**AFR**
**RESERVED**
**Court No.1**

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,**

**LUCKNOW**

**O.A. No. 302 of 2011**

Monday, this the 04th day of December, 2017

**Hon'ble Mr. Justice D.P. Singh, Member (J)**
**Hon'ble Air Marshal BBP Sinha, Member (A)**

No. 8036135P Ex Sep Brijendra Kumar Singh, son of Sri Kesari Singh, resident of C/o Sri Achche Lal Singh, Ward No. 2, Shikshak Nagar, Shankargarh, Allahabad.

…. Applicant

By Legal Practioner **Shri V.A Singh**, learned counsel for the applicant.

Versus

1. The Union of India, through Secretary Defence, Secretariat, New Delhi.
2. The Chief of Army Staff, Sena Mukhyalaya, Sena Bhawan, New Delhi -110011.
3. Presiding Officer of SCM, COD Chheoki, Allahabad.

..... Respondents.

By **Shri Yogesh Kesarwani,** learned Central Govt Counsel assisted by Maj Piyush Thakran, OIC Legal Cell.

**ORDER**

**Per Hon'ble Mr. Justice D.P. Singh, Member (J)**

1. This OA under Section 14 of the Armed Forces Tribunal Act, 2007 has been preferred by the applicant being aggrieved with the impugned

order of punishment in pursuance to Summary Court Martial (SCM) proceedings and rejection of his statutory representation by the Chief of Army Staff (COAS).

2. We have heard Shri V.A.Singh, learned counsel for the applicant and Shri Yogesh Kesarwani, learned counsel representing the respondents, assisted by Major Piyush Thakran, OIC Legal Cell and perused the record.

3. The case of the applicant, a Soldier in Indian Army, is that on 26.01.2008, he was travelling by Mumbai-Hawrah Mail train. He boarded the train at Itarsi for Shankargarh with valid reserve ticket of II Class, his seat number being 31 in S-6 Coach (Annexure-1). Another army personnel Hav A.K.Mishra was also travelling by the same train. At Jabalpur railway station, one Major A.P.Gupta boarded the train. It is not disputed that Major A.P.Gupta entered the reserved compartment without any valid reservation and travelled in a reserved class with a general class ticket. Major A.P.Gupta has, however, alleged that he was occupying seat No. 30 in Coach S-6.

4. It appears that Maj A.P.Gupta was in civil dress. With regard to alleged occupancy of Seat No. 31 by a person having no valid reservation ticket (Major A.P.Gupta), some heated arguments took place between the applicant and Hav A.K.Mishra on the one side and Major A.P.Gupta on the other. TTE was called during the course of heated arguments. It is alleged by the applicant that Major A.P.Gupta occupied the seat No. 31 reserved for the applicant and declined to vacate the same. On hearing the noise when exchange of heated arguments was going on, one Colonel Mishra reached

there. He took Major A.P.Gupta to his berth No.36 and asked the applicant to remain at his seat. It is alleged that Col Mishra got down at Satna railway station. Thereafter at Manikpur railway station, again some heated arguments took place between the applicant and Major A.P.Gupta. One Dy Commandant, BSF Mr. Rajendar reached there to pacify both the sides. At about 09-30 hrs, the train halted at Shankargarh, railway station, the destination of the applicant and Hav A.K.Mishra arrived, hence they alighted. It is alleged that soon thereafter, the applicant alongwith 9-10 persons, who were armed with motor-cycle chains, steel rods and wooden sticks, came to Major A.P.Gupta and started beating him and thus inflicted severe injuries on his head and body. His fore-head started bleeding and he is alleged to have become unconscious. It is further alleged that the culprits caught hold of Major A.P.Gupta by legs and started dragging him out, but anyhow he saved himself by holding the strings beneath the train berth. On reaching Allahabad, Major A.P.Gupta noted the details of the applicant from the chart pasted on the train and went to the MCO Office, Allahabad and reported the matter to 2IC 4 Infantry Division Provost Unit. Major A.P.Gupta lodged a complaint at Allahabad with the help of military police. No written complaint, however, was given by him to the Unit, as is evident from the letter dated 19.02.2008 (Exhibit-4) written by the Commanding Officer. The said letter is reproduced as under:

