

**RESERVED**  
**COURT NO. 1**

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

**T.A. No. 69 of 2013**

Tuesday, this the 17<sup>th</sup> day of April, 2018

**Hon'ble Mr. Justice S.V.S. Rathore, Member (J)**  
**Hon'ble Air Marshal BBP Sinha, Member (A)**

Smt. Omi Devi, wife of late Col Dayanand, **IC 19073F**, College of Material Management Jabalpur, attached to Headquarters 32 Infantry Brigade, Meerut.

..... Petitioner

Learned counsel for the petitioner: **Col (Retd) Rakesh Johri, Adv**

Versus

1. Union of India through the Chief of Army Staff, Army Headquarters, New Delhi.
2. General Officer Commanding, 11 Corps C/o 56 APO located at Jullandhar.
3. General Officer Commanding, 9 Infantry Division, C/o 56 APO located at Meerut.

..... Respondents

Ld. Counsel for the respondents: **Shri R.K.S. Chauhan, CGSC**  
assisted by **Maj Salen Xaxa**  
OIC Legal Cell.

**ORDER**

**Per Justice SVS Rathore, Member (J)**

1. Writ Petition No. 12021 of 1996 was filed by late Col Dayanand before the Hon'ble Allahabad High Court. Vide order dated

09.07.2013, this petition was transferred to this Tribunal and was registered as T.A.No. 69 of 2013.

2. During pendency of the instant TA, Col Dayanand, hereinafter referred to as the petitioner, expired and his wife Smt. Omi Devi has been substituted in his place vide order dated 27.02.2017.

3. We have heard learned counsel for the petitioner Col Rakesh Johri (Retd) and Shri R.K.S. Chauhan, learned counsel for the respondents, assisted by Maj Salen Xaxa, OIC Legal Cell and perused the records.

4. By means of this petition, the petitioner has made the following prayers:

*“(i) To issue a writ of certiorari order or direction in the nature of certiorari quashing the entire proceedings of the General Court Martial in pursuance of the revision order dated 14.03.1996 passed by the General Officer Commanding, 9 Infantry Division.*

*(ii) To issue a writ of certiorari, order or direction in the nature of certiorari quashing the orders dated 18.01.1996 (Annexure-‘VI’) and order dated 18.03.1996 (Annexure-‘VIII’).*

*(iii) To issue a writ of mandamus order or direction in the nature of mandamus directing the respondents to release the petitioner from military custody.*

*(iv) To issue a writ of mandamus, order or direction in the nature of mandamus directing the respondents to pay the gratuity, other amounts, pension and pensionary benefits to the petitioner.*

*(v) To issue such writ order or direction as this Hon’ble Court may deem fit and proper in the circumstances of the case.*

*(vi) Award the costs of the writ petition throughout in favour of the petitioner.”*

5. In brief, the facts giving rise to the instant TA, may be summed up as under:

The petitioner had joined as Commissioned Officer in the Army on 16.12.1967 as 2<sup>nd</sup> Lieutenant and thereafter he earned promotions and ultimately became Colonel. Lastly, he was posted at College of Materials Management, Jabalpur. By the time the petitioner was punished by GCM, he had put in 28 years of service as Commissioned Officer besides 06 years as non-commissioned officer (as Signaller). During the tenure of 34 years of service as aforesaid, the petitioner had an unblemished service record. A Court of Inquiry (Col) was convened against him by the Headquarters of 9 Infantry Division on 15.01.1994. However, the said convening order was changed and a new convening order dated 04.03.1994 was issued. The Col against the petitioner was held for certain charges which pertained to certain procedural irregularities in purchases while the petitioner was functioning as Commanding Officer, 9 Infantry Division Ordnance Unit, Meerut during the period January 1992 to January 1993. However, Additional Col was held against the petitioner from 02.08.1994 to 02.09.1994 and thereafter Summary of Evidence (SoE) was recorded from 25.04.1995, which concluded on 02.06.1995. Based on the Col and SoE and also on the advice of the Judge Advocate General's Branch of Headquarters Western Command, the petitioner was summoned for trial by General Court Martial (GCM) and a notice for GCM dated 25.08.1995 was served on the petitioner levelling 04 charges against him. The date for



