

Court No.1**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW****TRANSFERRED APPLICATION No. 48 of 2011**Thursday, this the 06th day of July 2017**Hon'ble Mr. Justice D.P. Singh, Member (J)****Hon'ble Air Marshal Anil Chopra, Member (A)**Ex Maj Taj Mohd Sheikh s/o PM Sheikh, r/o House No
592K/50 Subhani Kheda, Telibagh, PS: Cantt, Distt:Lucknow.**....Petitioner**Ld. Counsel for the : **Shri R. Chandra, Advocate**
Petitioner

Verses

1. Union of India through its Secretary, Ministry of Defence,
South Block, New Delhi.
2. Chief of Army Staff, Army Headquarters, New Delhi.
3. General Officer, Command-in-Chief, Headquarters
Central Command, New Delhi.

...RespondentsLd. Counsel for the : **Shri Ashish Agnihotri,**
Respondents Central Govt Standing Counsel.OIC Legal Cell : **Maj Soma John, OIC Legal Cell.**

ORDER (Oral)

1. The petitioner being aggrieved with the order of cashiering and six months' rigorous imprisonment in pursuance to General Court Martial (GCM) proceeding preferred Writ Petition No 1036 (MB) of 1998 in the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow. Upon constitution of the Tribunal, the said petition has been transferred to this Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007 and re-numbered as T.A. No. 48 of 2011.

2. We have heard Shri R.Chandra, Ld. Counsel for the petitioner and Shri Ashish Agnihotri, Ld. Counsel for the respondents assisted by Maj Soma John, OIC Legal Cell and perused the records.

3. Briefly stated, the facts of the case are that the petitioner joined the Indian Army as soldier on 27.11.1970. He was commissioned in the Indian Army on 03.08.1980 directly through competition and joined on the post of 2 Lt. On 06.04.1993 the petitioner was transferred to AMC Centre and School, Lucknow as Company Instructor and later on 03.08.1993 he was promoted to the rank of Maj. In August 1993 the petitioner was posted as Quarter Master and Instructor in Officers Training School, Lucknow which is part of AMC Centre and School. On 25.11.1994 the petitioner was taken into military custody and placed in close arrest for alleged offence under Section 64 (e) of

the Army Act, 1950 i.e. charge relating to accepting illegal gratification as a motive for procuring enrolment of a person namely, V. Ramadu s/o L/Nk Y. Khadaraiah. After Court of Inquiry and Summary of Evidence, GCM was convened which assembled on 28.02.1995 for trial of petitioner for the said charge. Charges levelled against the petitioner as contained in **Annexure-I** to the Writ Petition are reproduced as under:-

“The accused, NTE-16480 Y Major Sheikh, Tal Mohammad of Occieru’ Training School, AMC, Centre and School, Lucknow, an officer holding permanent Commission in the Regular Army is charged with”

*Army Act
Section 64 (e)*

**ACCEPTING FOR HIMSELF A
GRATIFICATION AS A MOTIVE
FOR PROCURING THE
ENROLMENT OF A PERSON**
In that he,

*at Lucknow, on 25 Nov, 94,
while working as Quartermaster in
Officers Training School, AMC
Centre and School, accepted for
himself Rs. 10,000/- (Rupees ten
thousand only) from No. 13853269
Ex-L/NK Y Khadaraiah a
gratification as a motive for
procuring enrolment of his son Shri
V Ramudu of Village & Post –
Giddalur, District – Prakasam (AP)
in the Regular Army.*

*Place: Lucknow
Date : 19 Jan 95*

*Sd/ x x x x
SR BHATTACHARYA
Maj Gen
Dy. Commandant,
AMC Centre and School”*

4. It may be pointed out that during Summary of Evidence the main evidence recorded against the petitioner was that he asked for bribe of Rs 10,000/- for enrolment of son of L/Nk Khadaraiah. It was further found by Court of Inquiry that the amount of Rs 10,000/- was recovered from the petitioner by Lt Col Ashok Kumar. Search and Seizure memo was prepared, copy of which

is Exhibit-Y on record of the GCM. For convenience sake, Exhibit-Y is reproduced as under:-

“Rs 10,000/- currency notes of Rs. 100/- denomination recovered from Bunglow No. 18/5 B, Kasturba Rd of Maj TM. Seikh. The currency notes have been initialed at random.

