proper channel)

PLACE OF TRIAL

Sir,

1. I have the hounour to state few lines for your kind consideration and favourable action please.

2. As you are aware Kashmir valley is a disturbed area. During S of E my witness could not reach on time due to natural calamities. Now my Bn 6 Rajput is also moving from this loc, to the other loc near Delhi. Therefore, you are requested to change the place of trial, if there is a GCM. So I can call a civil advocate in Kashmir Valley no one will like, if this is not so, then it will be useless to defence myself. Please give a chance to defence my case.

3. In this regard ref AA 124, also.

Sd/-x x
(SS Chauhan)
2 Lt

Copy to
1. HQ 15 Corps
2. AG BR"

202. The aforesaid application submitted by the petitioner to the Adjutant General, Army Headquarters was rejected by order

dated 13.05.1991 brought on record through affidavit and communicated to the petitioner through HQ 15 Corps. The order of rejection is reproduced as under:-

"HQ 15 Corps
C/O 56 APO

2200/249/A3 *13 May 91*

2 Lt SS Chauhan
Att with 4 Raj Rif
C/O 56 APO

PLACE OF TRIAL

1. Ref your letter No 48848/SSC/Pers dt 07 Apr 91.

2. Your request to hold trial outside the valley is not accepted in terms of Note 1 & 2 to AA Sec 124 and DSR para 452 (c).

3. As far as engaging a civ counsel is concerned, you may have any body through correspondence/relations.

Sd/-x
(KS Saghu)
Col
Offg Col 'A'
For COS"

203. A plain reading of order of rejection shows that the petitioner's request for change of place of trial was not forwarded to the office of Adjutant General, Army Headquarters, New Delhi, rather it was rejected by the office of GOC, 15 Corps, Lt Gen Zaki Mohammad Ahmad and communicated by his subordinate officer. Inference may be

drawn that effort was made by office of 15 Corps to speed up the trial in a manner so that the Army Headquarters may not be able to know the ground realities while taking decision with regard to change of location of trial. Letter addressed to the higher authorities could not have been rejected by the subordinate authority and in case it has been done so, it is a case of serious misconduct and insubordination. Section 124 deals with the place of trial. For convenience sake, Section 124 is reproduced as under:-

> *"124. **Place of trial**.- Any person subject to this Act who commits any offence against it may be tried and punished for such offence in any place whatever".*

204. A plain reading of aforesaid provision shows that statute has conferred power on the respondents to proceed with the trial of an accused at any place whatever. Accordingly SGCM proceeding could have been transferred to any place in pursuance of the statutory mandate. Army Regulation 452 (c) also deals with the question. The same is reproduced as under:-

> *"452 (c). If, in the opinion of the convening officer, a court-martial could more conveniently be held at a place other than where the accused is, he may cause the court to be convened at any place within his command. If it is desired to hold the trial in any place beyond his command, application will be made to the GOC-in-C, and by him, if necessary to the Adjutant General's Branch, Army Headquarters, with an explanation for the reason of this*

> *course. A saving of expense in transit of witness or members would be a sufficient reason, but no change of place will be made when it appears that the accused is likely to be prejudiced in his defence by the change. When the case is to be tried in another command, the court will be convened under the orders, and on the responsibility, of the GOC-in-C to whose command the accused is removed".*

205. A plain reading of the aforesaid regulation shows that in case an application is moved to GOC-in-C or through him, if necessary, to the Adjutant General's Branch, Army Headquarters assigning reason i.e. **saving expense in transit of witnesses or members, and if accused is likely to be prejudiced in his defence, the case may be referred for trial in another command under the responsibility of GOC-in-C to whose command the accused is moved.** The Regulation gives option to apply to GOC-in-C or to Adjutant General's Branch Army Headquarters.

206. The petitioner had moved the application through GOC, 15 Corps (supra) which should have been forwarded to the Adjutant General's Branch but the same was not done. Non availability of a counsel was a strong reason whereby the application should have been forwarded to the Adjutant General's Branch for transferring the trial. GOC, 15 Corps was not empowered for the reason that whatever should have been done in pursuance of petitioner's application should have been done by Adjutant General's Branch which deals with whole of

the country. GOC, 15 Corps Lt Gen Zaki Mohammad Ahmad acted in a highly prejudicial manner and, prima facie, committed indiscipline by not forwarding petitioner's application to the Adjutant General's Branch, Army Headquarters. This violates principles of natural justice denying the petitioner opportunity to have a fair trial at a place where he could engage a counsel to defend himself. Hence the trial seems to be hit by Article 14 of the Constitution of India and vitiates.

XXI. CONVENING ORDER:

207. In pursuance of Court of Inquiry and Summary of Evidence final order of SGCM proceeding was issued on 01.06.1991 by Lt Gen Zaki Mohammad Ahmad of 15 Corps. **The convening order does not mention name of the accused person**. Only reference with regard to accused name was in the scheduled annexed to it, but no schedule seems to have been annexed with it and brought on record. Copy of the convening order has been filed as Annexure-8 to the petition. Manual of Indian Military Law (MIML) Volume-2 of 1983 provides a format of convening order and appendix-III of the Army Rules provides certificate of medical officer required to be on record before passing convening order. The petitioner applied for the copy of the convening order in response to which Brig S.K. Chatterji, Director General Intelligence informed

that all the information petitioner prayed has been furnished except copy of the convening order which has been destroyed. The material was supplied to Shri Randhir Singh, Advocate authorized by the petitioner. Copy of reply dated 29.06.1991 has been filed as Annexure A-4 to the affidavit. However, convening order has been made available by the petitioner and filed as Annexure-8 to the petition. The convening order in its totality is reproduced as under:-

"*In lieu of IAFF-956*

FORM FOR ASSEMBLY AND PROCEEDINGS OF A SUMMARY GENERAL COURT MARTIAL

A-ORDER-CONVENING THE COURT

At Srinagar this First day of June 91.

1. Whereas it appears to me, IC-7613H Lieutenant General Zaki Mohammad, PVSM, AVSM, VrC, the Officer Commanding the forces in the Field on active service that the accused person name in the alleged schedule and being subject to Army Act has committed the offences in said scheduled mentioned.

I hereby convene a Summary General Court Martial to try the said person and to consist of :-

MEMBERS

IC-26088M Colonel Sandhu Amar Jit Singh	*- 54 Field Regiment*
IC-24269Y Lieutenant Colonel Gurdial Singh	*- 19 Division Ordnance Unit*
IC-31536X Major Abhay Singh	*- 8 BIHAR.*

WAITING MEMBERS

IC-19633H Lieutenant Colonel Sheo Shankar Prasad Singh	*- 519 Army Service Corps Battalion*
IC-36920H Major Gupta Pramod Swaroop	*- 170 Field Regiment*

JUDGE ADVOCATE

SS-33170K Captain Manveet Singh	*- Deputy Assistant Judge Advocate General Headquarters Northern Command is appointed Judge Advocate.*

PROSECUTOR

IC-39029Y Major Singhai Rupendra Kumar	*- 236 Field Workshop is appointed prosecutor.*

2. Summary General Court Martial shall assemble on Seventh June 1991 at 4th Battalion the Rajputana Rifles location for trying the accused person named in the annexed schedule.

3. The proceedings (of which four copies are required) will be forwarded to this Headquarters through Deputy Judge Advocate General Headquarters Northern Command.

Sd/- x
(Zaki Mohammad Ahmad)
Lieutenant General
General Officer Commanding"

208. The convening order (supra) seems to not comply with the procedure provided by the rule. Para 15 of the Army Order Standing Guidelines relating to the authority to pass convening order and para 18 relating to forwarding of its copy to different authorities are relevant. For convenience sake paras 15, 16, 17 and 18 are reproduced as under:-

"15. The Court of Inquiry derives its jurisdiction or authority from the convening order. Therefore, it should be unambiguously worded. It should include the following:

(a) Date, time and place of assembly.

(b) Points on which evidence is required to be collected, should be specifically and unambiguously stated in the terms of reference.

(c) Composition, see para 10 to 14 above.

(d) Army Rule 180 to be complied with.

(e) Responsibility to make administrative arrangements.

(f) By which date proceedings of Court of Inquiry are required to be submitted, to whom and in how many copies?

16. A suggested specimen layout of the convening order is given as Appendix 'A' to this chapter.

17. The text of the convening order must be personally approved by the convening authority on file and the same must be preserved. Thereafter the convening order maybe signed by the convening officer himself or by a staff officer for him.

18. After the convening order has been signed copies thereof should be sent to all concerned. A suggested distribution is as under:

(a) Presiding Officer and members.

(b) Fmn / Unit responsible for making administrative arrangements:

(c) Next higher Fmn.

(d) Fmn/unit(s) of the witnesses.

> *(e) Persons whose character/ military reputation is likely to be impugned by the evidence to be adduced at the Court of Inquiry.*
>
> *(f) Any other Fmn/unit/persons, as may be considered relevant by the convening authority/HQ".*

209. Rule 37 of the Army Rules imposes certain duties on the convening authority which provide that convening authority shall record its satisfaction for the trial of the accused for the offence within the meaning of the Act; kind of Court Martial which he proposed to convene; shall appoint or detail officer to form the Court along with waiting officers and shall furnish to the senior member of the Court with the original charge sheet on which the accused is to be tried.

210. Rule 39 of the Rules 1954 provides for ineligibility or disqualification of officers for Court Martial. A perusal of the alleged convening order (though original not produced) shows that it does not contain the name of the accused. It has been referred in the convening order that the name of the accused has been indicated in the annexed schedule but at the bottom there is no endorsement with regard to annexation. It also does not seem to carry copies of charge sheet, Summary of Evidence and name of accused etc. The fact remains that the name of the accused and the allegation for which the SGCM proceeded is missing in the convening order and not in

statutory format (supra). In the absence of original record we may draw an inference that copy annexed as Annexure-8 to the petition by the petitioner is correct.

211. It is fatal to the convening order inasmuch as name of the accused and the charges for which he was shown to be tried is not mentioned in the convening order. This might have been done to conceal the proceeding from Army Headquarters. This goes to the root of the matter and makes trial bad in law.

XXII. JUDGE ADVOCATE:

212. Provision with regard to Judge Advocate has been provided in Section 129 of the Army Act, read with Rule 104 of the Army Rules. The Judge Advocates are sworn oath of office along with members of the SGCM and witnesses in the prescribed format appended with Army Act and Rules framed there under. For convenience sake Section 129 of the Army Act is reproduced as under:-

> *"129. **Judge-advocate.-** Every general court-martial shall, and every district or summary general court-martial, be attended by a judge-advocate, who shall be either an officer belonging to the department of the Judge-Advocate General, or if no such officer is available, an officer approved of by the Judge-Advocate General or any of his deputies".*

213. A perusal of Section 129 shows that ordinarily the Judge Advocate shall belong to the department of Judge Advocate

General of the Indian Army and in case not available an officer approved by the Judge Advocate General or any of his deputies. In the present case appointment of Judge Advocate General seems to be not in conformity with the statutory mandate. In the present case Deputy Judge Advocate General Lt Col A.C. Sharma of Sthanapan Up Nyaya Mahadhivakta, Offg Deputy Judge Advocate General by recommending for disciplinary action and proceeding with regard to some charges informed the authorities that trial should be attended by Judge Advocate who will be detailed by the Deputy Judge Advocate General, HQ Northern Command. The relevant portion of the report of Deputy Judge Advocate General dated 01.04.1991, while recommending for Court Martial under Section 63 read with Section 38 of the Army Act has been filed with affidavit dated 05.12.1916 of Maj Soma John, an officer of the JAG Branch. Relevant portion of the report dated 01.04.1991 is reproduced as under:-

> *"15. In the result, I am of the opinion that there is a prima facie case against the accused. I have drafted a charge sheet which is attached to this report. To avoid multiplicity and over burdening of the charge sheet as also for leak of evidence, charges on account of breaking a TV set, using criminal force against civilians, tempering with leave certificate, outraging the modesty of a woman etc have been dropped. Allegations levelled by his father and wife in their complaints (Exhibits 'AJ', 'AL', 'AN' and*

'AM') even if false, cannot be made subject matter of charges against the accused.

16. Considering the gravity of offences, the accused be brought to trial before a Summary General Court Martial as recommended by you.

17. Certain points for guidance of the prosecutor for leading evidence at the trial are appended to this report. The same may be handed over to him for compliance.

*18. **It is desirable that the trial should be attended by a Judge Advocate, who will be detailed by the Dy JAG, HQ Northern Command. A Judge Advocate is readily available**. The Court Martial should be assembled within 10 days from the date of receipt of this report. To enable him to detail the Judge Advocate, firm date and place of trial should be intimated to him directly with a copy to this office. In fixing the date of trial, care should be taken that all the witnesses are available and necessary arrangements are complete. Three copies of Summary and additional Summary of Evidence, convening order and charge sheet as finally approved by you, should be sent to the Dy JAG HQ Northern Command for use of the Judge Advocate.*

19. Regarding the composition of the court, your attention is invited to Army Act Section 115 and Army Rule 151 (3).

20. If the accused is being defended by a Counsel or a legally qualified officer, a prosecutor with legal qualification and experience should be detailed.

21. Your attention is invited to Army Rule 33. Please draw attention of the Commanding Officer of the accused to Army Rule 34 for compliance.

22. In accordance with Army Rule 37 (4) a copy of the charge sheet only be furnished to each member composing the court.

23. A competent steno/typist should be detailed to type out the proceedings of the trial.

24. ***The involvement of L/Nk AK Singh in the first offence is also seen. He had also committed theft of gold ornaments from a civilian house. It would be advisable to dispose of his case before the trial of the accused.*** *Similarly the complaint of Sh Ajaz Ahmad on similar matter of 11 Apr 90 is also on record (Exhibit 'AH'). It is alleged therein that the Army personnel had looted cash and jewellery from Ziarat Batmaloo on 11 Apr 90. It is evident from Para 27 of the opinion of the Court of Inquiry that the matter is under investigation by 6 RAJPUT. You may like to ensure that a suitable action is taken against the defaulters.*

25. Before I close, it would be pertinent to point out that vide Signal No A-1659 dated 25 Apr 90 (Exhibit 'P'), your HQ had directed that the accused would be escorted from Lucknow to Udhampur/Srinagar under close arrest. This order was not complied with. You may wish to look into the matter and take any appropriate action as deemed fit, please".

Sd/- x
(AC Sharma)
Lieutenant Colonel
Sthanapan Up Nyaya Adhivakta
Offg Deputy Judge Advocate General

NOO

Copy to:-
The Judge Advocate General
Army Headquarters, Sena Bhawan,
DHQ, PO. New Delhi-110011

The Dy Judge Advocate General
Headquarters Northern Command

Two copies of the report along with one typed copy of Summary and

Additional Summary of Evidence and Court of Inquiry Proceedings are enclosed, please".

214. A perusal of the convening order (supra) shows that Capt Manveet Singh, Dy Assistant Judge Advocate General, HQ Northern Command was appointed as Judge Advocate which was in tune with the recommendations (supra) and Army Rules. Keeping in view the spirit of aforesaid provisions of the Army Act, it was Capt Manveet Singh, Judge Advocate who drew the attention towards Army Rule 97 which provides for appearance of the counsel. It was he who drew the attention of the Presiding Officer towards the fact that in spite of best endeavour the petitioner was unable to engage a counsel due to the situation prevailing in the valley and gave opinion for grant of time of ten days to enable the petitioner to engage a counsel which was acceded to by the Presiding Officer and the case was adjourned. But immediately after lapse of ten days when the SGCM convened one new Judge Advocate was appointed by the GOC, 15 Corps Lt Gen Zaki Mohammad Ahmad to replace Capt Manveet Singh. Order dated 13.06.1990 is reproduced as under:-

"CHANGE OF JUDGE ADVOCATE
ORDER BY IC-7613H LIEUTENANT GENERAL ZAKI MOHAMMAD AHMAD, PVSM,

AVSM, VrC THE GENERAL OFFICER COMMANDING 15 CORPS

Place-Srinagar *Date: 13 Jun 1990*

Whereas SS-33170K Capt Manveet Singh, DAJAG HQ Northern Command was appointed as the Judge Advocate at the trial of IC-48848K Second Lieutenant SS Chauhan of 6th Battalion the Rajput Regiment attached to 4th Battaion the Rajputana Rifles on 07 June 1991 and whereas the said SS-33170K Capt Manveet Singh is not available any more to perform the duties of the Judge Advocate at the said trial on account of exigencies of the service SS-33693H Capt Javed Iqbal attached officer HQ 15 Corps is hereby appointed as the Judge Advocate for the residue of the said trial.