*In that he,*

*at Meerut, on 16 February 93, as Officer Commanding 9 Infantry Division Ordnance Unit, with intent to defraud, scored out the quantity rejected by the Board of Officers for inspection of store purchased, on the inspection note and entered it as "Quantity accepted" and as per details given below:-*

<i>Inspection Note No &amp; Date</i>	<i>Item</i>	<i>Total Value</i>
<i>(a) 791 16 Feb 93</i>	<i>Canopy Body 4 Tons Qty-05</i>	<i>Rs 14225.00</i>
<i>(b) 796 16 Feb 93</i>	<i>Canopy Body NSN 1 Ton Qty-05</i>	<i>Rs 7300.00</i>
<i>(c) 801 16 Feb 93</i>	<i>Cover Water Proof Qty-03</i>	<i>Rs 6795.00</i>
<i>(d) 803 16 Feb 93</i>	<i>Fan Belt TK 1 Ton Qty-56</i>	<i>Rs 2212.00</i>
<i>(e) 807 16 Feb 93</i>	<i>Cobl Comp Mk-II Qty-04</i>	<i>Rs 7060.00</i>
<i>(d) 808 16 Feb 93</i>	<i>Vest Cotton S/95 Cm Qty-232</i>	<i>Rs 4825.00</i>
<i>(e) 815 16 Feb 93</i>	<i>Shirt AD S/5 Qty-37</i>	<i>Rs 7215.00</i>
<i>(c) 819 16 Feb 93</i>	<i>Net Mosquito Khaki Qty-90</i>	<i>Rs 14760.00</i>

*Fourth charge  
Army Act  
Section 52 (f)*

*SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE  
(f) OF SECTION FIFTY TWO OF THE ARMY ACT,  
INTENT TO DEFRAUD,*

*In that he,*

*at Merrut between April 92 and January 93, as Officer Commanding 9 Infantry Division Ordnance Unit, with intent to defraud, splitted the purchases of the following demands for amounts as mentioned against each to keep it within the financial powers of the Commanding Officer, Division Ordnance unit, well knowing it to be contrary to Paragraph 4 (c) of DGOS Technical Instruction 014 dated 10 Jul 96:-*

<u>Ser No</u>	<u>TE No &amp; Date</u>	<u>Item</u>	<u>Dues Out</u>	<u>Quantity Demanded Purchased</u>	<u>Total Value</u>
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1.	09 dated 15 Apr 92	Short Men Khakhi	796	176	7480.00
2.	38 dated 12 May 92	COBL Comb Mk II	19	4	6760.00
3.	80 dated 26 Jun 92	Cushion Mats	32	10	7315.00
4.	179 dated 17 Sep 92	BSP Bty 75 AH	62	2	5780.00
5.	201 dated 17 Oct 92	Bty 12 V 180 AH	14	1	4890.00
6.	210 dated 23 Oct 92	BSP Bty 12 V 75 AH	44	2	5780.00
7.	251 dated 18 Jan 93	Trouser Combat Dis S/3D	75	63	7434.00

Place: Meerut Cantt  
Dated: 02 Nov 95

Sd/- Illegible  
(VVBS Yadav)  
Brigadier  
Commanding Officer  
Commander 32 Infantry Brigade

*To be tried by a General Court Martial.*

Place : Meerut Cantt  
Dated: 02 November 95

Sd/- Illegible  
(SG Pitre)  
Major General  
General Officer Commanding  
9 Infantry Division"

7. A total of 4 charges were, thus, framed against the petitioner for the purpose of General Court Martial. In brief, the first two charges related to the petitioner as CO 9 infantry Division Ordinance Unit, giving supply order to two firms knowing fully well that the said firm had been de-registered on 13 November 1992, with an intent to cause wrongful gain to the firm. The third charge relates to accepting certain quantity of stores (total value Rs 64393/-) despite rejection by a Board of Officers. The fourth charge relates to the petitioner, splitting the purchase of

seven stores (total value Rs 30124/-) so as to bring them within own financial powers contrary to DGOS Technical Instructions.