*"4 Inf Div Provost Unit*
*PIN: 908404*
*C/O 56 AOI*

*Pro/00042/A*
*602 EME Bn*
*PIN: 906602*
*C/O 56 APO*

*DISCIPLINE: SEP B K SINGH, INT RECORDS*

*1. Ref your letter No 24501/EME dt 04 Feb 2008.*

*2. IC-64814A Maj A P Gupta reported on tele from MCO Rly Stn Allahabad in 2IC this unit on 26 Jan 2008 at about 2100h regarding he being manhandled by a service person and his civ associates at rly stn Shankargarh.*

*3. The offr was taken by MP on duty at Allahabad rly stn to MH Allahabad and the subject case was thereafter covered by MP det of HQ MP C&A Sub Area being stn matter. No written complaint was given by the offr to this unit.*

*Sd./- Illegible*
*(M S Bika)*
*Col*
*Commanding Officer*

*Copy to:-*

*HQ MP C&A Sub Area*
*PIN : 907749*
*C/O 56 APO*

*MITS*
*PIN : 900449*
*C/O 56 APO"*

*-for info and necessary action pl.*

5. Pursuant to the complaint made by Major A.P.Gupta, the applicant was subjected to SCM proceedings and was punished with dismissal from service. However, in a separate trial on the same charges, Hav A.K.Mishra was punished with reversion to lower rank and two months' rigorous imprisonment. The trial of the applicant was under Section 40(a) of the Army Act.

6. It is alleged by the applicant that Major A.P.Gupta forcibly occupied his seat in train, in consequence to which he called the TTE, but Major A.P.Gupta was not ready to leave the seat, hence heated exchange of words

and scuffle took place between him and Major A.P.Gupta. It is further alleged that Major A.P.Gupta also tried to restrain the applicant, at his destination station, from taking out his luggage kept under seat No. 31. According to the applicant, at the beginning of the incident, it was on account of intervention of Col Mishra that the things were sorted out and the applicant could get his seat.

7. It is not disputed that against the applicant, Court of Inquiry (COI) was held in 2008; Summary of Evidence (SoE) was recorded in December 2010 and charge-sheet was served on 24.12.2010 under Section 40(a) of the Army Act read with Section 34 of the IPC for using criminal force to his superior officer. The SCM began on 19.01.2011 and concluded on 03.02.2011 with punishment of dismissal from service, against which the applicant submitted statutory appeal to COAS, which was rejected on 28.02.2011. For convenience, Section 40 of the Army Act and Section 34 of the IPC are reproduced as under:

> *"**40. Striking or threatening superior officers**.—Any person subject to this Act who commits any of the following offences, that is to say,—*
>
> *(a) uses criminal force to or assaults his superior officer; or*
> *(b) uses threatening language to such officer; or*
> *(c) uses insubordinate language to such officer;*
>
> *shall, on conviction by court-martial,*
>
> *if such officer is at the time in the execution of his office or, if the offence is committed on active service, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and*
>
> *in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned:*

> *Provided that in the case of an offence specified in clause (c), the imprisonment shall not exceed five years."*
>
> *"34.* ***Acts done by several persons in furtherance of common intention.****—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

8. So far as Section 34 of the IPC is concerned, the law over the subject is no more a *res integra*. The vicarious or constructive liability under Section 34 of the IPC can arise only where the two conditions stand fulfilled: i.e. (a) the mental element, called the intention to commit the criminal act conjointly with another or others; and (b) actual participation in one form or the other in the commission of the offence. The accused is not liable to be punished under Section 34 IPC, for what another or others have done by himself or themselves, but only for what he had done in furtherance of the common intention to commit the offence conjointly with another or others. Neither the entertaining of the common intention for the commission of the criminal act by itself, nor the participation in the commission of the offence by itself, would render the accused liable to be punished under Section 34 IPC. To convict an accused under Section 34, it should be proved that the criminal act was done in concert, pursuant to the pre-arranged plan. In **Suresh versus State of U.P,** *( 2001) 3 SCC 673*, the Hon'ble Supreme Court observed:

> *"Thus to attract Section 34 IPC two postulates are indispensable: (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person. (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have*

*been in furtherance of the common intention of all such persons."*

9. Coming to Section 40(a) of the Army Act, the statement of PW-2 indicates that the applicant also suffered injuries with swollen mouth. On the other hand, the only injury suffered by complainant Major A.P.Gupta was a bruise on his fore-head. No Medical Officer was produced to establish the injury suffered by Major A.P.Gupta. There is also nothing on record which may indicate that non-production of Medical Officer was justified for any compelling reason. Oral statements of the witnesses on record indicate that both, the applicant and the complainant, suffered injuries, but who was the aggressor is not ascertainable. The complainant was in civil dress; his identity was not known to the applicant at initial stage. Unless the identity of superior officer is known to a subordinate, that too, at civil places, no offence under Section 40(a) of the Army Act can be said to have been made out. As already observed, there is no evidence on record to establish that the applicant had intention to commit assault on the complainant or/and that the person to whom he was using criminal force or making assault was his superior officer.

10. Intention to assault knowingly, an officer of the Indian Army is a condition precedent to constitute an offence under Section 40(a) of the Army Act. In the absence of intention or *mens rea* to assault an officer of the Indian Army, no person can be convicted under Section 40(a) of the Act. Burden was on the respondents to establish that the applicant was having full knowledge about the complainant being Major of the Indian

Army, in which they have failed. There is no evidence to show that initially when the exchange of heated arguments had begun, both, the applicant and the complainant, were known to each other being members of the Indian Army. *Mens rea* or intention to assault an officer of the Indian Army is a condition precedent to convict a person. (Vide: **NNMY Momin versus State of Maharashtra,** *AIR 1971 SC 885*, **State of Uttar Pradesh versus Iftikhar Khan,** *AIR 1973 SC 863* and **Ethuba versus State of Gujarat,** AIR 1970 SC 1266.)

11. Submission of learned counsel for the applicant is that whole trial of the applicant is vitiated because a person (Major A.P.Gupta), who was travelling without a valid ticket in the reserved compartment of train, tried to forcibly occupy applicant's seat; he had not lodged any written complaint with Railway Police nor any FIR was registered at any police station. It is also submitted that though COI was held but it was an *ex parte* inquiry and the applicant was never asked to participate in it, hence on account of violation of statutory provisions of Rule 180 of the Army Rules, the whole proceeding vitiates. It has also been argued that during SoE, material witnesses were not called in spite of the request made by the applicant. Material witnesses were Col Mishra, Mr. Rajendar Dy Commandant BSF and two RPF constables, who had reached the spot during the course of heated arguments between the applicant and passengers. Submission further is that though the applicant pleaded 'not guilty' but the Court presumed it to be 'guilty'. Medical certificate submitted by Major A.P.Gupta was not a credible one in terms of the date and place of injury. Additionally no doctor was summoned to testify the said medical

certificate and prove the injuries alleged to have been suffered by Major A.P.Gupta. It is further submitted that Hav A.K.Mishra, who was charged for the same offence, has been given lesser punishment with two months' RI in military custody and reduction to the rank of Sepoy, which could not have been given in view of the provisions of Section 34 of the IPC, with the aid of which charges were framed. It is also submitted that Major A.P.Gupta entered the compartment in civilian dress and it took considerable time before identify of Major A.P.Gupta was disclosed.