Signed at Srinagar this thirteenth day of June

Sd/- x
(Zaki Mohammand Ahmad)
Lieutenant General
General Officer Commanding 15 Corps"

215. A perusal of the order at the face of record shows that Capt Manveet Singh who was Dy Judge Advocate General was changed without indicating the reason with caption 'is not available any more to perform the duties' which is contrary to the spirit of Sections 101, 102 and 103 of the Army Act, read with Rule 104 of the Army Rules and letter dated 01.04.1991 (supra). For convenience sake Rule 104 of the Army Rules is reproduced as under:-

"*104.* ***Substitute on death, illness or absence of judge-advocate.-*** *If the judge-advocate dies, or from illness or from any cause whatever is unable to attend, the court shall adjourn, and the presiding officer shall*

> *report the circumstances to the convening authority; and a fit person not disqualified to be judge-advocate may be appointed by that authority, who shall be sworn, or affirmed, and act as judge-advocate for the residue of the trial, or until the judge-advocate returns".*

216. A combined reading of Section 101, 102 and 103 of the Army Act, read with Rule 104 of the Army Rules shows that the Judge Advocate may be changed in case he dies or because of illness, or for any other cause he is unable to attend the Court. In such an event the Court shall adjourn and the Presiding Officer shall report the circumstances to the convening authority and a fit person not disqualified to be Judge Advocate may be appointed who shall been sworn and affirmed to act a Judge Advocate for residue of the trial or until the Judge Advocate retires. In the present case the convening authority Lt Gen Zaki Mohammad Ahmad, GOC 15 Corps on his own changed the Judge Advocate without assigning any justified reason. In case for some reason he was unable to appear for a day, then he could have joined the proceeding after receipt of communication of the next date in view of provisions of Rule 104 of the Army Rules. Without any request made by the Presiding Officer of the SGCM the convening authority changed the Judge Advocate Capt Manveet Singh. It shows either non application of mind for some unforeseen reason or deliberate attempt on the part of the Corps Cdr Lt Gen Zaki Mohammad

Ahmad to induct his own person, even if unqualified, in place of Capt Manveet Singh.

217. A perusal of SGCM proceeding as made available does not show that Capt Javed Iqbal who replaced Judge Advocate Capt Manveet Singh was sworn in the format provided under the appendix of the Act/Rules. The Presiding Officer noted in the proceeding that Capt Javed Iqbal, an officer attached to HQ 15 Corps is duly appointed as Judge Advocate for the residue of the trial. Though in the SGCM proceeding it is noted that the newly appointed Judge Advocate has been duly affirmed, but the manner of affirmation of oath is not borne out from the record.

218. The appointment of unqualified officer Maj Javed Iqbal replacing a qualified officer i.e. Capt Manveet Singh seems to be substantially illegal and violative of statutory mandate for the reason that he lacks experience of Judge Advocate General's Branch and also it has not been established by the respondents by appropriate material that he was a qualified and sound person and permission was obtained from JAG Branch. A plain reading of Section 129 of the Army Act, shows that the Judge Advocate shall be either an officer belonging to the department of Judge Advocate General or any of his deputies. Capt Javed Iqbal neither belonged to the Judge Advocate General

Department nor his appointment seems to have been approved by the Judge Advocate General or any of his deputies; hence replacing of a qualified Judge Advocate General by Capt Javed Iqbal is violative of the provisions of the Act/Rules. The principles of natural justice have been violated and the trial is hit by Articles 14 and 21 of the Constitution of India. On this ground alone, the trial seems to vitiate.

219. Why the Judge Advocate should belong to the department of Judge Advocate General and its significance is apparent from Regulations 459, 470 and 471 of the Defence Service Regulations. Regulation 470 of the Defence Service Regulations provides that proceeding of General Court Martial of those of a District Court Martial where the sentence is one of dismissal or above will be submitted by the Judge Advocate at the trial or if there is no Judge Advocate through the Deputy JAG of the Command to the confirming officer; hence Judge Advocate must have some experience and legal knowledge to assist the Presiding officer and the members of the Court Martial. Regulation 459 makes it compulsory to refer all the cases and seek advice to and from the Judge Advocate General before the trial.

220. Maj Javed Iqbal belonged to Artillery having neither any knowledge nor experience of working in the JAG Branch. For

convenience sake Regulation 470 and 471 of the Defence Service Regulations are quoted as under:-

> *"470.* ***Court Martial Proceedings****.- The proceedings of a General Court-Martial or those of a District Court-Martial where the sentence is one of dismissal or above, will be submitted by the judge advocate at the trial or if there is no judge advocate by the presiding officer through the deputy JAG of the command to the confirming officer. The proceedings of a District Court-Martial will be sent by the presiding officer or the judge advocate direct to the confirming officer, who may if he considered it necessary, seek the advice of the deputy JAG of the command before confirmation. The matter on which advice is required will be fully set out in the application. Court-martial proceedings, original and duplicate will be registered and sent by separate post.*
>
> *471.* ***Confidential Nature of Reports****.- The reports by officers of the JAG's department are confidential and will not be communicated directly or indirectly to any authority lower than the authority to whom they are addressed. When proceedings are forwarded to lower formations or to units, such reports will be removed."*

A perusal of aforesaid provisions as contained in Regulations 470 and 471 show the significance and importance of an officer from the JAG Branch to be appointed as Judge Advocate.

221. In the case of ***Union of India & Anr vs. Charanjit S. Gill & Ors*** (2000) 5 SCC 742 it has been held that Courts Martial are typically adhoc bodies appointed by a military officer from among his subordinates. They have always been subject to

varying degrees of 'command influence'. In essence, these tribunal are simply executive tribunals whose personnel are in the executive chain of command. In such situation unfair practice may not be ruled out. With regard to appointment of Judge Advocate General, their Lordship has held that convening order shall be read over to the accused with benefit of section 150 of the Army Act. Their Lordship held that a Judge Advocate associated with the Court Martial theoretically performs no function as a Judge but he is an effective officer of the Court conducting the case against the accused under the Act. Any defect or irregularity may vitiate the trial. Relevant portion from the case of ***Charanjit*** (supra) is reproduced as under:-

> *"16. It is true that Judge-Advocate theoretically performs no function as a judge but it is equally true that he is an effective officer of the court conducting the case against the accused under the Act. It is his duty to inform the court of any defect or irregularity in the charge and, in the constitution of the court or in the proceedings. The quality of the advice tendered by the Judge-Advocate is very crucial in a trial conducted under the Act. With the role assigned to him a Judge-Advocate is in a position to sway the minds of the members of the court-martial as his advice or verdict cannot be taken lightly by the person composing the court who are admittedly not law knowing persons. It is to be remembered that the court-martials are not part of the judicial system in the country and are not permanent courts.*

17. The importance of role played by a Judge-Advocate was noticed by this Court in S.N. Mukherjee vs. Union of India [1990 (4) SCC 594] wherein it was held: "From the provisions referred to above it is evident that the judge-advocate plays an important role during the course of trial at a general Court Martial and he is enjoined to maintain an impartial position. The Court Martial records its findings after the judge-advocate has summed up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or of "not guilty". It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative a requirement to give reasons for its finding and sentence by the Court Martial and reasons are required to be recorded only in cases where the Court Martial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the Court Martial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the Court Martial makes such a recommendation.

18. In view of what has been noticed hereinabove, it is apparent that if a 'fit person' is not appointed as a judge-advocate, the proceedings of the Court Martial cannot be held to be valid and its finding legally arrived at. Such an invalidity in appointing an 'unfit' person as a judge-advocate is not curable under Rule

103 of the Rules. If a fit person possessing requisite qualifications and otherwise eligible to form part of the general Court Martial is appointed as a judge-advocate and ultimately some invalidity is found in his appointment, the proceedings of the Court Martial cannot be declared invalid. A "fit person" mentioned in Rule 103 is referable to Rules 39 and 40. It is contended by Shri Rawal, learned ASG that a person fit to be appointed as judge-advocate is such officer who does not suffer from any ineligibility or disqualification in terms of Rule 39 alone. It is further contended that Rule 40 does not refer to disqualifications. We cannot agree with this general proposition made on behalf of the appellant inasmuch as Sub-rule (2) of Rule 40 specifically provides that members of a court-martial for trial of an officer should be of a rank not lower than that of the officer facing the trial unless such officer is not available regarding which specific opinion is required to be recorded in the convening order. Rule 102 unambiguously provides that "an officer who is disqualified for sitting on a Court Martial shall be disqualified for acting as a judge-advocate in a Court Martial". A combined reading of Rules 39, 40 and 102 suggest that an officer who is disqualified to be a part of Court Martial is also disqualified from acting and sitting as a judge-advocate at the Court Martial. It follows, therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the Court Martial, the officer of such rank would be disqualified for acting as a judge-advocate at the trial before a GCM. Accepting a plea to the contrary, would be invalidating the legal bar imposed upon the composition of the court in sub-rule (2) of Rule 40."

25. …. After examining various provisions of the Act, the Rules and Regulations framed thereunder and perusing the proceedings of the court-martial conducted against the respondent No.1, we are of the opinion that the judge-advocate though not forming a part of the court, yet being an integral part of it is required to

> *possess all such qualifications and be free from the disqualifications which relate to the appointment of an officer to the court-martial. In other words a judge-advocate appointed with the court-martial should not be an officer of a rank lower than that the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public service) available and the opinion regarding non-availability is specifically recorded in the convening order. As in the instant case, judge-advocate was lower in rank to the accused officer and no satisfaction/opinion in terms of sub- rule (2) of Rule 40 was recorded, the Division Bench of the High Court was justified in passing the impugned judgment, giving the authorities liberty to initiate fresh court-martial proceedings, if any, if they are so advised in accordance with law and also in the light of the judgment delivered by the High Court".*

222. In another case reported in ***S.N. Mukherjee vs. Union of India*** (1990) 4 SCC 594 the importance of Judge Advocate has been considered by Hon'ble Supreme Court. The same is reproduced as under:-

> *"45. As regards confirmation of the findings and sentence of the Court Martial it may be mentioned that Section 153 of the Act lays down that no finding or sentence of a general, district or summary general, Court Martial shall be valid except so far as it may be confirmed as provided by the Act. Section 158 lays down that the confirming authority may while confirming the sentence of a Court Martial mitigate or remit the punishment thereby awarded, or commute that punishment to any punishment lower in the scale laid down in Section 71. Section 160 empowers the confirming authority to revise the finding or sentence of the Court Martial and in sub-section (1) of Section 160 it is provided that on such revision, the court, if so directed by the confirming authority, may take additional*

evidence. The confirmation of the finding and sentence is not required in respect of summary Court Martial and in Section 162 it is provided that the proceedings of every summary Court Martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held or to the prescribed officer; and such officer or the Chief of the Army Staff or any officer empowered in this behalf may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. In Rule 69 it is provided that the proceedings of a general Court Martial shall be submitted by the judge-advocate at the trial for review to the deputy or assistant judge- advocate general of the command who shall then forward it to the confirming officer and in case of district Court Martial it is provided that the proceedings should be sent by the presiding officer, who must, in all cases, where the sentence is dismissal or above, seek advice of the deputy or assistant judge-advocate general of the command before confirmation. Rule 70 lays down that upon receiving the proceedings of a general or district Court Martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings. Rule 71 lays down that the charge, finding and sentence, and any recommendation to mercy shall, together with the confirmation, non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct, and if no direction is given, according to custom of the service and until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated."

223. Apart from above Rule 102 of the Army Rules provides that a person who is not qualified to become member of the Court Martial shall not be appointed Judge Advocate. Capt Javed Iqbal belonged to Artillery having no legal background and did not belong to JAG Branch, seems to be unqualified to be appointed as Judge Advocate. Accordingly the SGCM proceeding vitiates on this ground also because of violation of statutory provision of the Act and Rules framed thereunder with regard to appointment of Judge Advocate.

XXIII. DEFENDING OFFICER:

224. Though original copy of the SGCM proceeding has not been produced but whatever has been placed on record by the petitioner shows pre-decided mind of the officer concerned to hold the petitioner guilty as is evident from the factual matrix on record (supra) and discussed hereinafter. A perusal of the SGCM proceeding as brought on record by the petitioner shows that the SGCM proceeding started at 10:45 AM on 07.06.1991. Maj R. Khullar was designated as defending officer by convening authority who belonged to 4th Battalion Rajputana Rifles. He did not possess any legal qualification or expertise. He was the officer who recorded Summary of Evidence for the Commanding Officer, 4th Battalion Rajputana Rifles, Col K.S.

Dalal. Thus he was assigned duty on behalf of the prosecution to collect evidence and record the proceeding.

225. A person who recorded statements during Summary of Evidence assisting the Commanding Officer could not have been appointed to defend the accused against whom he recorded a finding. The petitioner prayed for grant of time to engage a counsel in pursuance to power conferred by Army Rule 97. For convenience sake Rule 97 of the Army Rules is reproduced below:-

> *"97.* ***Requirements for appearance of counsel.-*** *(1) An accused person intending to be represented by a counsel shall give to his commanding officer or to the convening officer the earliest practicable notice of such intention and, if no sufficient notice has been given, the court may, if it thinks fit, on the application of the prosecutor, adjourn to enable him to obtain, a counsel on behalf of the prosecutor at the trial.*
>
> *(2) If the convening officer so directs, counsel may appear on behalf of the prosecutor, but in that case, unless the notice referred to in sub-rule (1) has been given by the accused, notice of the direction for counsel to appear shall be given to the accused at such time (not in any case less than seven days) before the trial, as would, in the opinion of the court, have enabled the accused to obtain counsel to assist him at the trial.*
>
> *(3) The counsel, who appears before a court-martial on behalf of the prosecutor or accused, shall have the same right as the prosecutor or accused for whom he appears, to call, and orally examine, cross-examine, and re-*

> *examined witnesses, to make an objection or statement, to address the court, to put in any plea, and to inspect the proceedings, and shall have the right otherwise to act in the course of the trial in the place of the person on whose behalf he appears, and he shall comply with the rules as if he were that person and in such case that person shall not have the right himself to do any of the aforesaid matters except as regards the statement allowed by clause (a) of sub-rule (2) of rule 58 and clause (b) of rule 59 or except so far as the court permits him so to do.*
>
> *(4) When counsel appears on behalf of prosecutor, the prosecutor, if called as a witness, may be examined and re-examined as any other witness and sub-rules (5) and (6) of rule 56 shall not apply".*

226. Accordingly in view of Rule 97 of Army Rules it is incumbent on the Presiding Officer to grant reasonable time to the petitioner to engage his counsel keeping in view the trial held at Niari, a remote area at a distance of 110 kms from Srinagar. In view of prayer made, 10 days time was granted to the petitioner to engage a counsel. It appears within the period of 10 days the petitioner could not engage a counsel due to curfew and disturbed situation prevailing in the valley. After a period of 10 days on 17.06.1991 the Court assembled and in spite of request made by the petitioner the defending officer had not made any request; rather thanked the court for giving 10 days time to prepare defence. The relevant portion recorded in SGCM proceeding is of 17.06.1991 brought on record, is reproduced as under:-

> *"At this stage the Defending Officer thanks the Honourable Court for giving adjournment for ten days to allow the accused to procure services of a defence counsel. He submits that the father of the accused, Sub Maj (Hony Capt) Jagpal Singh, is making efforts to procure the services of a defence counsel. Hopeful that he would bring defence counsel soon. However, the defending officer submits that he does not seek any adjournment on this account and the Court may proceed".*

227. A plain reading of the aforesaid provision shows that the defending officer appointed by the convening authority Maj R. Khullar had not discharged his obligation fairly to seek adjournment and kept mum and permitted the Court to proceed ahead. It was unfair on his part. The petitioner in his application dated 07.04.1991 had categorically requested for granting time to engage counsel stating that Kashmir Valley is a disturbed area and 6 Rajput has moved to another place therefore, place of trial may be changed so that he may engage a civil advocate since the lawyers of Kashmir Valley were not providing necessary assistance and the petitioner will not be able to defend himself. In spite this categorical prayer and bringing the ground reality of Kashmir Valley, the defending officer kept mum and no further adjournment was given to the petitioner and trial was concluded in a hasty manner against law and spirit of the Army Rules. During course of trial Maj R. Khullar himself submitted that the accused had full faith in the defending officer provided to him by the convening authority

and the Court may proceed with the trial. Relevant portion as recorded in the SGCM proceeding is reproduced as under:-

> *"The accused says, he has full faith in his defending officer provided to him by the convening officer, and the court may proceed with the trial. Although it is required in cases punishable with death that the convening officer may employ a counsel for the defence of the accused at the government expense if he is satisfied that the accused is not having sufficient pecuniary resources but it is not binding on the convening officer. Since the defending officer provided to the accused by convening officer is of his choice and he has full faith in his capabilities you may proceed with the trial".*

228. Aforesaid facts and material on record seem to have been cooked up to proceed with the SGCM proceeding without giving reasonable opportunity to the petitioner to engage defending counsel. In any way, no man of common prudence will express faith in an officer (Maj R. Khullar) and permit him to proceed the trial who had recorded Summary of Evidence, that too when the offence is punishable with death or imprisonment. How the Presiding Officer had recorded in the proceeding that the Convening Officer has appointed a defending officer of the choice of the accused is not understandable. Prima facie, the defending officer does not seem to be fair while discharging his duties. It is a case where it may be inferred that the petitioner was not permitted to engage a counsel to defend him.