0630 hr
25 Nov 94

Sd/ x x x x
Lt Col Ashok Kumar”

5. In Exhibit-Z on the record of the GCM, list of currency notes of Rs Hundred Denomination with initials recovered from Qr. No. 18/5 B Kasturba Marg of Maj T.M.Sheikh (AMC) on 25 Nov 94 at 0625 hrs has been mentioned. For convenience sake, the same is reproduced as under:

“CURRENCY NOTIES OF Rs HUNDRED DONOMIATION NOTES WITH INITIALS RECOVERED FROM Qr. No.. 18/5 B KASTURBA MARG OF MAJ TM SHEIKH (AMC) on 25 NOV 94 at 0625 h.”

8 BD - 0195586	9KP -	003385
7 BD - 378075	8EQ -	342905
JP - 52515	9AT -	548660
6 RT - 212788	8CC -	525092
0IT - 201889	9CC -	452804
7 AV - 364303	DEA -	028091
0FL - 140985	JSA -	050067
3QM - 253141	9SB -	621289
9 DU - 912282	AF/63 -	165304
2 FC - 186166	0PQ -	592086
4 PE - 396896	JKN -	050058
7 EC - 522987		
5 AG - 850018		
2CP - 470796		
OMF - 812676		
9MM - 909332		
0EA - 442700	Sd/- x x x	
3SS - 573416	(Lt Col Ashok Kumar)	
6 HA - 682593		
6GB - 425071		
9UE - 882830		
7FR - 470803		
6EM - 108981		

(Sd/- x x x
(N.K. Gupta)
Lt Col
Recording Officer”

6. A plain reading of the seizure memo indicates that it contains signatures of Lt Col Ashok Kumar who appeared during course of Court Martial as PW-3. During the proceedings Lt Col Ashok Kumar stated that he had recovered an amount of Rs 10,000/- from the petitioner which was being paid to him by L/Nk Y. Khadaraiah for recruitment and enrolment of his son V. Ramadu. One another witness PW-2 Hav James Joseph also stated that he accompanied Lt Col Ashok Kumar at the time of search and seizure and witnessed recovery of Rs 10,000/-. However the seizure memo does not contain signatures of PW-2 Hav James Joseph. The foundation of the entire allegation against the petitioner is based on complaint of L/Nk Y. Khadaraiah and search and seizure memo.

7. It has not been disputed by Ld. Counsel for the respondents that complainant L/Nk Y. Khadaraiah was also not produced during the course of trial before the Summary of Evidence or the GCM. It is also not disputed the son of L/Nk Y. Khadaraiah was not called upon and appeared as witness to establish that the amount in question was demanded by the petitioner. Further admitted fact on record is that the search and seizure memo (supra) contained only the signature of Lt Col Ashok Kumar. Even Hav James Joseph has not signed the search and seizure memo.

8. It may be further pointed out that there is no written complaint by L/Nk Y. Khadaraiah. However, according to Ld. Counsel for the respondents the Military Intelligence was making

surveillance and when the amount was being demanded by the petitioner he was caught by the Military Intelligence personnel. But the fact remains that the person from whom the amount was demanded or the person who was likely to be recruited and enrolled were not produced as witnesses either during the Summary of Evidence or GCM proceedings.

9. Ld. Counsel for the petitioner has relied upon the case of **Govindaraju @ Govinda vs. State by Sri Ramapuram Police Station and Anr**, reported in (2012) 4 SCC 722, and one another case of **Harivardhan Babubhai Patel vs. State of Gujrat**, (2013) 7 SCC 45.

10. In response to arguments advanced by Ld. Counsel for the petitioner it has been submitted by the respondents that notices were sent to L/Nk Y. Khadaraiah to appear as witness but he did not turn up. However, no explanation has been given by the respondents as to why no other person has signed the search and seizure memo except Lt Col Ashok Kumar who admittedly is an Army officer and shall be interested to prosecute the petitioner on alleged charge of recovery of amount of Rs 10,000/-. No Explanation has been given by the respondents that though demand was made for Rs 10,000/- and recovery was also made of Rs 10,000/- but as per the seizure memo how only Rs 3,400/- (Rs. thirty four thousand) were initialled . It has been submitted by Ld. Counsel for the respondents that at no stage the petitioner has challenged recovery of Rs 10,000/-

except difference of amount alleged to be recovered and entered in the recovery memo.

11. It is vehemently argued by Ld. Counsel for the respondents that the Army Act is a special act and the provisions contained in Code of Criminal Procedure cannot apply in matters relating to persons subject to Army Act. Further submission of respondents counsel is that the difference in the amount alleged to have been recovered and the entry made in the seizure memo is not material for the purpose of conviction of the petitioner. It is also submitted that L/Nk Y. Khadaraiah was hands in globe with the petitioner to collect money and give it to the petitioner by demanding bribe.