**MAJOR A.P.GUPTA**

12. It is not disputed that Major A.P.Gupta was travelling in Coach No. S-6 which was a reserved compartment; with an ordinary IInd Class Ticket, without any reservation. Though it is alleged that he was on Seat No. 32 (upper berth), but it appears to be incorrect for the reason that Seat No. 31 was the lower berth adjoining the window and it is not expected that any scuffle would have taken place if he had not occupied the applicant's seat No. 31 at lower birth.

13. Under Section 137 of the Railways Act, 1987, travelling without ticket is an offence. Under Section 138 of the said Act, Railway has got powers to levy excess charge and fare. Such person can be removed by a railway servant authorised in this behalf in pursuance to powers conferred under Section 139 and for that, he may call security personnel. Under Section 140 of the Act, it is expected that passengers shall maintain good behaviour and any attempt to commit offence shall be punishable. For

convenience, Sections 137 to 140 of the Railways Act are reproduced as under:

> ***"137. Fraudulently travelling or attempting to travel without proper pass or ticket.****—(1) If any person, with intent to defraud a railway administration,—*
>
> *(a) enters or remains in any carriage on a railway or travels in a train in contravention of section 55, or*
>
> *(b) uses or attempts to use a single pass or a single ticket which has already been used on a previous journey, or in the case of a return ticket, a half thereof which has already been so used,*
>
> *he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both:*
>
> *Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, such punishment shall not be less than a fine of five hundred rupees.*
>
> *(2) The person referred to in sub-section (1) shall also be liable to pay the excess charge mentioned in sub-section (3) in addition to the ordinary single fare for the distance which he has travelled, or where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were so examined or, in case of their having been examined more than once, were last examined.*
>
> *(3) The excess charge referred to in sub-section (2) shall be a sum equal to the ordinary single fare referred to in that sub-section or [two hundred and fifty rupees], whichever is more.*
>
> *(4) Notwithstanding anything contained in section 65 of the Indian Penal Code (45 of 1960), the court convicting an offender may direct that the person in default of payment of any fine inflicted by the court shall suffer imprisonment for a term which may extend to six months.*

***138. Levy of excess charge and fare for travelling without proper pass or ticket or beyond authorised distance.—*** *(1) If any passenger,—*

*(a) being in or having alighted from a train, fails or refuses to present for examination or to deliver up his pass or ticket immediately on a demand being made therefor under section 54, or*

*(b) travels in a train in contravention of the provisions of section 55,*

*he shall be liable to pay, on the demand of any railway servant authorised in this behalf, the excess charge mentioned in sub-section (3) in addition to the ordinary single fare for the distance which he has travelled or, where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or, if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were so examined or in the case of their having been examined more than once, were last examined.*

*(2) If any passenger,—*

*(a) travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket; or*

*(b) travels in or on a carriage beyond the place authorised by his pass or ticket,*

*he shall be liable to pay, on the demand of any railway servant authorised in this behalf, any difference between the fare paid by him and the fare payable in respect of the journey he has made and the excess charge referred to in sub-section (3).*

*(3) The excess charge shall be a sum equal to the amount payable under sub-section (1) or sub-section (2), as the case may be, or [two hundred and fifty rupees], whichever is more:*

*Provided that if the passenger has with him a certificate granted under sub-section (2) of section 55, no excess charge shall be payable.*

*(4) If any passenger liable to pay the excess charge and the fare mentioned in sub-section (1), or the excess charge and any*

*difference of fare mentioned in sub-section (2), fails or refuses to pay the same on a demand being made therefor under one or other of these sub-sections, as the case may be, any railway servant authorised by the railway administration in this behalf may apply to any Metropolitan Magistrate or a Judicial Magistrate of the first or second class, as the case may be, for the recovery of the sum payable as if it were a fine, and the Magistrate if satisfied that the sum is payable shall order it to be so recovered, and may order that the person liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month but not less than ten days.*

*(5) Any sum recovered under sub-section (4) shall, as and when it is recovered, be paid to the railway administration.*