229. Relying upon the case of ***Union of India vs Major A. Hussain*** (1998) 1 SCC 537 Shri Asit Chaturvedi, Ld. Sr. Counsel appearing for the respondents vehemently argued that there is no legal bar to provide other officer than an officer of JAG Branch to represent a case. The arguments advanced seems to be not correct for the reason that in the case of ***Major A. Hussain*** (supra) the facts and circumstances were entirely different. None of the three officers from the JAG Branch could be made available as defending officer. The accused was asked to give name of any officer who could be deputed as defending officer but he did not give any name. In such situation another was appointed. For convenience sake para 20 of the aforesaid judgment is reproduced as under:-

> *"20. As noted above, when none of the three officers who were all from JAG Branch could be made available to the respondents as defending officer he was asked to give the name of any officer who could be deputed as his defending officer. It is not the case of the respondents that the convening officer did not use his best endeavour to ensure that the respondents was represented by a suitable defending officer. It was the respondents himself who declined to give any other name. Nevertheless the convening officer did not depute three officers one after the other to represent as defending officer for the respondents. But the respondents declined to avail of their services."*

230. It was further held by Hon'ble Supreme Court in the aforesaid case that while entertaining such a case under Article

226 of the Constitution the Court lacks jurisdiction to record a contrary finding by re-appreciation of evidence than what has been recorded by the Court Martial. Para 22 of the case of ***Major A. Hussain*** (supra) may be reproduced as under:-

> *"We find the proceedings of the General Court Martial to be quite immaculate where trial was fair and every possible opportunity was afforded to the respondent to defend his case. Rather it would appear that the respondent made all efforts to delay the proceedings of the Court Martial. Thrice he sought the intervention of the High Court. Withdrawal of the defence counsel in the midst of the proceedings was perhaps also a part of plan to delay the proceedings and to make that a ground if the respondent was ultimately convicted and sentenced. Services of qualified defending officer was made available to the respondent to defend his case, but he had rejected their services without valid reasons. He was repeatedly asked to give the names of the defending officers of his choice but he declined to do so. The Court Martial had been conducted in accordance with the Act and Rules and it is difficult to find any fault in the proceedings. The Division Bench said that the learned single Judge minutely examined the record of the Court Martial proceedings and after that came to the conclusion that the respondent was denied reasonable opportunity to defend himself. We think this was fundamental mistake committed by the High Court. It was not necessary for the High Court to minutely examining the record of the General Court Martial as if it was sitting in appeal. We find that on merit, the High Court has not said that there was no case against the respondent to hold him guilty of the offence charged."*

231. However in the present case after constitution of the Armed Forces Tribunal, we decide the controversy like

appellate forum where the power exercised is in continuation of the original trial. This fact is evident from the fact that their Lordships of the Supreme Court in the case of ***Major A. Hussain*** (supra) held that Court Martial is not subject to superintendence of High Court under Article 227 of the Constitution, hence it seems to be dealing with different facts and circumstances and is not applicable in the present case.

232. In ***Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni***, AIR 1983 SC 109 : (1983) 1 SCC 124 : (1983) 1 SCWR 177; and ***Bhagat Ram v. State of Himachal Pradesh***, AIR 1983 SC 454 : 1983 Lab IC 662 : (1983) 2 SCC 442, it has been held by the Supreme Court that a delinquent has a right to be represented by an officer of his choice. The Supreme Court placed reliance on its earlier judgment in ***C.L. Subramaniam v. Collector of Custom, Cochin,*** AIR 1972 SC 2178 : (1972) 3 SCR 485 : 1972 Lab IC 1049, wherein it had been held that when the Department was being represented by a trained Prosecutor, the delinquent must have been given an opportunity to be represented by a legal practitioner to defend him, lest the scale would be weighed against him.

233. In ***J.K. Aggarwal v. Haryana Seeds Development Corporation Ltd***, AIR 1991 SC 1221 : 1991 Lab IC 1008 :

(1991) 2 SCC 283, the Apex Court placed reliance upon the judgments in ***Pett. V. Greyhound Racing Association Ltd***, 1969 (1) QB 125 : (1968) 2 WLR 1471 : (1968) 2 All ER 545; ***Pett. Greyhound Racing Association Ltd***, (1970) 1 QB 46; ***Pharmaceutical Society of Great Britain v. Dickson***, 1970 AC 403 on the issue and interpreted the relevant rule observing as under:-

> *"Where the charges are so serious as to entail a dismissal from service, the Enquiry Authority may permit the services of a Lawyer. This rule vests a discretion. In the matter of exercise of this discretion, one of the relevant factors is whether there is a likelihood of combat being unequal and telling a miscarriage or failure of justice and a denial of real and reasonable opportunity for defence by reason of appellant being pitted against a Representing Officer who is trained in law….. In the last analysis, a decision has to be reached to the case based on the situational particulars and the special requirement of the justice of the case. It is unnecessary, therefore, to go into the larger question whether "as a squeal to an unadverse verdict in a domestic enquiry, serious civil and pecuniary consequences are likely to ensure in order to enable a person so likely to suffer such consequences with a view to giving him a reasonable opportunity to defend himself, on his request, should be permitted to appear through a legal practitioner".*

In view of above since the petitioner was not provided assistance of an Advocate of his choice, the whole trial vitiates being violative of principles of natural justice.

XXIV. SUMMONING OF WITNESSES BY PETITIONER:

234. Apart from above during Court of Inquiry, Summary of Evidence as well as SGCM, material witnesses were not called as defence witnesses in spite of application moved by the petitioner. The petitioner seems to have been prejudiced on account of non production of material witnesses during Summary of Evidence as well as SGCM. During said proceeding the petitioner had prayed to summon following witnesses:-

(1) Station House Officer (SHO) of Police Station, Laxmanpur, Batmaloo or his representative.

(2) Sub Maj SS Chauhan of Army Hospital, Delhi Cantt,

(2) Col. Dr. Rajendrxa Singh of Army Hospital, Delhi.

(3) Lt Gen Y.S. Tomar.

(4) Maj R.K. Narauna.

(5) Col K.J. Singh.

(6) Col B.K. Sharma.

(7) Ward Master Command Hospital, Lucknow.

(8) Ward Master Command Hospital, Udhampur.

235. The witnesses referred to hereinabove seem to be material witnesses. Atleast Lt Gen Y.S. Tomar, Adjutant General whom the petitioner had contacted after leaving Transit Camp, Udhampur on 09.06.1990. It was Lt Gen Y.S. Tomar on whose recommendation petitioner was admitted in Army

Hospital, New Delhi on 26.06.1990 and who directed to hold inquiry by Maj Gen R.S. Taragi. He was not only relevant but material witness. By not permitting to produce him the petitioner has been prejudiced. This violates the principles of natural justice and vitiates the trial.

236. When the legislature, Government or Chief of the Army Staff made certain Rules and Regulations to carry out the purpose of the Act, then power should not be misused by a delegate. The delegate has to discharge duty within the prescribed limit. The statutory rule must have been complied with (Vide ***Kunj Bihari Lal Butail v. State of Himachal Pradesh***, AIR 2000 SC 1069 : 2000 AIR SCW 543 : JT 2000 (2) SC 307.

237. We have given our endeavour to find out the truth. The manner in which the respondents proceeded with the inquiry of a young officer who served for less than two years on a commissioned post, shattered, ruined and spoiled, seems to make out a case of failure of justice. On account of commission and omission on the part of respondents, the petitioner suffered serious prejudice and it has defeated his right available in law resulting into failure of justice (vide ***Nageshwar Sh. Krishna Ghoble v. State of Maharashtra***, AIR 1973 SC 165).

XXV. MENS REA:

238. Apart from Section 51 of the Army Act, there is one another reason as to why the petitioner seems to have not committed any offence. While escaping from custody he approached the higher authorities. The reason is lack of mens rea. In criminal law *mens rea* means 'guilty intention' and unless it is found that the accused had guilty intention to commit the crime, he cannot be held guilty of committing crime. Even otherwise in case a person is not capable to distinguish between right and wrong, he may not be punished for crime because of lack of *mens rea*. In the absence of assistance from psychiatric treatment before or during SGCM or while escaping from Udhampur, roaming here and there unable to reach home on his own, creates doubt over petitioner's mental ability (vide ***Directorate of Enforcement v. MCTM Corporation Private Limited***, 1996 (2) SCC 47, ***Sarjoo Prasad v. Statse of U.P.***, AIR 1961 SC 631, ***Indira Nehru Gandhi v. Raj Narain***, 1975 Supp SCC 1, ***Medchl Chemicals & Pharama (P) Ltd. V. Biological E. Ltd & Ors***, 2000 (3) SCC 272. We feel that in any case there was no intention on the part of the petitioner to commit wrong or to desert the Army. There was no guilty mind (mens rea) as well as *actus reus*,

hence deserves to be acquitted of the charges levelled against him for desertion.

239. In view of above we are of the considered opinion that the Presiding Officer of the SGCM proceeding had not applied mind to the totality of material facts and circumstances on record and the statutory mandate (supra). The trial and the finding seem to be vitiated because of non application of mind to the totality of evidence on record and statutory provisions (supra).

XXVI. CRY FOR JUSTICE:

240. After the fateful day i.e. 11.04.1990, detention, Kambal Parade, unlawful arrest and then formal arrest, attempt to murder and trial, petitioner's family has been continuously pursuing to different authority but one way or the other things were manipulated and Army Headquarters was kept in dark with regard to recovery of 147 gold biscuits. The persuasion made by petitioner's family during 1990 and 1991 with various letters are as under:-

Sl. No.	Date	From	To	Jist Document	Reference	Remark
1.	23.05.1990	Wife of petitioner	COAS with copy to P.M. and Defence Minister	Wife apprehended danger to life of her husband and requested to post him outside Northern Command.	Page No.-318 in SGCM	
2.	06.06.1990	Wife of petitioner	Chief of Army Staff, Army HQ, New Delhi	Prayer for the safety of Husband (petitioner)	Page-325 of SGCM	Letter Not replied.
3.	23.07.1990	HQ 68 Mtn Bde	6 Rajput	Wife of Petitioner forwarded for parawise comments	Page-324 of SGCM	
4.	26.07.1990	6 Rajput	HQ 68 Mtn Bde	Reply of letter at Serial-2	Page-321 of SGCM	Falsely stated as Lt. Shukla passed via Lucknow to New Delhi on 05.07.1990 not 06.07.1990. No direct Train exist from Kanpur to New Delhi via Lucknow
5.	08.06.1990	Petitioner	Brother	Apprehsive of Misfortune by Col M.S. Rawat and Lt. Rajiv Shukla	Page 361 of SGCM	
6.	08.06.1990	Petitioner	Brother-in-Law	Apprehension to life while moving from Udhampur to Srinagar when Officer from 6 Rajput may cause	Page 362 of SGCM	

				harm to my life.		
7.	07.08.1990	Satendra Singh	Maj Gen R.S. Taragi	About the Recovery of Gold and incident of Blanket parade on 11.04.1990, 13.04.1990 respectively	Exhibit 'BK' of SGCM, page-344 Annexure-4 of W.P. Type Copy also provided	
8.	23.03.1991	Petitioner	COAS	Impartial Enquiry outside 15 Corps	Exhibit-1 para 11 and Page 18 of Court of Inquiry dated 27.04.1991	
9.	07.04.1991	Petitioner	Adj. Gen. Army HQ New Delhi	Change of location of Trial outside valley and Near Delhi or Alwar where 6 Rajput advance party had gone	Annexure 18-A of W.P. and para 90 and 91 of W.P.	
10.	13.05.1991	HQ 15 Corps	Petitioner	HQ 15 Corps did not forward the letter to Adj. Gen. and rejected the request	Annexure 18 of W.P.	
11.	01.05.1991	Petitioner	Adj. Gen. Army HQ	Since petitioner persisted on reporting Seizure of Gold Biscuits attempt made on his life;	Annexure 24 and para 109 of W.P.	
12.	03.05.1991	Father of petitioner	SSP Srinagar	Informing attempt on life of his son (petitioner) on 11.04.1990	Annexure 23 of W.P. Para 108 of W.P.	

241. Though news in printed media may not be treated as evidence but a perusal of the report in printed media during the period in question shows that in several newspapers right from 1990 to 1993 it was reported that the petitioner was fraudulently framed in various cases. The newspapers also reported that actual dispute was with regard to recovery of 147 gold biscuits. Some of the newspapers reported that Col K.R.S. Panwar was relative of some minister in the Government. Apart from newspaper news also appreared in electronic media indicting the Government on its part. The clippings published in the newspaper are reproduced hereinafter in the form of chart.

LIST OF PRINT MEDIA COVERAGE

मीडिया का योगदान

Sr. No	NEWSPAPER	DATE	HEADING
1.	INDIAN EXPRESS	15.01.1993	"Army officer pays dearly for honesty" (By reporter Praveen Shani)
2.	जनसत्ता	20.11.1992	*"ईमानदारी का इनाम कोर्ट मार्शल"* (By reporter Shri Anil Bansal)
3.	राष्ट्रीय सहारा (संपादिकीय)	19.07.1993	**"***सेना की न्याय प्रक्रिया पर प्रश्न चिन्ह लगाता एक मामला"* (By reporter Shri Nitish Joshi)
4.	अमर उजाला (संपादिकीय)	8.03.1993	*"*न्याय के लिए भटकता एक जांवाज़" ***(By reporter Shri C.P. Goyal)***

5.	अमर उजाला	15.04.2007	इस बार मत चूकना लेफ्टिनेंट चौहान" **(By reporter Shri Pradeep Chauhan)**
6.	नव भारत टाइम्स	10.05.1995	सेना में भ्रष्टाचार का मामला संसद में गूंजा ***(By Special correspondence)***
7.	राष्ट्रीय सहारा	15.05.2008	प्रताड़णा की हद **(By reporter Piyush Chandel)**
8.	जनसत्ता	20.03.1993	दोषियों के खिलाफ कार्यवाही सुस्त रफ़तार से
9.	अमर उजाला	03.12.2008	**Lt Chauhan** *को* **18** *साल बाद इंसाफ* **(By reporter Amar Ujala Bureau)**
10.	अमर उजाला	07.12.2008	जावांजी का कैसा इनाम ***(By reporter Delhi)***
11.	दैनिक देश धर्म	08.05.2008	सेना के शूरमा की एक अनूठी संघर्ष गाथा ***(By Dr. Jay Chandra Bhadauriya)***
12.	अमर उजाला	18.04.2007	कमांडर कान्फ्रेंस मे भी हुई चौहान पर चर्चा ***(By reporter Delhi)***
13.	जनसत्ता	20.03.1993	दोषियो के खिलाफ कार्यवाही सुस्त रफ़तार से ***(By reporter Shri Anil Bansal)***
14.	स्वतंत्र भारत	18.07.1992	लेफ्टिनेंट चौहान की रिहाई के आदेश
15.	जनसत्ता	18.03.1993	नया जांच दल गवाहों को डरा धमका रहा है