12. We have considered the rival submission of the Ld. Counsel for the parties. No explanation has been given by the respondents that how the numbers of currency notes were not tallying with the number of currency notes entered in the seizure memo and actual currency notes produced during course of trial.

13. Coming to first limb of arguments with regard to non production of L/Nk Y. Khadaraiah who seems to be the complainant with regard to present controversy, it is vehemently argued by Ld. Counsel for the respondents assisted by OIC Legal Cell that notices were sent to L/Nk Y. Khadaraiah who did not turn up. Further submission of respondents counsel is that since L/Nk Y. Khadaraiah himself was having connection with the petitioner in collection and sharing of bribe, as such, his absence does not make any difference and affect the trial and

finding recorded against the petitioner. Arguments advanced by Ld. Counsel for the respondents seems to be misconceived for the reason that no effort has been made and attention of the Tribunal has been invited to any proceeding or decision or material which may indicate that same charges were framed against L/Nk Y. Khadaraiah in connection with racket of fraudulent enrolment at the Centre at Lucknow. In the absence of any such material on record the case set up by the respondents seems to be an afterthought. Respondents should have prosecuted L/Nk Y. Khadaraiah in case he had any connection with crime in question.

14. Apart from above L/Nk Y. Khadaraiah and his son V Ramadu both seem to be material witnesses. Amount of Rs 10,000/- was paid by L/Nk Y. Khadaraiah for the recruit and enrolment of his son. No written complaint has been made by L/Nk Y. Khadaraiah nor attention of the Tribunal has been invited to any written note on record which may indicate that L/Nk Y. Khadaraiah has submitted complaint in writing. Thus, the foundation of offence based on oral statement given by L/Nk Y. Khadaraiah to the Army authorities on the basis of which the Army Intelligence trapped the petitioner, demolishes. In such situation L/Nk Y. Khadaraiah and his son were material witnesses and their non production during course of Summary of Evidence and GCM trial is fatal and vitiates the findings against the petitioner.

15. Ld. Counsel for the petitioner invited attention to the case of **Govindaraju @ Govinda** (supra) which seems to squarely cover the present controversy. For convenience sake para 51 and 52 of the case of **Govindaraju @ Govinda** (supra) is reproduced as under:-

“51. Now, we will come to the recoveries which are stated to have been made in the present case, particularly the weapon of crime. Firstly, these recoveries were made not in conformity with the provisions of section 27 of the Evidence Act, 1872. The memos do not wear the signatures of the accused upon their disclosure statements. First of all, this is a defect in the recovery of weapons and secondly, all the recovery witnesses have turned hostile, thus creating the serious doubt to the said recovery. According to PW 4 and PW 5, nothing was recovered from the appellant Govindaraju. According to PW 6 and PW 8 nothing was recovered from or at the behest of the accused Goverdhan.

52. Ext. MO 1 was the knife recovered from Govindaraju while MO 2 and MO 3 were the knife and the bloodstained shirt recovered from the accused Govardhan. Ext MO 1, the weapon of offence, did not contain any bloodstain. Ext MO 2, the knife that was recovered from the conservancy at the behest of the accused Goverdhan was bloodstained. However, the prosecution has taken no steps to prove whether it was human blood, and if so, then was it of the same blood group as the deceased or not. Certainly, we should not be understood to have stated that a police officer by himself cannot prove a recovery, which he has affected during the course of investigation and in accordance with law. However, it is to be noted that in such cases, the statement of the investigating officer has to be relied and so trustworthy that even if the attesting witnesses to the seizure turn hostile, the same can still be relied upon, more so, when it is otherwise corroborated by the prosecution evidence, which is certainly not there in the present case.”

16. The second limb of arguments advanced by Ld. Counsel for the petitioner and contested by Ld. Counsel for the respondents relates to the recovery memo. The submission is that the recovery memo does not contain the signatures of any other person except Lt. Col. Ashok Kumar. Lt. Col. Ashok Kumar