8. Learned counsel for the petitioner has submitted that there were several voluminous documents which could not have been gone through within a span of few hours on the same day, and this shows that there was non-application of mind on the part of General Officer Commanding, 9 Infantry Division and in a mechanical and arbitrary manner, his trial by GCM was approved in violation of the provisions of Rule 37 of the Army Rules. The GCM was held against the petitioner and he was put under arrest during the trial with effect from 16.11.1995. During the trial, the petitioner retired from service on 31.12.1995. Since the GCM was continuing on 31.12.1995, the Commanding Officer applying the provisions of Section 123 of the Army Act, continued the GCM after the retirement of the petitioner and his military custody continued. All the charges which were levelled against the petitioner in the charge-sheet were under Section 52(f) of the Army Act. The petitioner denied all the charges and gave his own statement on oath before the GCM. With regard to charges no.1 and 2, he submitted that M/s Sat Traders and Co. and M/s Deepson Brothers, as per recommendations of the Board of Officers and approved by Dy Director of Ordnance Services, 11 Corps, continued their registration for the Financial Year 1992-93 and were included in the approved panel of registered firms, as such there was no question of their deregistration. The petitioner also explained the matter in detail regarding charges no. 3 and 4, but the same was not taken into

consideration by the GCM while giving its findings. With respect to charge no. 3, according to the petitioner, it was fully proved before the GCM that the petitioner had never scored out the inspection notes, hence the said charge was not proved against him by the prosecution. With regard to charge no. 4, the petitioner stated that he had to resort to local purchases only in respect of those items for which urgency certificates were issued and the local purchases were confined to the emergent demands of the units and the emergent certificates were scrutinized by the Local Purchase Officer. He further stated before the GCM that since these items were urgently required to meet the urgent requirement of troops, he resorted to purchase stores worth Rs.45435/- for convenience of the troops. The petitioner was cross-examined by the prosecution and re-examined by the defence. The GCM concluded the trial and submitted its findings on 18.01.1996. The GCM acquitted the petitioner of charges no. 1 and 2 but held him guilty of charge no. 3 and partially of charge no. 4, on the basis of which he has been awarded punishment of 05 years forfeiture of service for pension. After the order passed by the GCM, the same was sent to the confirming authority for confirmation/revision in accordance with the provisions of Section 160 of the Army Act. The case of the petitioner is that in his case, the confirming authority was the General Officer Commanding in Chief, Western Command, Chandimandir as per para 472 of the Army Regulations (Revised Edition 1987), but contrary to the said provision, the matter was referred to General Officer Commanding, 9 Infantry



Division on the advice of Judge Advocate General's Branch of Headquarters, Western Command, Chandimandir, who passed the revision order dated 14.03.1996, directing for reconsideration of the findings of GCM in regard to item (1) to (5) of charge no. 4 and also the quantum of punishment awarded to the petitioner. The revisional authority was of the view that the findings recorded in respect to the items mentioned at serial no. 2 to 5 of charge no. 4 were perverse, being against the weight of voluminous evidence on record and further that the GCM had apparently omitted to suitably evaluate certain weightage of relevant and cogent documentary evidence on record, and on these lines, the revisional authority had directed for reconsideration of the findings on charge no. 4 and the sentence on the basis of the observation set out by the revisional authority in its order. It has been averred that the revisional authority itself had re-appreciated the evidence and virtually gave specific direction to impose harsher punishment to the petitioner which was not within its jurisdiction as envisaged under Section 160 of the Army Act. On the basis of this revision order, fresh GCM was convened on 18.03.1996. According to the petitioner, the members of this fresh GCM proceeded on the basis of the directions given in the revision order. The GCM found the petitioner guilty of splitting the items 1, 2, 3, 5, 6 and 7 of the charge no. 4 and accordingly sentenced him to be cashiered and to suffer simple imprisonment for six months vide order dated 18.03.1996. This order was again sent to the confirming authority under Section 154 of the

Army Act. The petitioner also sent a pre-confirmation petition on 22.02.1996, which was rejected vide order dated 26.03.1996. After conclusion of the trial, the petitioner was released from military custody but after revision order dated 18.03.1996, he was again taken in custody with effect from the same date i.e. 18.03.1996 and he was continuing in military custody awaiting confirmation of the aforesaid order by the confirming authority. Subsequently, the order of cashiering passed against the petitioner was converted into dismissal from service. It is submitted that in the GCM, Brig PP Yadav was examined as CW-1, who had given evidence as an expert regarding the procurement procedure, but his evidence was not at all considered by the GCM while giving its findings. Feeling aggrieved, the petitioner has preferred this petition.