16.	जनसत्ता	22.05.2007	सोलह साल से लड़ रहे ***Lt Chauhan*** अब रक्षा मंत्री से उम्मीद ***(By reporter Shri Anil Bansal)***
17.	सियासत कानपुर	02.07.1992	सम्मान व पुरस्कार मिलने के बजाए मिली उसे जेल की सलाखें ***(By reporter*** मुख्य संवाददाता)
18.	अमर उजाला	21.04.2007	लेफ्टिनेंट चौहान करेंगे न्याय की फरियाद सोनिया जी से ***(By reporter Delhi)***
19.	अमर उजाला	23.04.2007	न्याय मूर्ती भी मदद को आगे आए ***(By reporter Delhi)***
20.	अमर उजाला	24.04.2007	रक्षा मंत्री ने किया लेफ्टिनेंट चौहान से न्याय का वादा
21.	स्वतंत्र भारत	18.07.1992	लेफ्टिनेंट चौहान की रिहाई के आदेश
22.	जनसत्ता	18.03.1993	नया जांच दल गवाहो को डरा धमका रहा है
23.	अमर उजाला	15.04.2007	**27** किलो सोने के लालच मे कैसा रचा था चक्रव्यूह
24.	दैनिक जागरण	27.01.1993	सेना अधिकारियों ने अदालत मे झूठ बोला
25.	अमर उजाला	07.12.2008	आखिरी जंग जीती
26.	अमर उजाला	23.02.2008	कैप्टन चौहान मामले मे सेना अधिकारी तलब
27.	अमर उजाला	09.12.2008	लेफ्टिनेंट चौहान की राह मे कई रोड़े
28.	दैनिक जागरण	24.12.1992	कर्नल की सिकायत करने पर कैप्टन को भगौड़ा करार

29.	सच्ची कहानिया	-----	न्याय की आस मे ***(By reporter Smt Shama Parveen)***
30.	देश धर्म	08.12.2008	सेना के एक कर्तव्यनिष्ठ शूरमा की अनूठी विजय-गाथा
31.	अमर उजाला	03.12.2008	03 ***दिसंबर*** 2008 ***सेना और रक्षामंत्रालय पर गंभीर टिप्पणी***
32.	अमर उजाला	23.04.2007	एक चौहान पर कितने मुकदमे
33.	देश धर्म	Copy not available	नाइंसाफी की बेजोड़ घटना के महानायक चौहान का राष्ट्रीय सम्मान हो

XXVII. PARLIAMENTARY PROCEEDINGS:

242. On petitioner's representation a Parliamentary Committee was constituted which recorded a finding that the petitioner should be discharged with all service benefits. However in response to the recommendation of the Parliamentary Committee, the Army Headquarters as well as Defence Ministry informed that the petitioner has been convicted and sentenced in pursuance to SGCM proceeding and the matter is pending before the High Court. The proceedings of Parliament show that the Committee showed its deep concern with regard to the weeding out of the record. It may be noted that during

Parliament proceeding in number of witnesses of the Indian Army and Ministry of Defence appeared and after scrutiny of the statements the Committee arrived to the conclusion that the petitioner had become victim of circumstances on account of recovery of 147 gold biscuits. A perusal of the minutes show that the Parliamentary Committee was consisting not only of civilians but atleast five witnesses were of the rank of Major General apart from Special Secretary and Secretary of Defence. The relevant portion of the conclusion arrived by the Committee of Petitions (Fourteenth Lok Sabha) Ministry of Defence in its Forty Third Report in the foregoing paras may be quoted as under:-

> *"35. It has been further submitted by the Ministry that during the search operation on 11 April 1990, the petitioner was charged with lifting and extorting money, i.e. Rs 8800/- and valuables from various individuals and houses along with L/Nk Anil Kumar since both used to enter houses on most occasions keeping the remainder search party outside on guard duty. On 14 April 1990, Col KRS Panwar, CO 6 Rajput verbally reported the incident involving the petitioner to the Brigade Commander and obtained verbal directions to attach him to 15 Corps Op Sig Regt with immediate effect for progressing disciplinary action.*
>
> *36. The Committee are surprised to note that even the Commanding Officer (CO) 6 Rajput did not submit any formal report initially after the Unit Court of Inquiry was ordered on 13 April 1990 to investigate the circumstances wherein L/Nk Anil Kumar Singh attempted to lift a gold necklace during the house-to-house search operation. The first and detailed report was submitted by 6 Rajput*

to HQ 68 Mtn Bde vide letter dated 14 April 1990, wherein the specific involvement of the petitioner in lifting money and the fact that the incident was verbally reported to Cdr, 68 Mtn Bde has been mentioned. The Committee express their anguish that while the Army proceeded for action against the petitioner levelling serious charges, no formal report was submitted by the concerned Commanding Officer to the Head Quarter. The fact was admitted by the Ministry during the course of evidence. This indeed is the submission of the petitioner of not being afforded the adequate opportunity to defend his case.

37. The Committee note with concern from the submissions made by the Ministry that the order for Court of Inquiry was given against L/NK Anil Kumar and not against the petitioner. It was L/NK Anil Kumar who mentioned the involvement of the petitioner during the Court of Inquiry on 13.4.1990. The Committee also note from the Ministry's submission that no FIR has been filed by any of the civilians living in the houses covered in search operation conducted by the platoon of 6 Rajput led by the petitioner on 11 April 1990.

38. The Committee are, therefore, of the view that the petitioner is not guilty of the charges of theft and extortion levelled by the Army and he should not have been penalized merely on the submissions made by other persons who were caught red handed because as per the evidence placed before the Committee, no complaint/FIR was lodged against the petitioner from the aggrieved parties.

39. As regards the charge of desertion from duty, the Committee note from the Ministry's submission that even though the petitioner was sanctioned leave w.e.f. 8 April 1990 earlier, but it stood automatically deferred immediately on issuance of movement orders for attachment to 15 corps Op Sig. Regt. On 14 April 1990. In their written submission dated 08 April 2008, the Ministry have stated that the movement order was handed over to the petitioner on 14 April 1990 evening whereby he was released from 6 Rajput

on 14 April 1990 and directed to report at the attachment location immediately, whereas in the same written submission the Ministry have also stated that CO 6 Rajput issued two letters in respect of the petitioner on 15 April 1990. One of these letters was the apprehension roll to secure the presence of the petitioner at the attachment location. The Committee take serious note of the contradictory version of the Ministry regarding the attachment of the petitioner which appears to be an attempt to cover the delay in issue of orders since the petitioner had proceeded on leave on 15 April 1990 itself.

40. In the instant case, the Committee note from the Ministry's submission that the petitioner was attached with 15 Corps Op. Sig. Regt. for disciplinary action based on the verbal directions of the superior officer. As the petitioner was initially granted leave on 06 April 1990 for two months, he was given leave certificate from April 1990 to June 1990 by the adjutant of 6 Rajput and the dates were left blank since these were to be filled in at 213 Transit Camp. As per the practice in vogue in field area (J&K), the leave was to commence and terminate at 213 Transit Camp, Jammu. Three copies of the leave certificate, with a railway warrant and Armed Forces Air Concession Form were handed over to the petitioner. The petitioner filled in the dates of his leave as 14 April 1990 to 12 June 1990 in one of the copies of the leave certificate held by him and handed over to his Sahayak with the instructions that in case he did not turn up, he (Sahayak) should deposit the same with Unit Subedar Major. It was learnt subsequently, that the petitioner had boarded Indian Airlines Flight from Srinagar to Delhi on 15 April 1990 and on 18 April 1990 he got himself admitted in 7 AF Hospital at Kanpur. Thus, the first incident of desertion by the petitioner was on record vide 15 Coprs Op. Sig. Regt. Letter dated 18 April 1990.

41. The second incident of desertion, according to the Ministry was brought out on 9.6.1990 vide Command Hospital, Northern Command letter dated 9 June 1990 and 68 Mtn.

Bde letter/telegram dated 11th June, 1990. The apprehension roll for the act of desertion on the second occasion was issued by his unit on 17.6.1990. The petitioner went mission second time at 261 transit Camp while waiting for the officer's bus. The petitioner was under escort for transit from compound Hospital Udhampur to 92 Base Hospital, Srinagar.

42. The Committee further note that CO Rajput issued two letters in respect of the petitioner. One of these letters issued to him specifically stated that he is leaving 15 Corps Op.Sig. Regt. with forged dates in the leave certificates which amounts to desertion. The Committee note with surprise from Ministry's submission that the relevant documents which could prove that the dates were forged have been destroyed within two-three months after the case filed by the petitioner was dismissed by the Court. The Committee while taking a serious view of the callous approach of the Army in dealing with the case and not keeping proper record of the relevant documents, are of the view that the concerned Army officials, have worked in haste in destroying the evidence, within 2-3 months, thereby violating the established practice of keeping the record for 10 years. The Committee are surprised to note that the Ministry/Army have not only disregarded the established procedure but also acted in violation of Army Act 1950, Section 106 wherein it has been provided that the proceedings for desertion could be initiated only after the officer has remained untraceable and absconding for a period of 30 days. Whereas in the instant case the petitioner wax not only traceable but was also taking treatment in 7 A F Hospital, Kanpur from where he had submitted his 'leave certificate.'

43. The Committee further note that on the allegations of theft and desertion, the petitioner was tried by Court Martial in 1991 and he was sentenced to be cashiered, i.e. he was dismissed from service with disgrace and to suffer rigorous imprisonment for seven years. Thereafter, the petitioner field a Review petitioner while disposing of the Post Confirmation Petition (PCP) submitted

by the petitioner, the Chief of Army Staff (COAS) on 7 July 1992 had in exercise of the powers conferred upon him, decided to mitigate the sentence by submitting the findings of the Court Martial with respect to the second charge and the third charge as 'absenting himself without leave' under Army Act Section 39 (a) in place of 'Deserting from service" under Army Act Section 38 (1).

44. The Committee are, therefore, convinced from the sequence of events and facts of the case brought before them that the charges of desertion from duty twice and theft of money from civilians during search operation have not been conclusively proved by the enquiries conducted in the matter by the Army as substantiated by the fact that the COAS on presentation of PCP by the petitioner had decided to mitigate the sentence as absenting himself without leave in place of deserting from service for which punishment includes rigorous imprisonment as well as dismissal from service. The charge of theft and extortion against the petitioner has even flimsier basis as no material evidence was brought out and no complaint and FIR was ever filed by the affected aggrieved persons. The Committee, therefore, conclude that in the absence of any concrete evidence and non-availability of records, the petitioner deserves sympathetic consideration as he was penalized for charges which could not be proved beyond doubt. The Committee, therefore, recommend that the petitioner should be reinstated in the Army with full honour on notional basis retrospectively from the date he was cashiered from service and be paid all consequential benefits with full pay and allowances which could have accrued to him in the normal course but for his dismissal from service. The Committee would like to be apprised of the conclusive action taken in this regard within a period of 03 months."

243. We are in respectful agreement with the findings recorded by the Committee of Petitions of Parliament (supra) which could

not be implemented because of pendency of the Writ Petition before the Allahabad High Court. It shall be relevant to point out that when the Committee of Petitions (supra) objected and recorded findings, Writ Petition preferred in the Allahabad High Court was dismissed in default but later on it was restored and transferred to this Armed Forces Tribunal, Regional Bench, Lucknow.

XXVIII. HUMILIATION:

244. Right from the very beginning i.e. 11.04.1990 the petitioner seems to be humiliated. On oral request of the Commanding Officer Col K.R.S. Panwar he was attached to the 4 Rajputana Rifles by Brigadier and was kept in custody/detention without any formal order. While being admitted in the Command Hospital, Lucknow he was brought to Udhampur under escort of junior officers which could not have been done in view of Army Regulation 394. For convenience sake Regulation 394 of the Defence Service Regulations is reproduced below:-

> ***"394. Officers, JCOs, And WOs Under Arrest.***
> *(a) When an officer, JCO or WO is placed under arrest, the CO, unless he dismisses the case, will report the matter without delay to the sub-area/equivalent commander who in turn will report the cases of officers and JCOs to*

division/are/command head-quarters and the Adjutant General's Branch (DV) Army headquarters indicating the personal number, rank, initial, name and unit of the officer or JCO and sufficient information to give a clear idea of the nature of the offence. Subsequent reports regarding the progress of investigation shall be submitted in the manner laid down by Army Headquarters, through normal staff channels.

(b) An officer, JCO or WO under arrest will not wear sash, sword, belt or spurs.

(c) An officer, JCO or WO under close arrest will be placed under the charge of an escort consisting of another officer, JCO or WO of the same rank, if possible and will not leave his quarters or tent except to take such exercise, under supervision, as the medical officer considers necessary. An officer, JCO or WO may, however, if circumstances so require, be placed for custody under the charge of a guard, piquet, patrol, sentry or provost - marshal.

(d) An officer, JCO or WO under open arrest may take exercise at stated periods and within stated limits, which will usually be the precincts of the barracks or camp of his unit ; these limits may be enlarged at the discretion of the OC on the spot. He will not appear in any place of amusement or entertainment, or at public assemblies. He will not appear outside his quarters or tent dressed otherwise than in uniform.

(e) Whenever possible, the sanction of the highest authority to whom the case may have been referred should be obtained before an officer, JCO or WO is released from arrest.

(f) An officer, JCO or WO has no right to claim trial by court-martial, except in the circumstances mentioned in Section 84 of the Army Act, or to claim a Court of Inquiry."

245. The petitioner was escorted by one JCO and three soldiers from Command Hospital, Lucknow to Command Hospital, Udhampur which seems to be manipulated and mentally disturbed the petitioner to yield to the wishes of the respondents officers may be with intention to suppress recovery of gold biscuits. It has been argued by Ld. Counsel for the petitioner that no escort personnel should be of the same Regiment. It is strange that Maj R. Khullar was later on appointed as defence counsel by the respondents. Inspite of best efforts of the petitioner he was not permitted to engage a counsel and Judge Advocate Capt Manveet Singh was replaced by Capt Javed Iqbal (supra).

246. While passing the order of arrest/detention dated 10.04.1991, the ground for arrest was not indicated and provision of Section 102 (supra) of the Army Act, were not complied with. The fact that the petitioner suffered gun injury from alleged assault was not informed to the family members in terms of SAO 8/S/85 (supra) that too when was placed in dangerously ill list compelling the petitioner's family to file Habeas Corpus Writ in the Supreme Court. While issuing

convening order, provisions of Rules 95 & 97 of the Army Rules were not complied with. While directing with regard to SGCM proceeding petitioner was not provided defending officer of his choice. Convening authority GOC, 15 Corps, Lt Gen Zaki Mohammad Ahmad had not ascertained the choice of the petitioner in pursuance to provisions of Rule 95 of the Army Rules rather he appointed Maj R. Khullar as defending officer who should have been appointed as prosecutor. One of the strange fact is that Summary of Evidence was not made available on the table of SGCM proceeding and it was produced by the defending officer, i.e PW-39 as last witness. The petitioner was not examined by the Psychiatrist in terms of para 74 of Regulations for the Army on each date of the trial and was not provided defence counsel in view of letter and spirit of Regulation 479 of the Army Regulation. Letters send by petitioner's father through registered post to Superintendent of Police, Srinagar was not brought on record and the police has not registered a case perhaps on pursuation of 15 Corps. Defence witnesses were not summoned in contravention of Rule 33 (4) read with Rule 137 of the Army Rules. There seems to be no room of doubt that rule of law, dignity and humanitarian aspect was given a go bye to punish the petitioner

in utter disregard to Constitutionaly protected fundamental rights and statutory mandate.

XXIX. WEEDING OUT THE RECORD:

247. In the present case the original records seems to have been weeded out by officers of the respondents in utter disregard to Regulation 592 of the Army Regulations which provides that no document shall be destroyed during pendency of departmental or judicial proceeding. While deciding controversy with regard to weeding out of record in a case decided on 02.03.1916 in T.A. No. 39 of 2012, ***Selina John vs Union of India & Ors***, we have held as under:-

> *"33. A plain reading of Regulation 592 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. In the present case, during pendency of Writ Petition in the High Court (supra), documents were destroyed in the year 2004, which at the face of the record seems to suffer from vice of arbitrariness and not permissible. It may be noted that the order dated 22.12.2004 provides that the record of legal cases shall be retained till 5 years after finalization of case. It means that earlier records were to be retained permanently but with effect from 22.12.2004, it were to be retained for immediate 5 years after finalization of the case; hence there appears to be no room of doubt that destruction of record by the respondents was not permissible.*
>
> *34. Section 114 of the Evidence Act deals with the presumption of incident of certain facts*

and Illustration (g) seems to be applicable in the present case. For convenience sake Section 114 of the Evidence Act with Illustration (g) is reproduced as under:-

> *" 114. **Court may presume existence of certain facts.—**The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.*
>
> *(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who holds it".*

248. The aforesaid proposition has been reiterated by the Supreme Court in the case of ***Ram Das v. State of Maharashtra,*** AIR 1977 SC 164 and ***B Venkatamuni v. C.J. Ayodhya Ram Singh***, AIR 2006 SCW 6155.