***139. Power to remove persons.—****Any person failing or refusing to pay the fare and the excess charge referred to in section 138 may be removed by any railway servant authorised in this behalf who may call to his aid any other person to effect such removal:*

*Provided that nothing in this section shall be deemed to preclude a person removed from a carriage of a higher class from continuing his journey in a carriage of a class for which he holds a pass or ticket:*

*Provided further that a woman or a child if unaccompanied by a male passenger, shall not be so removed except either at the station from where she or he commences her or his journey or at a junction or terminal station or station at the headquarters of a civil district and such removal shall be made only during the day.*

***140. Security for good behaviour in certain cases.****—(1) When a court convicting a person of an offence under section 137 or section 138 finds that he has been habitually committing or attempting to commit that offence and the court is of the opinion that it is necessary or desirable to require that person to execute a bond for good behaviour, such court may, at the time of passing the sentence on the person, order him to execute a bond with or without sureties, for such amount and for such period not exceeding three years as it deems fit.*

*(2) An order under sub-section (1) may also be made by an appellate court or by the High Court when exercising its powers of revision."*

14. In the present case, it is not disputed that TTE was called. He reached the spot and tried to pacify both sides but he failed to discharge his statutory obligations as envisaged under Sections 137, 138, 139 and 140 of the Railways Act (supra). Further, it is also an admitted fact that two constables of RPF and BSF Commandant besides Colonel Mishra of Indian Army reached the Spot. Colonel Mishra, like an elder brother, pacified both, the applicant as well as Major A.P.Gupta, and took Major A.P.Gupta to his seat. This fact establishes that the complainant occupied the applicant's seat. There appears to be failure on the part of Railway machinery to interfere and maintain the rule of law in the coach.

15. Major A.P.Gupta, being without a lawful ticket, was in no way authorised to occupy the seat validly allotted to another person in a reserved coach. It is also very clear that on objection by the applicant to his unauthorised travel on a reserved seat, he misused the requirements of Army discipline and converted the situation into a conversation about how a jawan should behave with an officer. It is always expected from a person holding the rank of a Major in the Indian Army that he shall be disciplined, uphold the maturity expected from an Army officer in dealing with a subordinate and will not do anything which is unlawful. Since seat No. 31 was reserved for the applicant, it is quite natural that he would have occupied the same. Later on, when Major A.P.Gupta came to know that the applicant was a Jawan in Army, he apparently has tried to justify his illegal

presence in a reserved compartment by getting into avoidable discussions about how a Jawan should behave with an Officer and give him respect.

16. There is a Latin maxim, *"Jure naturae aequum est neminem cum alterius detriment et injuria fiery locupletiorem"*, which means- It is a law of nature that one should not be enriched by the loss or injury to another. Major A.P.Gupt could not be permitted to raise grievance against the applicant to validate his unlawful entry in the coach and occupy the seat of the applicant to reach his destination.

17. It is further well settled that *"Id possumus quod de jure possumus"* (a person can do that which one can do lawfully). Why the Indian Army, in spite of the fact that Major A.P.Gupta was travelling without valid ticket in a reserved IInd Class Compartment, has not taken action against him for his unlawful entry in the said coach, is not understandable. Further, the Railway authorities should have interfered in the matter and proceeded against Major A.P.Gupta under Section 137 of the Railways Act instead of accommodating him in a reserved coach. A person, who himself is guilty for breach of law, must be cautious before entering into a scuffle with anyone or making a hue and cry for no valid cause. Passengers have right to assert for the possession of their seats. From the material on record also, it does not appear that the TTE had charged any additional amount or issued a ticket to Major A.P.Gupta for travelling in reserved coach, as required under Section 138 of the Railways Act. Hence the contention of Major AP Gupta that he was permitted by the TTE to travel in a reserved compartment without valid ticket and reservation, can not be accepted at face value and has no legal basis.