9. As far as first two charges are concerned it is interesting to note that despite the applicant stating that these two firms were not deregistered and that he had placed orders on them because of lowest bid as identified by a Board of officers, the court of enquiry and summary of evidence went ahead with this allegation. However the applicant was acquitted of the first two charges by GCM because of clear evidence that these two firms had not been deregistered. Such a major lapse on the part of prosecution in the GCM is very rare and reflects poor quality of investigation done during the court of enquiry and summary of evidence on one hand and also it possibly reflects an unreasonable desire to blame the applicant.

10. As far as third charge is concerned it is also very interesting to note that the applicant had justified the acceptance of stores locally purchased by him as CO 9 Infantry Division Ordnance Unit despite the same having been rejected by the Board of Officers on the ground that the acceptance/rejection of local purchase stores has to be linked to sealed bin samples which have been used for placing the local purchase orders. The suppliers base their quotes in the tender based on quality and specifications of Bin sample. He also contends that the junior Captain who had come to inspect the stores as part of Board of officers was comparing it with Ordnance depot specifications and rejecting the stores without even looking at the sealed Bin samples. He has further amplified that the primary cause of purchase from local market is the non availability of stores from Ordnance depots and that there are constraints in local market hence hundred percent comparison with ordnance depot specifications of local market samples and stores is not practical. He has further stated that as CO 9 infantry Division Ordnance Unit and as CFA he has the power to accept stores despite rejection by Board of officers. During the General Court Martial an Ordnance expert, Brigadier PP Yadav, had been called to advise the Court on procurement procedures. He has by and large corroborated the procedures stated by applicant hence even if there were certain minor indiscretions by the applicant there was scope for taking a lenient view by the court on this matter.

11. As far as fourth charge of splitting purchases to bring under own powers as CO is concerned it is again interesting to note that the total amount involved in purchase of these seven stores was as small as Rs 30124/- and the applicant has tried to justify the purchase on the grounds of fast moving items required for annual training camp, impending exercise and other priority commitments hence there was scope once again for the court to be lenient against any minor indiscretions. There was absolutely no allegation that he did so for his personal use or any amount was converted to his own use.

12. Notwithstanding the above, the most intriguing part of this GCM is that the convening authority was not satisfied with the applicant getting a punishment of forfeiture of 05 years of service for pensionary purposes only and felt that the applicant has got away lightly and therefore ordered Revision of proceedings resulting in reconvening of the GCM. Subsequently the reconvened GCM based on same evidence as earlier found the accused once again guilty of charge three and four and surprisingly gave the harshest punishment possible for an officer i.e. sentenced the accused to be cashiered and 6 months of rigorous imprisonment. The sentenced was subsequently remitted to dismissal however, the applicant by then had already spent six months in Army custody.

13. It is worth noting that the officer had retired as Colonel during his trial by GCM in 1995. He had 28 years of service as officer and an

additional 06 years of service in ranks. He died while fighting his case and has been substituted by his wife who is above 70yrs of age. The officer could not get any pension during his lifetime; likewise his wife is not in receipt of any family pension.

14. Further submission of learned counsel for the petitioner is that the General Officer Commanding, 9 Infantry Division was not the confirming authority and, therefore, he could not have passed the revision order. Apart from it, the revision order itself shows that the confirming authority had virtually given a direction to the GCM to give a revised finding and impose a harsher punishment on the petitioner. It has also been argued that the petitioner got himself examined as a witness and he was also cross-examined. That apart, Brig PP Yadav was also examined by the Court as CW-1, but neither the evidence of the petitioner nor of Brig PP Yadav was taken into consideration. It has also been argued that the petitioner made purchases according to the samples approved by the Board; therefore, it cannot be said that there was any illegality or irregularity in making the local purchases. It is further submitted that it was only under the direction of General Officer Commanding, 9 Infantry Division that the punishment of 05 years forfeiture of service for pension, a minor punishment given earlier was converted into a harsher punishment i.e. six months' imprisonment and cashiering from service, and that too without affording him an opportunity of hearing during GCM held after order of revision.