249. In the present case records were weeded out as observed by the Parliamentary Committee and statement made by the respondents before it within three months from the date of dismissal of Writ Petition by the High Court on account of absence of petitioner's counsel, though later on the Writ Petition was restored. In view of Regulation (supra) even after dismissal of the Writ Petition at least for five years the records should have been preserved. Hasty decision to weed out the records seems to deprive the petitioner to defend him and

sustain the punishment during judicial review. It was done with high handedness and in abuse of power by GOC, 15 Corps and other officers.

250. Weeding out of record before the expiry of five years after dismissal of Writ Petition in the Allahabad High Court, which was later on restored, is very serious matter on the part of the Army and the authorities concerned which seems to be influenced by extraneous reasons and considerations. In view of Apex Court decision, (supra) we may infer that it was done to stand by with the wrong done by GOC, 15 Corps Lt Gen Zaki Mohammad Ahmad and Col K.R.S. Panwar on whose behest records were fabricated to suppress allegations with regard to recovery of 147 gold biscuits by the petitioner, alleged to be handed over to Col K.R.S. Panwar.

XXX. MALICE:

251. From the factual matrix on record we have no doubt that the present is a case of extreme high handedness and persecution of the petitioner to suppress alleged recovery of 147 gold biscuits. However since the petitioner has not impleaded officers as respondents, we are not recording any conclusive finding against them and make it open to hold appropriate inquiry in accordance to law. But undoubtedly it is a case of malice in law based on biased action.

252. 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".

253. 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.

254. 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".

256. 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.

257. 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."*

258. 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).

259. Passing an order for unauthorised purpose constitute malice in law. (Vide ***Punjab State Electricity Ltd. Vs. Nora Singh***, (2005) 6 SCC 776; and ***Union of India Vs. V. Ramakrishnan***, (2005) 8 SCC 394).

260. Prof. H.W.R. Wade in his famous treatise "Administrative Law" (fifth edition page 58-59) had observed that it is expected from the bureaucracy to possess high degree of detachment from the party politics and publicity. The learned author proceeded to observe as under:

> *"The civil servant thus achieves a very high degree of self-effacement, and although he is*

> *bound to be much concerned with questions of policy as well as with administration, he is insulated from the effects of political controversy. Working in this atmosphere of detachment, he can give his services to a government of any complexion with impartiality--- or at least with the greatest degree of impartiality that it is reasonable to ask of a human being."*

261. De Smith, Woolf and Jowell in their famous treatise, "Judicial Review of Administrative Action", (fifth edition page 521) while defining the scope of the rule against bias and its content, observed that there are three requirement of public law to quote:-

> *"The first seeks accuracy in public decision-making and the second seeks the absence of prejudice or partiality on the part of the decision-maker. An accurate decision is more likely to be achieved by a decision-maker who is in fact impartial or disinterested in the outcome of the decision and who puts aside any personal prejudices. The third requirement is for public confidence in the decision-making process. Even though the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the decision-making process. In general, the rule against bias looks to the appearance or risk of bias rather than bias in fact, in order to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

262. We are satisfied that though it is collective exercise of some persons with meeting of minds to suppress petitioner's allegation of alleged recovery of 147 gold biscuits with consequential Court Martial and his punishment to dissuade

him to pursue the matter which may result in arrest, trial and conviction of offenders on account of swallowing 147 gold biscuits with punishment of death sentence or life imprisonment, we are not recording any conclusive finding against any person since they have not been made a party.

XXXI. HIGH AUTHORITY THEORY:

263. Ld. Sr. Counsel Shri Asit Chaturvedi appearing for the respondents argued that no inference of malice or fraud can be drawn against high officers of the Army to deprecate their actions.

264. We are conscious of the fact that the petitioner has attributed malafide on the part of GOC, 15 Corps. However, no finding can be recorded since he has not been made party. However, this court is not precluded to record finding with regard to malice in law or commission of fraud while initiating departmental proceeding and that we have done.

265. In a case reported in ***S. Pratap Singh Vs. State of Punjab*** AIR 1964 SC 72, where allegations were raised against the Chief Minister of State while initiating disciplinary proceeding their Lordship of Hon'ble Supreme Court instead of throwing the petitioner's case under the presumption of correctness at higher level scrutinised the evidence and

material placed by the petitioner and decided the case. Their Lordships in the case of ***S. Pratap Singh*** (supra) have observed as under:-

> *"The Constitution enshrines and guarantees the rule of law and Art. 226 is designed to ensure that each and every authority in the State, including the Government, acts bona fide and within the limits of its power and we consider that when a Court is satisfied that there is an abuse or misuse of power and its Jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual. It is with these considerations in mind that we approach the facts of this case."*

266. In ***Shivajirao Nilangekar Patil Vs. Dr. Mahesh Madhav Gosavi and others*** 1987 AIR 294, where allegation was raised against the higher authorities and role of Chief Minister was also in question Hon'ble Supreme Court reiterating the principle enunciated by ***C.S. Rawjee*** (supra) observed that court should be cautious to deal with the allegations of mala fide or cast aspirations on holders of high office and power but the court cannot ignore the probabilities arising from proven circumstances. It shall be appropriate to reproduce relevant portion from the judgement of Shivajirao Nilangekar Patil (supra) as under:-

> *"It is true that allegation of mala fides and of improper motives on the part of those in power are frequently made and their frequency has increased in recent times. This Court made these observations as early as 1964. It is more*

> *true today than ever before. But it has to be borne in mind that things are happening in public life which were never even anticipated before and there are several glaring instances of misuse of power by men in authority and position. This is a phenomenon of which the courts are bound to take judicial notice. In the said decision the court noted that it is possible to decide a matter of probabilities and of the inference to be drawn from all circumstances on which no direct evidence could be adduced..... Therefore, while the court should be conscious to deal with the allegations of malafide or cast aspirations on holders of high office and power, the court cannot ignore the probabilities arising from proven circumstances".*

267. In a case reported in ***Shri Arvind Dattatraya Dhande Vs. State Of Maharashtra and other***, 1997 (6) SCC 169, Hon'ble Supreme court held that there is unimpeachable and eloquent testimony of the performance of the duties of higher authorities courts should not shirk from his responsibility to protect the Government officers. It was further observed that when the power exercised malafide it tends to demoralise the honest officer who efficiently discharges the duty of public office.

268. A Constitution Bench of Hon'ble Supreme Court in a case reported in ***DELHI TRANSPORT CORPORATION Vs. D.T.C. MAZDOOR CONGRESS***, AIR 1991 SC 101, had reiterated the aforesaid proposition and observed that arbitrary unbridled and naked power of wide discretion used by the government tend to defeat the constitutional purpose. Court should take into the

actualities of life. It has further been observed that sincere, honest and defeated subordinate officers are unlikely lick the boots of the corrupt superior officer and they become inconvenient for their superiors and tends to spoil the career of the honest, sincere and devoted officers. Their Lordship observed that one should circumspect, pragmatic and realistic to these actualities of life to reproduce relevant portion, which is as under :-

> *"How to angulate the effect of termination of service. Law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under rule of law. The prevailing social conditions and of life are to be taken into account to adjudging whether the impugned legislation would subserve the purpose of the society. The arbitrary, unbriddled and naked power of wide discretion to dismiss a permanent employee without any guidelines or procedure would tend to defeat the constitutional purpose of equality and allied purposes referred to above. Courts would take note of actualities of life that persons actuated to corrupt practices are capable, to maneuver with higher echolons in diverse ways and also camouflage their activities by becoming sycophants or chronies to the superior officers. Sincere, honest and devoted subordinate officer unlikely to lick the boots of the corrupt superior officer. They develop a sense of self-pride for their honesty, integrity and apathy and inertia towards the corrupt and tent to undermine or show signs of disrespect or disregard towards them. Thereby, they not only become inconvenient to the corrupt officer but also stand an impediment to the on-going smooth sipbony of corruption at a grave risk to their prospects in career or even to their tenure*

> *of office. The term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. if a superior officer develops likes towards sycophant, though corrupt, he would tolerate him and found him to be efficient and pay encomiums and corruption in such eases stand no impediment. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential with delightfully vague language imputing to be 'not upto the mark', 'wanting public relations' etc. Yet times they may be termed to be "security risk" (to their activities). Thus they spoil the career of the honest, sincere and devoted officers. Instances either way are gallore in this regard. Therefore,one would be circumspect, pragmatic and realistic to these of life while angulating constitutional validity of wide arbitrary, uncanalised and unbriddled discretionary power of dismissal vested in an appropriate authority either by a statute or a statutory rule. Vesting arbitrary power would be a feeding ground for nepotism and insolence; instead of subserving the constitutional purpose, it would defeat the very object, in particular, when the tribe of officers of honesty, integrity and devotion are struggling under despondence to continue to maintain honesty, integrity and devotion to the duty, in particular, when moral values and ethical standards are fast corroding in all walks of life including public services as well. It is but the need and imperative of the society to pat on the back of those band of honest, hard-working officers of integrity and devotion to duty. It is the society's interest to accord such officers security of service and avenues of promotion."*

269. With regard to presumption of fairness on the part of higher authorities Hon'ble Supreme Court again proceeded to observe (supra) that theory of higher authorities is unrealistic and has been buried keeping in view the present scenario.

> *"The "high authority" theory so-called has already been adverted to earlier. Beyond the self-deluding and self-asserting righteous presumption, there is nothing to support it. This theory undoubtedly weighed with some authorities for some time in the past. But its unrealistic pretensions were soon noticed and it was buried without even so much as an ode to it".*

270. However, in our country, the procedure to secure personal freedom as well as to prevent the abuse of power both, seems to be not upto the mark.

271. In view of above we reject the arguments advanced by Ld. Sr. Counsel appearing for the respondents and hold that whole action with regard to petitioner's arrest, detention and trial suffers from malice in law.

XXXII. FRAUD:

272. The recovery memo against the petitioner with regard to recovery of Rs 5,100/- as well as leave format apparently seems to have been fabricated to charge him for the offence in question.

273. According to Legal Maxims, "Acts Exteriora indicant interiors secrets." i.e., act indicate the intention, is applicable in the present case with full vigour. In Broom's Legal Maxims (Tenth Edition: Page 200) it has been discussed as under:

> *"The law, in some cases, judges of a man's previous intentions by his subsequent acts;*

> *and, on this principle, it was resolved in a well-known case, that if a man abuse an authority given him by the law, he becomes a trespasser ab initio."*

Lord Denning had rightly said in his famous treatise, "The discipline of Law" (page 61) to quote:

> *"Our procedure for securing our personal freedom is efficient, but our procedure for preventing the abuse of power is not."*

274. In **Dalip Singh vs. State of U.P.,**(2010) 2 SCC 114, the Hon'ble Supreme Court considered the question whether relief should be denied to the appellant who did not state correct facts in the application filed before the prescribed authority and who did not approach the High Court with clean hands. After making reference to some of the precedents, it was observed:

> *"9….. while exercising discretionary and equitable jurisdiction under Article 136 of the Constitution, the facts and circumstances of the case should be seen in their entirety to find out if there is miscarriage of justice. If the appellant has not come forward with clean hand, has not candidly disclosed all the facts that he is aware of and he intends to delay the proceedings, then the Court will not non-suit him on the ground of contumacious conduct."*

275. In **Oswal Fats and Oils Ltd vs. Commr (Admn),** (20P10) 4 SCCF 728 relief was denied to the appellant by making the following observations (SCC pp.738-39 paras 10-20):-

> *"19. It is quite intriguing and surprising that the lease agreement was not brought to the notice*

of the Additional Commissioner and the learned Single Judge of the High Court and neither of them was apprised of the fact that the appellant had taken 27.95 acres land on ease from the Government by unequivocally conceding that it had purchased excess land in violation of Section 154(1) of the Act and the same vested in the State Government. In the list of dates and the memo of special leave petition filed in this Court also there is no mention of lease agreement dated 15.10.1994. This shows that the appellant has not approached the Court with clean hands. The withholding of the lease agreement from the Additional Commissioner, the High Court and this Court appears to be a part of the strategy adopted by the appellant to keep the quasi-judicial and judicial forums including this Court in dark about the nature of its possession over the excess land and make them believe that it has been subjected to unfair treatment. If the factum of execution of lease agreements and its contents were disclosed to the Additional Commissioner, he would have definitely incorporated the same in the order dted 30.5.2001. In that event, the High Court or for that reason this Court would have none suited the appellant at the threshold. However, by concealing a material face, the appellant succeeded in persuading the High Court and this Court top entertain adventurous litigation instituted by it and pass interim orders. If either of the courts had been apprised of the fact that by virtue of lease deed dated 15.10.1994, the appellant has succeeded in securing temporary legitimacy for its possession over excess land, then there would have been no occasion for the High Court to entertain the writ petition or the special leave petition.

20. It is settled law that a person who approaches the court for grant of relief, equitable or otherwise, it is under a solemn obligation to candidly disclose all the material/important facts which have bearing on the adjudication of the issues raised in the case. In other words, he owes a duty to the

> *court to bring out all the facts and refrain from concealing/ suppressing any material fact within his knowledge or which he could have known by exercising diligence expected for a person of ordinary produce. If he is found guilty of concealment of material facts or making an attempt to pollute the pure stream of justice, the court not only has the right but a duty to deny relief to such person".*

276. How the petitioner's family was treated and hasty trial was held may be inferred from other facts on record that the petitioner's wife Mrs. Geeta Chauhan had sent letter on 27.04.1991 informing that she is not being permitted to meet her husband and his life is in peril. The Director General, Medical Services after four months vide his letter dated 21.08.1991 informed that her husband suffered some injury and was discharged on 14.05.1991 in S-3 category. Copy of the reply received by the wife of the petitioner has been filed as Annexure-14 to the petition. This was done in utter disregard to Army Order SAO 8/S/85, a copy of which has been annexed as Annexure-12 to the petition. This Army Order contains the procedure how to deal with next of kin of an Army personal with regard to physical casualty. Relevant portion of Army Order SAO 8/S/85 is reproduced as under:-

> *"21. In order to avoid delay in informing the next of kin, the Officer Commanding unit will notify physical casualties direct to the next of kin by express telegram giving the nature, date and cause of casualty. In case of death, if the specific cause cannot be established till further*

investigation, eg, suicide, murder and the like, due care will be exercised in composing the telegrams to be sent to the next of kin. Specimen telegrams to the next of kin are given at Appendix 'C'. In the event of the next of kin being resident within or adjacent to the duty station, it will be the responsibility of the officer commanding unit to notify the physical casualty to him/her by quickest possible means. In the case of personnel on dangerously or seriously ill list, the unit will ensure that periodical progress reports are sent to the next of kin, reflecting change in condition, if not done by the hospital.

22. In exceptional cases where, for want of address or lack of communication facilities, it is not practicable to inform the next of kin, it will be the responsibility of the Record Officer to notify the next of kin by express telegram and also to intimate particulars of the next of kin to the unit and to Army Headquarters, Adjutant General's Branch, Org 3(d) by signal.

23. A further communication in the form of a letter will at the first available opportunity, be addressed by the Officer Commanding unit to the next of kin, giving more information. Details of sentimental or humanitarian nature should be included, but narrowing details which may cause mental distress and suffering to the next of kin will be omitted. Details which are likely to jeopardise security will be omitted. Details which are likely to jeopardise security will also not be communicated".

277. The petitioner vide his letter 01.05.1991 communicated to the Adjutant General that there was an attempt to murder him on 11.04.1991. Petitioner's father sent letter dated 03.05.1991 to the Superintendent of Police, Srinagar, (Annexure-23 to the petition) but no FIR was lodged. In his letter dated 03.05.1991, father of the petitioner made allegations against Col R.S.

Panwar, Commanding Officer, Lt Col M.S. Rawat, Maj M. Sanguri and Capt A. Hazela. Cry for justice, safety and security of an officer of the Indian Army was in vain for unforeseen reason. No one came forward to help the petitioner and the GOC, 15 Corps, Lt Gen Zaki Mohammad Ahmad as well as Commanding Officer, 6 Rajput Col K.R.S. Panwar tried their best to keep the Army Headquarters at a distance before the petitioner was convicted by SGCM proceeding. Constitution has been made a mockery, Constitutional rights shattered with maltreatment of the petitioner like feudalistic State where rights are under the thumb of autocracy. Such humiliation atleast in Indian polity is not expected.