was holding the rank and post of Director, Resettlement, Central Zone, Lucknow. At the time of alleged recovery along with Lt Col Ashok Kumar one another officer PW-8 viz. Col GS Mann who was holding the rank and post of Commanding Officer Central Command Liaison Unit i.e. the Intelligence Unit of the Army was present. Since he was on duty to recover the alleged amount of bribery he seems to be interested witness. He will always try to defend his action with regard to recovery of amount in question from the petitioner. In such situation absence of any other independent witness during course of trial and proceeding makes the search memo untrustworthy and unbelievable, that too when there is no recovery witness. In view of provisions contained in Section 27 of the Evidence Act, it was incumbent on the respondents while preparing search and seizure memo to call independent witness to witness the recovery of amount in question from the petitioner. Reliance placed by the petitioner on the case of **Harivadan Babubhai Patel** (supra) seems to be correct wherein their Lordship of the Supreme Court declined to accept the confessional statement which was not supported by *panch* witnesses as well as *panchnama*. It is held that recovery or discovery of seized articles cannot be relied upon against a person in case it is not supported by independent witness. For convenience sake para 16 of the case of **Harivadan Babubhai Patel** (supra) is reproduced as under:-

“16. The next limb of attach relates to the confessions made by the accused person and issue of leading to discovery of articles. It is submitted that the confession part is absolutely inadmissible and that apart, when the panch witnesses had not supported

the panchnama, the recovery or discovery of the seized articles cannot be utilized against the appellant. There can be no shadow of doubt that the confession part is inadmissible in evidence. It is also not in dispute that the panch witnesses have turned hostile. But the fact remains that the place from where the dead body of the deceased and other items were recovered was within the special knowledge of the appellant.”

17. In another case reported in **State of Maharashtra vs. Damu**, (2000) 6 SCC 269, their Lordships of the Supreme Court held that recovery of object is not discovery of a fact as envisaged in Section 27 of the Evidence Act. Their Lordships have relied upon an earlier Privy Council decision reported in **Pulukuri Kotayya vs King Emperor**, (1946-47) 74 IA 65 : AIR 1947 PC 67 wherein it has been held that ‘fact discovered’ envisaged in the Section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. The same principal has been reiterated in a number of cases. Thus in the present case recovery memo itself treating it as discovery of fact relating to the question of bribery cannot be accepted unless it is proved by cogent and trustworthy evidence.

18. Apart from above there is one more reason why the search and seizure memo seems not to inspire confidence. The amount alleged to be recovered was Rs 10,000/-. At the time when it was produced before the Court Martial it was counted to be Rs 3,400/- in Indian currency. That apart the number of notes mentioned in the search and seizure memo is different than what has been placed before the Court Martial. This difference and reduction in amount of recovery shatters the prosecution case.

19. In view of the above, it may be noted that the General officer Commanding-in-Chief himself had made serious observation when the matter was placed before him as is evident from **Annexure-5** placed on record. It was in pursuance of remark of GOC-in-C that fresh trial was held but it would not create any difference so far allegation with regard to alleged recovery of amount in question is concerned.

20. In the present case by not producing the material witnesses coupled with the shaky recovery memo not signed by independent witnesses, difference in numbers of currency notes alleged to be recovered and produced before the GCM, reduction of amount of Rs 10,000/- to Rs 3,400/- at the time of production before the GCM shakes the very foundation of the charges against the petitioner and once the foundation of the building is shaken, then the whole building collapses. All allegations for which the petitioner has been charged seems to be not established. The prosecution has failed to establish its case beyond all reasonable doubt, rather even to the extent of fraction of that charges, for reasons discussed hereinabove, are not proved.

21. In view of our foregoing discussions the T.A. deserves to be allowed.

22. T.A. is accordingly **allowed**. Impugned order dated 18.07.1995 (Annexure-5 to the petition), order dated 20.07.1995 (Annexure-6 to the petition and order dated 24.06.1997 (Annexure-8 to the petition) are set aside with all consequential

benefits. The petitioner shall be restored in service on the rank which he was holding at the time of cashiering, in case some service is left to his credit otherwise he shall be deemed to be in service and notionally retired on completing service for rank and for the purpose of payment of arrears of salary and pensionary benefits. Let consequential benefits be paid to the petitioner expeditiously, say, within four months from today. Apart from the petitioner, respondents shall communicate this order forthwith to the authorities concerned.

No order as to costs.

A certified copy of this order shall be supplied to Ld. Counsel for the parties on payment of usual charges within a week.

(Air Marshal Anil Chopra) (Justice Devi Prasad Singh)
Member (A) Member (J)

Dated: 06 July, 2017

Maj Soma John, OIC Legal Cell prays for grant of leave to appeal under Section 31 of the Armed Forces Tribunal Act, 2007 without pointing out questions of public importance. In such situation, no case is made out to grant leave to appeal.

Prayer is rejected.

(Air Marshal Anil Chopra) (Justice Devi Prasad Singh)
Member (A) Member (J)

Dated: 06 July, 2017

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