15. Learned counsel for the petitioner has placed reliance on Para 472 of the Regulations for the Army 1987 (as revised), hereinafter referred to as the Regulations. It is submitted that as per the aforesaid para, the confirming authority for confirmation of Death Sentence, is the Central Government; in cases of sentence passed on officers of the rank of Brigadier and above is the Chief of Army Staff; in cases of sentence passed on officers below Brigadier is the GOC-in-C, Command and in cases of sentence passed on JCOs, as dismissal and above in the scale of punishment vide Army Act Section 71, is the GOC-in-C, Command. On the strength of this Para 472 of the Regulations, it is submitted that the General Officer Commanding, 9 Infantry Division was not the confirming authority in the case of the petitioner and it was only the GOC-in-C, Command, who was the confirming authority; therefore, the order of revision passed by the authority who was not competent to confirm the findings or give direction for revision of findings of GCM, as noted above, is without jurisdiction, hence not sustainable.

16. **Per contra**, learned counsel for the respondents has drawn our attention towards Section 154 of the Army Act, 1950, which deals with the power to confirm finding and sentence of GCM. It reads as under:

***“154. Power to confirm finding and sentence of general court-martial. The findings and sentences of general courts- martial may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government.”***

17. It is submitted that in pursuance of the said provision under the Army Act, 1950, warrant for confirming the findings and sentences of

GCM was in existence since 06<sup>th</sup> day of January, 1970 whereby the General Officer Commanding, 9 Infantry Division has been appointed to confirm the findings and sentences of GCM. Copy of the said Warrant is on record. Since the General Officer Commanding, 9 Infantry Division has already been authorized by the Central Government in this behalf, the said authority was within its power to act as confirming authority in the case of the petitioner. It is further submitted that there is no dispute to the legal position that the confirming authority can direct the revision of the findings of GCM. Therefore, the submission of learned counsel for the applicant to the extent that he had no power to act as confirming authority and pass the revision order, has no substance.

18. The next argument of learned counsel for the applicant is that while passing the revision order, instead of giving a discretion to reconsider the finding on charge no. 4 and also to review the sentence imposed on the applicant, virtually a specific finding was given by the revisional authority and a direction was given to award a harsher punishment to the petitioner. The submission is that once the revisional authority, who was the confirming authority, had given a specific direction, no discretion was left with the GCM to give its own independent finding on charge no. 4 and to reconsider the sentence but GCM was directed to impose a harsher punishment on the petitioner in compliance of the said direction.

19. Before proceeding further, it would be relevant to reproduce the revision order, which reads as under:

“REVISION ORDER

Order by IC-14261Y Major General SG Pitre General Officer Commanding 9 Infantry Division.

1. The General Court Martial which assembled at 7 SIKH LI on the sixteenth day of November 1995 and subsequent days for the trial of IC-19073F Colonel Dayanand of College of Material Management Jablapur attached to Headquarters 32 Infantry Brigade will reassemble in an open Court at 7 SIKH LI on 18 March 1996 for reconsidering its finding on the fourth charge and also the sentence.

2. In thus ordering the Court of reassemble to reconsider its finding and sentence; I do not, in any way, wish to interfere with the discretion vested in the Court to accept or reject any part of the evidence before it to arrive at just and reasonable findings on the charges and the quantum of punishment awarded. I as confirming officer have carefully deliberated upon the brief reasons recorded by the Court on pages 206 to 207 of the proceedings. The findings of the Court on the first, second and third charges warrant no interference. However, I am of the view that the special findings of the court in relation to items mentioned against serials 2 to 5 of the fourth charges is perverse being against the weight of overwhelming evidence on record. The Court has apparently omitted to suitably evaluated certain weighty, relevant and cogent facts of the documentary evidence available on record. Therefore, I direct the Court to reconsider its finding on the fourth charge and the sentence on the basis of the observations set out in the subsequent paragraphs.

Fourth Charge

3. The main issues for your considerations relating to this were whether or not the accused splitted the purchases of the demands for items given at serial 1 to 7 of this charge, well knowing it to be contrary to paragraph 4(c) of DGOS Technical Instruction 014 dated 10 July 86 and whether or not he did so with intent to defraud. The contents of para 4(c) of the said instructions (Exh'0') are explicit and need no explanation. The simple fact which it conveys is that no purchase should be splitted up into convenient amounts to agree with the purchasing officer's financial powers.

4. It has been brought on record, vide exhibits 'FF-1' to 'LL-1', that on the day of placing supply order there were more items existing as demand (dues out) to be met by 9 Inf Div Ord Unit. Howevr, the accused unmindful of the provisions of para 4(c) of Exh 'P' went ahead by placing supply orders for limited items which could come within his financial powers. The contention of the accused that he had placed supply



orders only in relations to those items which were urgently required by units and for which urgency certificates were issued does not satisfy logic for the following reasons:-

(a) A number of urgency certificates have been issued by unauthorized/incompetent officials. For example urgency certificate produced vide Exhibits 'WW-1', 'WW-2', 'WW-3', 'YY-2', 'YY-3', and 'AAA' have not been signed by the Commanding Officer of the concerned units.