XXXIII. **CHARGES:**

278. In the present case charges were framed with regard to three counts which relate to desertion and recovery of certain cash. For convenience sake the three charges framed by the respondents against the petitioner are reproduced as under:-

"*First charge :* *Army Act Section 63*	*An ACT prejudicial to good order and Military Discipline.* *In that he,* *While on active service, at Field, on 11 April 1990, during cordon and search operation improperly*

	and without authority removed Rs, 8,800/- (Rupees eight thousand and eight hundred only) from the civilians of Laxmanpura (Batmaloo) Srinagar.
Second Charge Army Act	*DESERTING THE SERVICE*
Section 38 (1)	*In that he* *While on active service, at Field on 15 April 1990, deserted from the service.*
Third Charge Army Act Section 38 (i)	*DESERTING THE SERVICE* *in that he,* *While on active service, at Field, on 09 Jun 1990, deserted from the service".*

279. A perusal of charges framed against the petitioner shows that one of the charges has been framed for recovery of Rs 8,800/- from the petitioner. The charge does not indicate with regard to amount of Rs 5,100/- originally possessed by co-accused Nk Kailash Chand which was alleged to have been given to him by the petitioner. This act of respondents seriously prejudiced the petitioner. Submission of Ld. Counsel for the petitioner is that on account of combined framing of charges no cross examination could have been done keeping in view the

breakup of recovery and the related evidence on record. Charges are framed in pursuance to provisions contained in Rule 28 of Army Rules. Rule 30 of the Army Rules deals with contents of charges. A plain reading of sub rule (4) of Rule 30 (supra) shows that the particulars shall state such circumstances respecting the alleged offence as will enable the accused to know what act, neglect or omission is intended to be proved against him as constituting the offence. Non disclosure of recovery of certain amount from Nk Kailash Chand and the statement recorded offends the statutory right conferred to the petitioner in accordance with sub rule 4 of Rule 30 of Army Rules. The material fact with regard to recovery of Rs 3,700/- does not come with regard to presumptive validation provided by Rule 32 of Army Rules. The factum of recovery from Nk Kailash Chand is a fact which is not borne out from the charge sheet and comes out only after the conclusion of trial, the material recorded and findings given by the SGCM. Hence framing of three charges (supra) seem to suffer from material illegality. The 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 offence whereof he/she is accused and it

must be conveyed to him with sufficient clearness and certainty what the prosecution intends to prove against him.

280. Object of the framing of the charge sheet is to enable the accused of the case he is required to answer during trial. Charges must be properly framed and evidences rendered 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 ***Srikantiah B.N. v. State of Mysore***, AIR 1958 SC 672, ***Waroo v. Emperor,*** AIR 1948 Sind 40, 48 : (1948) 49 Cr. L.J. 72 and ***Birichh Bhuian v. State of Bihar***, AIR 1963 SC 1120.

281. 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 partial of principles of natural justice. Offence whatever may be, no trial may proceed without framing of charges. Section 211 of CrPC deals with the contents of charges. Section 212 of CrPC provides that the charge shall indicate the particulars, place and person, the time

and place of the offence and Section 213 of CrPC provides that manner of committing offence must be stated. Section 215 of the CrPC deals with the effect of errors for framing of charges.

282. In ***Bhupesh Dev Gupta v. State of Tripura***, (1979) 1 SCC 87 Hon'ble Supreme Court 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. Relevant portion of the judgment is reproduced as under:-

> *"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 Sachindra Deb on the plea of securing service for the said Sachindra Deb. The High Court understood the charge as meaning that the money was sent by Nikhil Chakraborty on behalf of Sachindra Deb as a gratification for securing service for the said Sachindra Deb. 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 913 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."*

283. Framing of charges is the part and parcel of Article 14 of the Constituion of India. That is why it has been held by Hon'ble Supreme Court in the case of ***Roop Singh Negi v. Punjab National Bank & Ors***, (2009) 2 SCC 570 that the 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 the charges is illegal.

284. Principles of natural justice is equally applicable to the Armed Forces personnel. In the case of ***Sheel Kr. Roy***. **v. Se*cretary Ministry of Defence & Ors*,** reported in (2007) 12 SCC 462 Hon'ble Supreme Court has 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 rights.

285. Otherwise also, charge framed against the petitioner is not sustainable for the reason that it is not a case of desertion. At the most charge No. 3 should have been 'escape from lawful custody punishable under Section 51 of the Army Act'. At no stage petitioner deserted Army. Assuming that the facts are correct, at the most it may be a case of 'escape from lawful

custody' and not 'deserting the Army punishable under Section 38 of the Army Act'.

286. In view of above the charges framed against the petitioner do not seem to meet the requirement of law and vitiate the trial.

XXXIV. SGCM PROCEEDINGS AND DISCUSSION:

287. We have already recorded a finding that how the SGCM began against the statutory mandate. Capt Manveet Singh who was qualified officer of JAG Branch was replaced by Capt Javed Iqbal belonging to Artillery having no experience of law or service in JAG Branch, that too without permission of the JAG Department in violation of statutory mandate. So far as charges for which the petitioner has been tried are concerned with regard to these charges Col K.S. Dalal had not recommended for Court Martial but even then it was done. No Court of Inquiry, Summary of Evidence or Court Martial proceedings were held in the manner provided by the statutory provisions with regard to recovery of 147 gold biscuits. Rs 3,700/- were recovered from Nk Kailash Chand who attributed it as money of the petitioner and L/Nk Anil Kumar Singh was himself an accused in the matter of recovery of gold necklace. But even then they were relied upon as star witnesses to punish the petitioner and as informed by Ld. Counsel for the petitioner they were benefitted for being standing as a witness

against the petitioner in their service career. They were accused with regard to serious offences and misconduct. The statement of accused in the pyramidical structure of the Army against own officer has been relied upon. The statement of co-accused is very weak evidence unless corroborated by strong independent witness. Statement of interested witnesses could not be relied upon in view of law settled by Supreme Court in the case of ***Dara Singh vs. Republic of India*** (2011) 2 SCC 490. Recovery of Rs 3,700/- was made from Nk Kailash Chand who attributed it to the petitioner's property and in case money belonged to some civilian then he would have been co-accused. Hon'ble Supreme Court acquitted him whose confession was purely based on evidence of co-accused in the case reported in ***Union of India vs. Balmukund*** (2009) 12 SCC 161, ***Raju Premji vs. Customs, NER, Shillong Unit***, (2009) 16 SCC 496.

288. In any case statement of such accused could not be taken as substantive evidence, vide ***Mohtesham Mohd. Ismail vs. Spl Director, Enforcement Directorate*** (2007) 8 SCC 254. Recovery of money from Nk Kailash Chand and statement of other witnesses with regard to charges seem to be mere hearsay evidence and should be excluded on the ground that it is always desirable in the interest of justice to get a person

whose statement is relied upon. Recovery of money of Rs 3,700/- from Nk Kailash Chand and Rs 5,100/- from the petitioner and the follow up search and seizure from petitioner's room seems to be hearsay evidence, that too after two days when the petitioner is alleged to have confessed that he got some rupees in presence of certain other JCOs and NCOs on 11.04.1990 and the recovery from his room was done on 13.04.1990 by three officers viz. Lt Col M.S. Rawat, Maj Sanguri and Capt Hajela. The alleged seizure memo does not contain signatures of the petitioner. Hon'ble Supreme Court in the case of ***Kalyan Kumar Gogoi vs. Ashutosh Agnihotri*** (2011) 2 SCC 532 assigned following reasons why hearsay evidence should not be accepted:-

(a) the person giving such evidence does not seem any responsibility. The law requires all evidence to be given under personal responsibility i.e. every witness must give his testimony, under such circumstance, as exposed him to all the penalties of the falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me".

(b) Truth is diluted and diminished with each repetition, and

(c) if permitted, gives ample scope for playing fraud by saying “someone told me that”. It would be attaching importance to false rumour flying from one foul lip to another. Thus statements of witnesses based on information received from others is inadmissible. (Also see ***Podyami Sukada vs. State of M.P.*** (2010) 12 SCC 142).

289. So far as recovery of Rs 5,100/- from the petitioner is concerned it cannot be relied upon for the reason that seizure memo does not contain petitioner’s signature. It contains signatures of three officers viz Maj M Sanguri, Capt Salim Asif and Capt Amit Hajela. It seems to be cooked up document.

290. It may further be noted that recovery from Nk Kailash Chand attributing it as money of petitioner also could not have been relied upon since he was not declared approval. The Commanding Officer, 4 Rajputana Rifles, Col K.S. Dalal who has recorded Summary of Evidence categorically expressed opinion that it is a fabricated case, to quote:-

> “*the case is fabricated, and the people who had actually been apprehended for offences committed on 11 Apr 90 were made witnesses with the only difference that those offences were now put on Lt Chauhan. L/Nk Anil caught red handed lifting money and so he played the main role. Nk Kailash was apprehended with stolen money. It was put on Lt Chauhan, Sep Lakhan was involved in molestation, he put the blame on Lt Chauhan. However, as the days*

> *passed stories were fabricated and evidence interwoven. However discrepancies remained, discrepancies which cannot be explained. Evidence of two witnesses do not match with one another's, Evidence of witnesses themselves differ. The truth has got buried in the rumour statements and contradictions between witnesses".*

291. For the aforesaid reasons Col K.S. Dalal did not recommend for petitioner's SGCM on the aforesaid grounds.

292. It has been vehemently argued by Petitioner's counsel that Summary of Evidence is like committal proceedings and it should be placed on table during Court Martial proceeding to assess the charges in view of Rules 41 and 42 of the Army Rules, which has not been done.

293. During SGCM proceeding Maj R. Khullar was appointed as his defence counsel who could not have been so appointed for the reason that he recorded Summary of Evidence and at the most he could have been appointed as prosecuting officer.

294. Perusal of SGCM proceeding as placed on record by the petitioner shows that provisions contained in Rule 58 of the Army Rules have not been followed. Clause (ii) of Rule 58 (supra) provides that after close of the case for the prosecution and before the accused is called on for his defence, certain questions are to be put to the accused. Sub rule (ii) further provides that he shall make an unsolved statement, orally or in writing, giving his account on the subject of the charge(s)

against him. For convenience sake Rule 58 is reproduced as under:-

> *"58. **Examination of the accused and defence witnesses.-** (1) (a) In every trial, for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him, the court of the judge advocates-*
>
> > *(i) may at any stage, without previously warning the accused, put such questions to him as considers necessary;*
> >
> > *(ii) shall, after the close of the case for the prosecution and before he is called on for his defence, question him generally on the cases.*
>
> *(b) No oath shall be administered to the accused when he is examined under clause (a).*
>
> *(c) The accused shall not render himself liable to punishment by refusing to answer questions referred in clause (a) above, or by giving answer to them which he knows not to be true.*
>
> *(2) After the close of the case for the prosecution, the presiding officer or the judge advocate, if any, shall explain to the accused that he may make an unsworn statement, orally or in writing, giving his account of the subject of the charge(s) against him or if he wishes, he may give evidence as a witness, on oath or affirmation, in disproof of the charge (s) against him or any person charged together with him at the same trial. Provided that,-*
>
> *(a) he shall not be called as a witness except on his own request in writing,*
>
> *(b) his failure to give evidence shall not be made the subject of any comment by any of the parties of the court or give rise to any*

> *presumption against himself or any person charged together with him at the same trial;*
>
> *(c) if he gives evidence on oath or affirmation, he shall be examined as first witness for defence and shall be liable to be cross-examined by the prosecutor and to be questioned by the court.*
>
> *(3) The accused may then call his witnesses including, if he so desires, any witnesses as to character. If the accused intends to call witnesses as to the facts of the case other than himself, he may make an opening address before the evidence for defence is given".*

295. In the present case perusal of SGCM proceeding shows that Rule 58 of Army Rules in its entirety has not been complied with and being statutory mandate, it is fatal to the prosecution and the SGCM proceeding.

296. Recovery of Rs 5,100/- from the petitioner by Lt Col M.S. Rawat, Maj Sanguri and Capt Hajela shows that they had visited petitioner's tent on 13.04.1990 where the petitioner handed over amount of Rs 5,100/- but as observed (supra) no recovery memo with due signature of the petitioner was prepared hence it has rightly been observed by Col K.S. Dalal that it is fabricated and concocted evidence and does not stand to reason.

297. In spite of statement of five witnesses viz. Sepoy Naresh Singh, Havildar Virendra Singh, CHM Puttu Singh, Sepoy Raj Kumar Singh, Sepoy Ajai Pal Singh during SGCM proceeding that 147 gold biscuits were recovered and handed over to Col

K.R.S. Panwar, the Presiding Officer of the SGCM proceeding has not taken advice from the JAG Branch (supra) not took care to assign reason for ignoring the evidence. No weight was given by the Presiding Officer of the SGCM proceeding to the fact that L/Nk Anil Kumar Singh could not demonstrate how he kept amount of Rs 5,100/- in his bullet proof jacket which he was alleged to be wearing on 11.04.1990 as is evident from page 68 of the SGCM proceeding. Further the Court itself noted that witness L/Nk Anil Kumar Singh was not aware how to put on the bullet proof jacket and there is no pocket on the upper side of the bullet proof jacket where the witness could have put the money. He could not be relied upon by the Presiding Officer of the SGCM proceeding for the reason that against him case with regard to property and attempt to murder was going on wherein bailable warrants were issued against him as brought on record during SGCM proceeding. In spite of bad antecedents on record he was promoted as L/Nk by Commanding Officer Col K.R.S. Panwar himself hence seems to be helpful to the Commanding Officer.

It may be noted that terms of reference dated 05.10.1990 of convening order by 68 Mtn Bde mentions to alleged removal of Rs 5,100/- by accused during cordon and search operations at Srinagar on 11.04.1990. During Summary of Evidence also

whole allegation was to establish recovery of Rs 5,100/- from the petitioner. Then how charges could have been framed and the petitioner has been tried for lifting Rs 8,800/-, that too on the statement of an accused L/Nk Anil Kumar Singh who was having bad antecedents, is not understandable. Even during SGCM proceeding Capt Salim Asif, Adjt to the Commanding Officer stated that he obtained signatures of Nk Kailash Chand on 11.04.1990 with regard to recovery of Rs 3,700/-. With regard to recovery from petitioner on 13.04.1990 he stated that he does not know as to who was member of the party which recovered the amount of Rs 8,800/- from petitioner though he had signed on the recovery memo of 13.04.1990. Thus there appears to be fabrication of record.

298. So far as charge with regard to desertion on 15.04.1990 is concerned from the evidence on record it is amply clear that during curfew the petitioner could not have moved out through Air India Flight without assistance of officers of 6 Rajput Regiment of 15 Corps. Moreover it has not been disputed that leave certificate submitted by the petitioner at 7, Air Force Hospital, Kanpur was genuine. Hence allegation of desertion against the petitioner on 15.04.1990 seems to be based on unfounded facts. There is no evidence on record of cancellation of leave certificate and the respondents had tried

to punish the petitioner in violation of statutory mandate. Apprehension roll was issued on 17.04.1990 and the petitioner was arrested on fabricated documents.

299. Coming to other charge of desertion dated 09.06.1990 from Udhampur, it may be noted that petitioner left Transit Camp on receipt of certain information from Sub Dharam Pal Singh who was escorting JCO and gave the petitioner his Identity Card. Though later on he retracted but the question remains as to how a person who was in close arrest was having Identity Card. Accordingly statement given by witnesses that Identity Card was given to him by Sub Dharam Pal Singh seems to be reasonably established defence. There is no evidence on record with regard to where abouts of the petitioner from 09.06.1990 to 26.06.1990 when he reached to native place. It appears that in distress and unfit mental condition he was roaming somewhere. It has also not been disputed by the respondents which is evident from record that along with his father who is an ex Army personal, the petitioner met Lt Gen Y.S. Tomar, Adjutant General, Army Headquarters on 26.06.1990 and briefed him about his plight and sufferings. It was he who recommended and got the petitioner admitted in the Army Hospital, New Delhi and remained there for about three months i.e. from 26.06.1990 to 01.10.1990. Intention of

leaving the Transit Camp Udhampur seems to not only save his life but also to brief high officers of the Army with regard to his sufferings on account of recovery of 147 gold biscuits. A deserter will never go to high officers. The mensrea with regard to desertion from Army is missing rather purpose to leave Transit Camp from Udhampur was to save life and receive help from family members and approach higher officers. Since the petitioner reported to higher officers i.e. Lt Gen Y.S. Tomar within thirty days and brought to the notice the factum of misappropriation of 147 gold biscuits by the Commanding Officer and his associates, he could not have been declared deserter in view of Section 106 of the Army Act, before expiry of 30 days. It was incumbent on the Commanding Officer as well as Lt Gen Zaki Mohammad Ahmad, GOC, 15 Corps to contact Lt Gen Y.S. Tomar to whom the petitioner reported in Army Headquarters with regard to his plight before proceeding ahead but it was not done. Lt Gen Y.S. Tomar was also Adjutant General who appointed Maj Gen R.S. Taragi to inquire into the facts but during SGCM proceeding Lt Gen Y.S. Tomar was not called to appear as witness even on petitioner's persuasion. This element of *mens rea* is missing. The Army Headquarters because of certain manipulations on the part of GOC, 15 Corps was kept in dark with regard to petitioner's arrest/detention and

custody, without formal order and later on with formal order. This indicates the hectic efforts made by 6 Rajput Regiment to suppress the truth behind the curtains keeping Army Headquarters in dark. In the absence of mensrea and efforts made by the petitioner to disclose the truth and his meeting with Adjutant General, Lt Gen Y.S. Tomar at Army Headquarters speaks loudly that mensrea of desertion is missing and the petitioner could not have been punished by the SGCM.

300. Apart from above the petitioner was placed on dangerously ill list. The trial took place at Niari where no neuro expert was available, hence medical examination in compliance of Regulation 462 seems to be only formal. For convenience sake, Regulation 462 of Defence Service Regulations is reproduced as under:-

> "*462. **Medical Examination before Trial**.- An accused person will be examined by a medical officer on the morning of each day that the court for his trial is ordered to sit, and an OC unit is responsible that no accused person is brought before a court-martial if in the opinion of the medical officer he is unfit to undergo his trial".*

301. It may be noted that where an accused is punished with capital punishment on a capital charge and pleads insanity he should be examined by two specialists on mental disease, one of whom should be a civilian, or an officer of the AMC in civil employment as provided in Regulation 463 of Defence Service

Regulations. In any case investigation of such cases in which insanity is raised should be carried out before the trial. Regulation 463 of Defence Service Regulations is reproduced as under:-

> *"463.* ***Examination for Insanity on Capital Charges****.- In cases where personnel are arraigned before court-martial on a capital charge and insanity is pleaded on their behalf, the accused shall be examined by two specialists on mental diseases, one of whom may be a civilian, or an officer of the AMC in civil employ. If it appears during the investigation of such cases that a defence of insanity is likely to be raised, the examination will be carried out before trial".*

302. In the present case submission of Ld. Counsel for the petitioner is that at Niari there was no specialist available with regard to mental disease from which the petitioner was suffering. This shows that on all counts the 15 Corps was interested to proceed with SGCM within its own jurisdiction without taking care of petitioner' health and mental condition. This fact is also proved.

303. Apart from above, in Special Army Order 8/S/85 it is imperative for the authorities to inform the next of kin of patient who is placed on dangerously ill list but it was not done in petitioner's case. When he was admitted in 92 Base Hospital, Srinagar, the petitioner had to file Habeas Corpus Petition in the Supreme Court. This was done inspite of the fact that Lt

Col Valdiya of 92 Base Hospital made endorsement on discharge slip not to keep the petitioner in isolation.

304. Defence set up by the petitioner is with regard to 147 gold biscuits and intention of certain officers to suppress the recovery and for that purpose assault was done on the petitioner. This could have proved only on the basis of injury report prepared in 92 Base Hospital, Srinagar. No injury report and medical treatment/prescription was produced during SGCM proceeding. Murderous assault was converted into suicidal attempt by the respondents which seems to be concocted and untrue (supra). No FIR was lodged. No injury report was produced. No weapon was produced during SGCM proceeding to establish suicidal attempt by the petitioner. From where the petitioner got the weapon is also not established. The defence set up by the petitioner of attempt to murder in the absence of any contrary evidence seems to be correct.

305. Hon'ble Supreme Court by a catena of judgments held that in the absence of recovery of weapon or doubtful recovery of weapon the accused cannot be convicted and is liable to be acquitted. Non production of weapon allegedly used for committing suicide also does not appear to be correct. Accordingly in view of settled proposition of law, the defence set by the petitioner with regard to his malicious prosecution,

punishment and suppression of fact with regard to recovery of 147 gold biscuits may be inferred to be correct. (See ***Muthu vs. State of Karnataka*** AIR (2002) SC 2902, Para 20 & 29, ***Shiv Lal & Anr vs. State of Chhattishgarh***, AIR (2012) SC 280, Paras 7,8 & 12, ***Surinder Pal Jain vs. Delhi Administration***, AIR (1993) SC 1723, Paras 25, 27, 29, 31 and 35, ***Durbal vs State of U.P.*** AIR (2011) SC 795, Para 15). According to Medical Jurisprudence by Dr. R.M. Jhala and V.B. Raju as well as Medical Jurisprudence of Modi injury caused could have been proved to be attempt to suicide only in case it has been corroborated by the weapon assigned. In the absence of corroboration by weapon the case of the respondents that the petitioner attempted to commit suicide may be held to be false and incorrect.

306. From the observations of Col K.S. Dalal and the material placed on record including seizure memo of Rs 5,100/- and statements of different witnesses it appears that the witnesses had been changing their statements from Court of Inquiry and Summary of Evidence to SGCM proceeding. Inconsistency in prosecution story is fatal and makes evidence unworthy to punish the petitioner (vide ***Bhugdomal Gangaram & Ors vs State of Gujrat***, AIR 1983 SCC 903 and ***Ram Das v. State of Maharashtra,*** AIR 1977 SC 1164). It is further held by

Supreme Court that suspicion howsoever strong cannot take place of legal proof (vide ***State of U.P. vs. Sukhbasi***, 1985 (suppl) 1 SCC 79).

307. We have referred to Army Order 37 of 1983 where a person suffering from psychiatric disease requires to be examined during Court Martial. Army Order 37 of 1983 provides that before proceeding with a Court Martial psychiatric examination shall be done and only after receipt of clearance from the Psychiatric, Court Martial proceeding may be held and the Psychiatric shall give report at the earliest. Report of the Psychiatric shall be shown to the Medical Officer and in case the Medical Officer disagrees he shall forward it to the DDMS. For convenience sake relevant portion of Army Order 37 of 1983 is reproduced as under:-

> *"1. When an accused is remanded for trial by a Court Martial, his CO will ensure that he is examined by a medical officer who will, after carrying out a thorough examination, issue the necessary certificate in the form IAFD 937. The certificate will be attached to the application for the trial to be sent to the convening officer. If the medical officer is of the opinion that the accused may be suffering from a psychiatric illness, or from mental retardation, he will inform the unit CO that the accused will require an examination by an Army Psychiatrist. The reference to the psychiatrist will be arranged through the medical officer who will forward a detailed clinical report of the history of the case, the result of the examination carried out by him and his own observations of the symptoms and behavior of the patient, under a confidential*

cover, to the Psychiatrist to whom the individual is being referred. The OC of the unit will inform the convening officer. He will also arrange to supply the following documents to the medical officer in order that they may be forwarded to the Psychiatrist without delay:-

(a) Nature of the charge (s) against the accused.
(b) A copy of the Summary of Evidence or a short statement.
(c) IAFF 3013 or information regarding the accused's previous record together with an relevant SP sheet.
(d) AFMSF-10 duly completed.
(e) Any other relevant medical documens.
(f) Any other information which may have relevance to the individual's conduct, "the alleged offence"or is suggestive of a mental illness.
(g) Address of the convening officer if a of the Psychiatrist's report is to be forwarded to him direct.

2. The CO will not wait for the psychiatrist report for applying for trial of the accused by a Court Martial (IAFD 937). He will request the psychiatrist to forward a copy of his report direct to the convening officer.

3. The psychiatrist will treat a disciplinary case as urgent and render his report to the CO in the form at Appendix to this Army Order with, if necessary, a copy to the convening officer. He will also endorse a copy of the report to the Advisor in Psychiatry.

4. The CO will show the report to the medical officer. If the medical officer disagrees with the report, the report together with medical officer's remarks, will be forwarded to DDMS of the Headquarters Command concerned for examination by the Adviser in Psychiatry".

In the present case the petitioner was examined by a doctor and not by a specialist of psychiatry. There is breach of

human right, Army Order and common medical aid required to be provided to the members of the Army during course of their service period. This shows the haste in which the SGCM proceeding was held and processed. In view of report of Army Hospital, Delhi (supra) no SGCM proceeding could have been held without following the instructions contained in Army Order 37 of 1983 (supra).

308. Apart from it, as is evident from record, CRPF constables were present. In para 29(f)(ii) it has been admitted that one section of Ex-88 Battalion CRPF was present during search and seizure operations. The case of the petitioner is that a lady constable Krishna was present with him during search and seizure operations. The respondents took a defence that such a lady constable is not available in 79 Mtn Brigade. Strangly in para 29 (f) (ii), deployment of lady constable has been said from 88 Mtn Brigade. But in para 29 (f) (xii) in the case of lady constable it has been alleged that she did not exist in 79 Mtn Brigade. Clarificatory affidavit filed by the respondents seems to be sheer lack of information and an effort to suppress the correct facts exposed on account of inadvertent mistake by the respondents while filing counter affidavit. It is true that truth persists in midst of untruth.

309. It is well settled law that when the statutute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto uncontroverted legal position that where a statutute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to that at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal postion is based on a legal maxim "*Expressio unius est exclusio alterius",* meaning thereby that if a statute provide to be done in a particular, then it has to be done in that manner and no other manner and following other course is not permissible. (vide ***Taylor v. Taylor,*** (1876) 1 Ch D 426 : 45 LJ CH 393; ***Nazir Ahmad v. King Emperor,*** AIR 1936, PC 253 : 63 Ind App 372 : 37 Cr LJ 897; ***Deep Chand v. State of Rajasthan***, AIR 1961 SC 1527 : (1962) 1 SCR 662 : 1962 (2) SCJ 655; ***Patna Improvement Trust v. Lakshmi Devi,*** AIR 1963 SC 1077 : 1965 1 SCJ 119 : 1963 BLJR 790; ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358 : 1965 (1) SCJ 184 : (1964) 4 SCR 485; ***Chettiam Veettil Ammad v. Taluk Land Board***, AIR 1979 SC 1573; 1979 Ker LT 601: (1979) 3 SCR 839; ***State of Bihar v. J.C. Saldanna,*** AIR 1980 SC 326 : 1980 Cr LJ 98 : (1980) 1 SCC 554; ***State of Mizoram v. Biakchhawana***,

(1995) 1 SCC 156 : 1995 AIR SCW 1497; ***J.N. Ganatra v. Morvi Municipality Morvi,*** AIR 1996 SC 2520 : 1996 AIR SCR 3130 : (1996) 9 SCC 495; ***Haresh Dayaram Thakur v. State of Maharashtra***, AIR 2000 SC 2281 : 2000 AIR SCW 2058 : (2000) 6 SCC 179; ***Dhananjaya Reddy v. State of Karnataka***, AIR 201 SC 1512 : 2001 AIR SCW 1217 : (2001) 4 SCC 9; ***Commissioner of Incometax v. Anjuman M. H. Ghaswala***, AIR 2001 SC 3868 : 2001 AIR SCW 4318 : (2002) 1 SCC 633; ***Prabha Shankar Dubey v. State of Madhya Pradesh***, AIR 2004 SC 486 : 2003 AIR SCW 6592 : (2004) 2 SCC 56; ***Ram Phal Kundu v. Kamal Sharma***, AIR 2004 SC 1657 : 2004 AIR SCW 1043 : (2004) 2 SCC 759; and ***Indian Bank's Association v. Dev Kala Consultancy Service***, 2004 AIR SCW 2091 : AIR 2004 SC 2615 : 2005 Tax LR 79.

In ***State of Uttar Pradesh v. Singhara Singh*** (supra) the Apex Court held as under:-

> *"8. The rule adopted in* ***Taylor v. Taylor****, (1876) 1 Ch D 426 : (1875) (1) Ch D : 45 LJ Ch 393 it is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."*

310. Apart from above while submitting statutory complaint under Section 164 of the Army Act, the petitioner had

categorically pleaded the facts as brought on record and discussed hereinabove, but the Government had rejected the complaint without adverting to the grounds taken by the petitioner by passing an unreasoned and non speaking order. Copy of the order dated 10.08.1993 has been filed by the petitioner as Annexure 28 to the petition.

311. In case the Government would have considered the grounds raised by the petitioner by applying mind the sufferrence of the petitioner would have come to an end. The Apex Court in the case of ***Krishna Swami v. Union of India***, AIR 1993 SC 1407 observed that the Rule of law requires that every action or decision of statutory or public authority must be founded on reasons stated in the order or borne out from the order. The Apex Court further observed that ***"reasons are the links between the material, the foundation for these errections and the actual conclusions. They would also administer how the mind of the maker was activated and actuated and there rational nexus and synthesis with the facts considered and the conclusions reached. Lest it may not be arbitrary, unfair and unjust, violate article 14 or unfair procedure offending article 21."*** The view taken by the Apex Court has been upheld in subsequent judgments till date.

XXXV. CONCLUSION:

312. In view of discussions made hereinabove we are of the view that prima facie the entire episode was enacted to frame the petitioner for the charges levelled against him on account of alleged recovery of 147 gold biscuits without lodging any FIR, following the procedure prescribed by law (supra), without preparing seizure memo in accordance with law and without providing medical aid and check-up required for a mentally disturbed person, a commissioned officer of the Army, viz. the petitioner, who served only for less than two years and it was never expected that he shall raise wrong allegations against his superiors with regard to recovery of 147 gold biscuits. The petitioner was tried and convicted against all canons of justice and sentenced to imprisonment which was later on reduced to period of imprisonment already undergone by Chief of the Army Staff keeping in view the material evidence on record. The Chief of the Army Staff was kept in dark and efforts were made to keep the petitioner at a reasonable distance from Army Headquarters while proceeding against him. It shows missing link in the unified command of Indian Army and requires to be filled up. Letter written by petitioner to higher authority during SGCM proceeding was not forwarded to the Adjutant General, Army Headquarters, rather it was decided by the office of GOC, Lt Gen Zaki Mohammad Ahmad at the Headquarters 15 Corps

himself which seems to be an act of serious misconduct. No action was taken in the light of Maj Gen R.S. Taragi's report who prepared it in pursuance of orders passed by Lt Gen Y.S. Tomar, Adjutant General, Army Headquarters. Cry of the petitioner to call Lt Gen Y.S. Tomar and other material witnesses was not suited to SGCM proceeding. Without reasonable thought and application of mind the report of Col K.S. Dalal who conducted Summary of Evidence and was recorded by Maj R. Khullar, the convening authority has passed the convening order to proceed with SGCM proceeding instead of regular General Court Martial proceeding. Maj R. Khullar was leader of the escort party while taking petitioner from Udhampur to Srinagar and who recorded the Summary of Evidence was made defence officer in utter disregard to settled principles of law that "*no one can be made judge to his own cause"* vide ***A.K. Kraipak vs Union of India***, 1969 (2) SCC 262 (Constitutional Bench).

313. Judge Advocate Capt Manveet Singh was replaced by Capt Javed Iqbal who belonged to Artillery without consulting Judge Advocate General's Branch in utter disregard to Army Act and Rules framed thereunder (supra). Petitioner was not permitted to produce material defence witnesses. At every stage, during pre-trial or trial, all efforts were made to persecute

the petitioner to yield to the pressure of respondents, the then officers of the Indian Army, hence inference may be drawn that intention was to suppress recovery of 147 gold biscuits.

314. On account of commission of fraud and non compliance of statutory provisions, the trial suffered from malice in law and vitiates the SGCM proceeding hence vitiate the trial and consequential punishment awarded to the petitioner.

315. Apart from above, the other conclusive findings in brevity, are as under:

(1) Brig Keshav Singh was not the competent authority under Rule 24 of the Army Rules to direct for Additional Summary of Evidence relied upon for SGCM proceeding.

(2) No reason has been assigned for Additional Summary of Evidence, seems to fill up vaccum/lacuna, which is not permissible.