(b) In relation to all purchases except Bty 12 V 180 AH purchased through supply order No 397 dt 31 Oct 92 (Exhs 'KK' and 'KK-1' refer) and trousers combat disruptive purchased through supply order No 688 dt 06 Feb 93 (Exhs 'LL' and 'LL-1' refer) the process of local purchase had started much before the units projected the urgency of their demands through urgency certificates. In the case of Trousers Combat disruptive although urgency Certificates was given on 08 Jul 92 but the supply order for the purchase of the said item was placed on 06 Feb 93, almost after 7 months. This belies the argument that local purchases pertained only to urgently required items.

(c) Conditions given in para 6(c) of DGOS Technical Instructions No 014 (Exh 'P') have also not been fulfilled by the accused.

5. Thus, it would be seen that local purchase carried out by the accused of all items was not only contrary to the provisions of para 4 (c) of Exh 'P' but also against the provisions of para 6 of the said Exhibit 'P'. Further, it is found that the special finding is silent with regard to items mentioned against serial 6 of this charge. In the light of the aforesaid, the Court should re-examine the entire evidence and reconsider its findings on the fourth charge.

6. Should the Court revoke its original findings on this charge, it must record the revised findings and brief reasons in support thereof.

#### Sentence

7. The Court should then consider that the accused stands convicted on a charge under Army Act Section 52 for an offence involving moral turpitude. It is an offence punishable with maximum of ten years imprisonment. While awarding the sentence the Court should give suitable considerations to the nature and gravity of the offence and the circumstances as brought out in the evidence on record.

8. The twin object of awarding punishment are to maintain a high standard of discipline by making it deterrent to others and at the same time to ensure that the accused is awarded a punishment which is commensurate with the gravity of the offence charged. While passing sentence, the paramountcy of discipline and good

name of the service must at all times are kept in view. As such, though the proper amount of punishment to be inflicted is the least amount by which discipline can effectively be maintained, it should also not be so lenient as to make the offence for which it is awarded look venial and make a mockery of justice. Inadequate punishments are bound to shake the very fibre of discipline, which in the large interests of the service has to be kept inviolate. The accused already stands convicted on the third charge and partially on the fourth charge also for a fraudulent act. The sentence awarded to the accused carries almost no effect on him. It should be noted that the amount of pension in respect of an officer is subject to maximum of Rs 4500/- per month and would be the retiring pension for 33 yrs of qualifying service. Since the accused has 34 yrs of service i.e, 28 yrs as commissioned officer and 6 yrs as Signalman, after deducting the forfeited service 5 yrs his qualifying service would be 29 yrs. Since he would be entitled to 7 yrs weightage vide para 5 of Govt of India/Min of Def Policy letter No 1 (5)/87/A (Pension/Services) dt 30 Oct 87 he would have more than 33 yrs reckonable qualifying service. In view of the aforesaid, the punishment as awarded by the Court would not affect the officer in any manner.

9. In the light of the above, if the Court, on reconsideration is of the opinion that the sentence awarded is lenient and inadequate, it should revoke the earlier sentence and pass a fresh and adequate sentence.

10. After the revision order is read in the open Court, the prosecution and the defence shall be given a further opportunity to address the Court, in terms of AR 68. Thereafter, if it is necessary to clarify any points, the Judge Advocate may give a further summing up. While reconsidering its findings, the Court should carefully shift the grain from the chaff, disregard extraneous considerations and arrive at the findings solely on the basis of admissible evidence and the law relating to the said charge.

11. The finding on revision and the sentence, if any, based thereon shall be announced in the open Court as being subject to confirmation.

12. Attention is invited to AA Sec 160, AR 68 and specimen form of proceedings on revision at pages 421 and 422 of MML (Vol II), 1983 which should be suitably amended to conform to the proceedings of the Army Rule cited above and Rule 67 (1).

13. After the revision, the proceedings should be forwarded to this HQ through by JAG, HQ Western Command.

Signed at Meerut Cantt this Fourteenth day of March 1996.

Station: Meerut Cantt

Sd./- Illegible  
(SG Pitre)  
Major General  
General Officer Commanding  
9 Infantry Division”

20. A plain reading of the aforesaid revision order shows that a specific finding has been given with regard to charge no. 4. Virtually it was a direction, whereby the GCM was directed to pass a fresh order of sentence as the sentence imposed on the petitioner was lenient and inadequate. The submission of learned counsel for the petitioner has substance that impliedly the revisional authority had directed the GCM to award a harsher punishment to the petitioner and it was in compliance with the said direction that the petitioner has been initially cashiered and subsequently dismissed from service.

21. It has also been argued that in para 10 of the revision order, it had been directed that the prosecution and the defence shall be given a further opportunity to address the Court in terms of AR 68 and thereafter, if it is necessary to clarify any points, the Judge Advocate may give a further summing up. A perusal of subsequent proceedings of GCM shows that opportunity to adduce additional evidence in defence was not given to the petitioner. In para 1 of the defence address made by the petitioner at revision proceedings, which is part of the record, it is mentioned as under:

*“While making this address, I am working under a handicap of the absence of the evidence of the witnesses whom I wanted to call to support my case at this stage. Irrespective of this , I shall try my best to explain to the court how,*

*even on the basis of the existence evidence, the observations made in the Revision Order and the prosecution address remain unsubstantiated and further how the accused is in fact not guilty of the fourth charge and nor of the third charge.”*

22. Thus, this part of the record clearly establishes that the petitioner had made a prayer to produce some defence witnesses in support of his case, but this opportunity was denied to him. This fact assumes great importance because in the revisional order, it was specifically directed that the prosecution and the defence shall be given a further opportunity to address the Court, but in spite of the such specific direction, the petitioner was not given an opportunity to examine any witness in his defence. The record also shows that during the initial GCM proceedings, the petitioner got himself examined as a witness and Brig PP Yadav was examined as CW-1. A perusal of the order shows that while giving findings, the GCM has not considered the defence version and has given its finding only on the basis of the other material available on record without taking into account the defence version. We cannot approve this conduct of the GCM because such a conduct is against the settled principles of criminal jurisprudence. Virtually the petitioner was not given due opportunity to defend him as the defence version was not at all considered. In this view of the matter, the conversion of punishment of five years reduction of service for pension to six months' imprisonment and cashiering, which was subsequently converted to dismissal from service becomes unsustainable. The order of enhanced punishment was too harsh, passed without affording due opportunity to

the petitioner to defend himself. Enhancement of punishment from five year reduction of pensionable service to dismissal from service and six months R.I is too disproportionate that really shocks the conscience. Since the petitioner was not afforded due opportunity to defend him and the defence case put by him was not at all considered, hence the finding recorded by the GCM becomes unsustainable and deserves to be set aside. Consequently the petitioner deserves to be exonerated of all the charges.

23. For the arguments sake only, even if we assume the charges no. 3 and 4 to be duly proved, even then it was only a financial irregularity, that too for a petty amount of about rupees thirty thousand. There was no allegation against the petitioner that he misused the said funds for his personal use or any such fund was misappropriated by him. For such minor financial procedural irregularity and that too for such a petty amount, the punishment of dismissal from service and six months' imprisonment was not only disproportionate but really shocking to the judicial conscience.

24. In view of the discussion made above, this TA deserves to be allowed and is hereby **allowed**. The findings of GCM as well as the orders impugned are hereby set aside. The petitioner is exonerated of all the charges. He shall be deemed to have been discharged from service after attaining the age of superannuation and thereafter he shall be entitled to pension and after his death, his wife Smt. Omi Devi shall

also be entitled to family pension as admissible under the rules. The respondents are directed to calculate the arrears of pension and other benefits, and ensure payment of the same within a period of four months from today. The petitioner shall not be entitled to any interest on the arrears of pension. However, in case this order is not complied with within the stipulated period, the petitioner shall be entitled to interest at the rate of 9% per annum on the total amount due from the date of its accrual till the date of actual payment.

We hope and trust that the respondents shall ensure speedy compliance of this order keeping a sympathetic and humanitarian approach towards Smt. Omi Devi, who is a very old lady.

No order as to costs.

**(Air Marshal BBP Sinha)**  
**Member (A)**

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

Dated: 17 April 2018  
LN/