(3) Statutory Complaint has been dismissed by cryptic and unreasoned order.

(4) The entire proceeding right from custody and arrest or attachment followed by Court of Inquiry and SGCM was with pre-decided mind set to give a lesson and convict the petitioner to suppress allegation with regard to recovery of 147 gold

biscuits by fudging documents. Actual accused have been let off to charge the petitioner, making them witness.

(5) Court of Inquiry as well as SGCM proceeding were farse and sham. During Court of Inquiry as well as during SGCM proceeding leading questions were asked by the Presiding Officers which is not permissible under the Evidence Act and the law on the subject. They could have asked questions only to clarify ambiguity in the statements made by the witnesses.

(6) Maj R. Khullar could not have been appointed as defence counsel keeping in view the Army Act, Rules framed thereunder and Army Regulations (supra) since he recorded statement during Summary of Evidence and at every stage he was active and took part against the petitioner. It seems he could have been appointed as Prosecuting Officer in accordance with rules (supra).

(7) The petitioner was not provided assistance of defence counsel arbitrarily.

(8) Hasty SGCM proceeding was held at distant place at Niari in violation of medical opinion. It suffers

from vice of arbitrariness hence the trial vitiates with consequent punishment.

(9) Replacing Capt Manveet Singh, Judge Advocate by Capt Javed Iqbal to work as Judge Advocate during SGCM proceeding was done on unfounded grounds and for extraneous reasons in violation of statutory provisions (supra) and Apex Court judgment in the case of ***Union of India vs. Charanjit S. Gill*** (supra). Hence whole trial vitiates because of non compliance of statutory provision.

(10) Custody and detention of petitioner at different stages, sometimes without passing any order and later on in pursuance to order at the dictate of GOC, 15 Corps, Lt Gen Zaki Mohammad Ahmad violative of Rule 27 of Army Rules seems to suffer from vice of arbitrariness and for unforeseen reasons to keep the petitioner within their own jurisdiction at 15 Corps during trial, smells foul play.

(11) Respondents had not taken care to consider report of Summary of Evidence submitted by Col K.S. Dalal whereby finding has been recorded with regard to fabrication of record, but proceded without taking care of such finding while convening SGCM.

Summary of Evidence was held in contravention of recommendation of Brig Vasudeva.

(12) One unfortunate fact in the present case is that GOC, 15 Corps Lt Gen Zaki Mohammad Ahmad had not taken into confidence his own GOC-in-C, Adjutant General of the Army or Chief of the Army Staff as is evident from the material on record, more so when there was attempt on the life of a commissioned officer who was likely to be punished with life imprisonment and death.

(13) SGCM under Section 112 of Army Act, meant for speedy trial of offence in the event of urgency, was not existing in present case.

(14) Prima facie Lt Gen Zaki Mohammad Ahmad and Col K.R.S. Panwar and others involved tried to build up a false case against the petitioner to suppress recovery of 147 gold biscuits.

(15) At no stage of arrest, detention and trial petitioner has been dealt with fairly, rather badly humialiated and persecuted.

316. The present petition could have been decided in 50 and odd pages but keeping in view the fact that credibility of the system of the country is in crises, we thought it appropriate to

reproduce and place on record, as far as possible, all relevant materials since mere reference may not suffice in the present scenario of the country.

XXXVI. WORDS OF CAUTION:

317. **Sun Tzu**, a great Chinese General in his most celebrated Treatise “ART OF WAR” has given seven comparative points to forecast the victory or defeat of an Army.

“1. Which sovereign possesses greater moral influence?

2. Which commander is more capable?

3. Which side holds more favourable conditions in weather and terrain?

4. On which side are decrees better implemented?

5. Which side is superior in arms?

6. On which side are officers and men better trained?

7. Which side is stricter and more impartial in meting out rewards and punishments?”

Sun Tzu further said- “You will not succeed unless your men have tenacity and unity of purpose, and, above all, a spirit of sympathetic cooperation. This is the lesson which can be learned from the Shuai-jan.”

Mau Tse-tung once said “In actual life we cannot ask for an invincible general; there have been few such Generals since ancient times. We ask for a General who is both brave and

wise; who usually wins battles in the course of war-a General who combines wisdom with courage."

Napoleon in his maxims said, "It is exceptional and difficult to find in one man all the qualities necessary for a great General. That which is most desirable, and which instantly sets a man apart, is that his intelligence or talent are balanced by his character or courage. If his courage is the greater, the General heedlessly undertakes things beyond his ability. If, on the contrary, his character or courage is less than his intelligence, he does not dare carry out his plans.

318. In the Indian context, **Kautilya** in his Economics, laid down the qualities for the Chief Commander of Infantry (Army) as under:

> "(i) the (relative) strengths and weaknesses of the standing army, the territorial army, organised militias, friendly troops, alien troops and tribal forces;
>
> (ii) the tactics to be used for fighting-in valleys or on high ground, or open and covert attacks, trench fighting or fighting from above and by day or night:
>
> (iii) how to keep control over the fitness or otherwise of troops in battle and in peacetime."

319. The qualities of a General or Commander of an Army depends upon variety of factors (supra) and a successful Army is one which possesses entire cohesive mechanism and regular preparation during peace and during war, efficient quick reaction team, plan and policy. The initial success of Germany during World War II according to **J.F.C Fuller** in his book, **"THE SECOND WORLD WAR"** was based on variety of factors like War and Policy, Strategy of Annihilation, Tactics of Velocity, Integration of Means, Demoralization of Enemies Command, Preparation of Means, Will to Win.

320. History shows that success or failure of an Army depends upon, how the member of its Armed Forces are treated by its commanders and prepared for war during peace time. Effective Professional Military leadership requires that certain standards of officer behaviour be met. Officers' attitudes, actions, and abilities contribute to the formation of unit integrity. At a very minimum, these standards do not permit soldiers to be used in pursuit of an officer's career. More importantly, the performance of Military forces should be comparable in specific terms, decree of unit cohesion, discipline and quality of leadership. The American forces were compelled to withdraw from Vietnam because of loss of leadership and cohesive forward action by their forces. In his Book **"CRISIS IN**

COMMAND", (Mismanagement in the Army), by **Richard A. Gabriel and Paul L. Savage** made certain observations which will be worthwhile to be reproduced":

> *"Another major concern is the radical inflation of officer strengths. The percentage of Army officers to troops during World War II and Korea was 7 and 9 percent respectively, by the end of the Vietnam War officers constituted approximately 15 percent of total strength. There is evidence that the swelling of the officer corps corresponded with a decline in quality. The destruction of primary military groups appears to be a critical factor of disintegration within armies. Military units whose essential task is combat resist disintegration principally because of the integrity of the primary military unit-the squad, platoon, or company. The American Army since World War II has experienced a progressive reduction of primary-group cohesion until the Vietnam War, when, it may be argued, it almost ceased to exist at all. There were, no doubt, several factors contributing to this condition, but the proximate cause of primary –group destruction appears to have been the rotation system. Two interrelated hypothesis may be suggested:*
>
> 1. *The U.S Army underwent a progressive disintegration and finally an accelerating one in the years 1961-71. To a significant degree, the disintegrative process operated independently of socio-political factors in the larger American society.*
> 2. *The disintegration of the Army, together with the dissolution of its primary-group cohesion, is directly related to the loss of officer professionalism expressed in the increasingly pervasive phenomenon of "managerial careerism."*

321. The Author deals with different facets of crises in Command of an Army (supra) and the present case is one of

such glaring example showing the shabby treatment to a young officer by own commanders for extraneous reasons seemingly because of gap of loss of communication between the Field Commander and Army Headquarters and effective mechanism over the hierarchy of command and control system of the Indian Army.

322. Though fool-proof mechanism exists in the Army like Army Act, Army Regulations, Army Order, and Circulars issued from time to time, to deal with all situations but at the same time, it shall be appropriate that the Chief of the Army Staff constitutes a high level Committee to lay down some guidelines to stem the rot and put stop to recurrence of such incident so that every Indian Citizen who joins the Indian Army have the assurance of dignified treatment and justice in accordance with law. It appears that on one or other count, things have been happening, may be on smaller scale, disenchanting the young generation to join the Armed Forces resulting in shortage of about 12,000 officers in the Indian Army. Some of the suggestions are being shortlisted for consideration of the Chief of Army Staff:-

(1) Every action or proceeding initiated against an officer should be in the knowledge of Army

Headquarters whether it is detention, custody, arrest or trial.

(2) Every letter or Application submitted through proper channel raising certain complaints to the higher authority must be forwarded to that authority by the subordinate authority with their own comment expeditiously within reasonable period or immediately, failure be treated as misconduct.

(3) Whatever proceeding is held against an officer in the form of Court of Inquiry or Summary of Evidence or alike proceedings must be communicated to higher forum and where a commissioned officer is involved or injured it should be brought to the knowledge of Army Headquarters/Chief of the Army Staff and family of the charged officer.

(4) Army Rules, Regulations and Circulars must be strictly complied with and services of legally skilled persons be provided to the officers and jawans who are tried by Court Martial and where a major penalty like dismissal or sentence of jail may be awarded, liberty must be given to engage skilled lawyer and in the event of incapacity, Army should provide competent lawyer to defend the case of Armed Forces personnel.

(5) Non compliance of Army Orders, Rules and Regulations etc. be treated as misconduct.

323. We hope and trust that present case shall be looked into by High Level Committee of Indian Army to chalk out future

plan to check recurrence of such incident and guilty persons who spoil the career and life of Commissioned Officers i.e. the petitioner shall be punished in accordance with law expeditiously, say within a year.

324. The present case seems to be 'honour killing of the career and ambition of a young commissioned officer', who has served less than two years in the Indian Army. The career of the petitioner was 'nipped in the bud' which seems to suppress recovery of 147 gold biscuits. Role of Lt Gen Zaki Mohammad Ahmad, GOC 15 Corps and Col K.R.S. Panwar and associates seems to be not upto mark and suffers from extraneous considerations. The honour for which a person joins Army is 'not money but to serve the nation with honour'. Last ambition of Armed Forces personnel is reflected from the couplet from a book '*मैं सारा हिंदुस्तान हूँ* ' written by serving Colonel of the Indian Army, Col Jeevan Kumar Singh, to quote:

"अंतिम अभिलाषा

बिखरी तारीखों के बीच कुछ लौह पल जीकर
एक सच्चे साधारण सैनिक की यही कामना है
ईश्वर से यही प्रार्थना है
हे भगवान मेरे शरीर को मरणोपरांत
ऐसे लगाना
तिरंगा बनाने वाले बुनकर के चूल्हे में ईधन बनाना
जिससे

जब जब वह कपड़े पर तिरंगे की छाप लगाए
अपने पसीने की भाप लगाए
मैं उसके पसीने के साथ
लहराता रहूँ
सदियों तक सरजमी पर फहराता रहूँ
देश भक्ति गीत गाता रहूँ
देश भक्ति गीत गाता रहूँ
देश भक्ति गीत गाता रहूँ"

XXXVII. <u>COST</u>:

325. Keeping in view the finding of fraud and trial by a farce SGCM proceeding and mental pain, 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***.

326. 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".*

327. 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".*

328. 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".*

329. 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.

330. 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.

331. 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.

332. In view of above we feel it appropriate to impose exemplary cost of Rs Five Crores, out of which Rs Four Crores shall be paid to the petitioner as compensatory cost and Rs One Crore shall be remitted to the Army Central Welfare Fund in the light of Apex Court decision in the case of ***Centre for Public Interest Litigation and others v. Union of India and others*** (supra). We hope and trust that the career and life of young commissioned officers shall not be spoiled in future and the Indian Army shall take appropriate measures by framing Rules and Regulations to check recurrence of such menace.

333. 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."*

334. 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.

335. Further it has not been disputed that upto the rank of Lieutenant Colonel time scale promotions are being granted keeping in view the seniority and length of satisfactory service. Hence it shall be appropriate that the petitioner be promoted to the rank of Lieutenant Colonel notionally with all service benefits, revision of pay scales and pension.

During attempt to murder the petitioner has not only paid "a pound of flesh" but his prime time of life and career to satisfy "Merchant of Venice, Shylock".

In the present case money shall not compensate the petitioner from the loss which he has suffered. Loss of honour, pride and opportunity to serve the country cannot be equated with monetary compensation but there may be some satisfaction to the petitioner and the credibility of administration

of justice shall strengthen in case guilty are punished. It is rightly said by Manu, to quote :

ªìÓ¾ãñ¾ãì: ÔãÌãÃÌã¥ããÃÏÞã
ãä¼ã²ãñÀ¶ÔãÌãÃÔãñ¦ãÌã:
ÔãÌãÃÊããñ‡ãŠ¹Çã‡ãŠãñ¹ãÏÞã ¼ãÌãñªáª¥¡Ô¾ã
ãäÌã¼Çã½ãã¦ãá

If the King fails in his duty to use the power of the State to punish the guilty, individuals with evil propensities would cross all barriers of law and cause injury to others and as a result, the people at large would suffer.

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But in a place where the punishment is imposed on the sinners, the people will have peace and happiness.

336. It is said that “Truth persists in the midst of Untruth”, “Light persists in the midst of darkness”, and “Life persists in the midst of death”. In the present case inspite of all odds and events and efforts to suppress alleged recovery of 147 gold biscuits, we appreciate the zeal of Col K.S. Dalal, the then Commanding Officer 4 Rajputana Rifles and Capt Manveet Singh, Judge Advocate who seem to be torch bearers of leadership, quality and firmness to do their duty fairly and honestly. They are the real heroes of Indian Army because of

whom reputation of Indian Army is appreciated all over the world, entitled for commendation.

337. It must be kept in mind that in view of the nature of duties the Army discharges and the history of the armies of the world in democratic polity, the executive is not supposed to interfere with day to day function of the Army. Persons at the helm of Army affairs must shun their colonial mind set and build an 'in camera' mechanism so that recurrence of such episode, like the present one, may not take place in future affecting reputation and glorious history of Indian Armed Forces.

XXXVIII. ORDER:

338. In view of above the T.A. deserves to be allowed, hence **allowed** and the impugned order with regard to Court Martial proceeding and conviction inflicted thereon dated 7th August 1991 approved by General Officer Commanding-in-Chief vide order dated 4th November 1991 are quashed with all consequential benefits with following directions:-

(i) The petitioner shall be deemed to be restored in service and be provided promotional avenues upto the stage of Lieutenant Colonel for the purpose of arrears of salary, pensionary benefits and rank.

(ii) Chief of the Army Staff shall constitute a committee to look into the matter and issue appropriate Order or Circular to check recurrence of

such episode with regard to commissioned and non commissioned officers of the Indian Army keeping in view the observations made in the body of the present order/judgment.

(iii) Cost is quatified to Rs Five Crores, out of which Rs Four Crores shall be paid as compensatory cost to the petitioner and Rs One Crore shall be remitted to Army Central Welfare Fund within a period of four months.

(iv) On the basis of letter submitted by petitioner's father and with liberty to the petitioner to move fresh appropriate application to the Superintendent of Police/Senior Superintendent of Police, Srinagar (J&K) and Chief of the Army Staff, let an FIR be lodged and inquiry be held by an independent agency of the Government or a Committee of the Army with regard to assault on the petitioner by AK-47 on 11.04.1991.

(v) It shall be open to the petitioner to move appropriate application to the Superintendent of Police/Senior Superintendent of Police, Srinagar (J&K) who shall ensure that FIR is lodged at Police

Station Batmaloo, Srinagar, (J&K) and forward a copy thereof to Chief of the Army Staff.

(vi) The Defence Ministry/Chief of the Army Staff are directed to hold appropriate inquiry keeping in view the observations made in the body of this order with rerspect to alleged recovery of gold biscuits and other facets of issues as observed hereinbefore.

(vii) Chief of the Army Staff shall look into the matter and ensure that appropriate action is taken against the persons who had been instrumental in persecuting and prosecuting the petitioner keeping in view the observations made in the body of the order/judgment expeditiously, say, in four months. The authorities shall not be influenced by observations made in the body of order but will proceed on the basis of evidence and material brought on record during inquiry/trial and in accordance to law.

339. Copy of the present order shall be sent by the Registry immediately, say, within three days to the Secretary, Ministry of Defence and Chief of the Army Staff for appropriate action. OIC Legal Cell shall also communicate the order forthwith.

340. T.A. **allowed** accordingly.

(Air Marshal Anil Chopra)
Member (A)

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

anb/rathore

Dated: 19 Jan 2017