18. One of the arguments advanced by learned counsel for the applicant is that since the alleged offence was committed while travelling in the train, FIR should have been lodged under Sections 145, 154, 155 and 175 of the Railways Act read with IPC. For convenience, these provisions are produced as under:

> *"**145. Drunkenness or nuisance.—**If any person in any railway carriage or upon any part of a railway—*
>
> *(a) is in a state of intoxication; or*
>
> *(b) commits any nuisance or act of indecency or uses abusive or obscene language; or*
>
> *(c) wilfully or without excuse interferes with any amenity provided by the railway administration so as to affect the comfortable travel of any passenger,*
>
> *he may be removed from the railway by any railway servant and shall, in addition to the forfeiture of his pass or ticket, be punishable with imprisonment which may extend to six months and with fine which may extend to five hundred rupees:*
>
> *Provided that in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the court, such punishment shall not be less than—*
>
> *(a) a fine of one hundred rupees in the case of conviction for the first offence; and*
>
> *(b) imprisonment of one month and a fine of two hundred and fifty rupees, in the case of conviction for second or subsequent offence."*
>
> *"**154. Endangering safety of persons travelling by railway by rash or negligent act or omission.—** If any person in a rash and negligent manner does any act, or omits to do what he is legally bound to do, and the act or omission is likely to endanger the safety of any person travelling or being upon any railway, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.*

***155. Entering into a compartment reserved or resisting entry into a compartment not reserved.—*** *(1) If any passenger.—*

*(a) having entered a compartment wherein no berth or seat has been reserved by a railway administration for his use, or*

*(b) having unauthorisedly occupied a berth or seat reserved by a railway administration for the use of another passenger,*

*refuses to leave it when required to do so by any railway servant authorised in this behalf, such railway servant may remove him or cause him to be removed, with the aid of any other person, from the compartment, berth or seat, as the case may be, and he shall also be punishable with fine which may extend to five hundred rupees.*

*(2) If any passenger resists the lawful entry of another passenger into a compartment not reserved for the use of the passenger resisting, he shall be punishable with fine which may extend to two hundred rupees."*

*"**175. Endangering the safety of persons.—**If any railway servant, when on duty, endangers the safety of any person—*

*(a) by disobeying any rule made under this Act; or*

*(b) by disobeying any instruction, direction or order under this Act or the rules made thereunder; or*

*(c) by any rash or negligent act or omission,*

*he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."*

19. Hon'ble Supreme Court from time to time repeatedly reiterated interpretative jurisdiction and observed that while considering statutory provision, the provision should be considered section by section, word by word, line by line along with punctuation in reference to context for which it has been used and inference should be drawn from the cumulative reading

of the provision. In the case reported in ***Vipulbhai M. Chaudhary vs. Gujarat Coop. Milk Mktg. Federation Ltd.*** (2015) 8 SCCC 1 the Hon'ble Supreme Court has held:-

> *"In the background of the constitutional mandate, the question is not what the statute does say but what the statute must say. If the Act or the Rules or the bye-laws do not say what they should say in terms of the Constitution, it is the duty of the court to read the constitutional spirit and concept into the Acts."*

Further, in the case of ***Deevan Singh vs. Rajendra Prasad Ardevi,*** reported in *2007 (10) SCC 28*, Hon'ble the Supreme Court held that while interpreting Statute the entire statute must be read as a whole, then section by section, clause by clause, phrase by phrase and word by word.

20. The Legislature, in its wisdom, in Section 145 of the Railways Act has used the phrase "*aid of any other person*". It means, the employees of the Railways may take the assistance of passengers, who are statutorily bound to help the Railways to remove any person who does not have a valid ticket. Accordingly, it was incumbent on the TTE to remove Major A.P.Gupta with the help of passengers including the applicant from berth No. 31 in case he was unauthorisedly occupying the same, but the TTE or RPF or BSF personnel do not appear to have discharged their duty. In such a situation, in case the complainant Major A.P.Gupta was in occupation of the applicant's seat/berth, then it was open to the applicant to assert his right and call the TTE or other Railway authorities in order to occupy his seat.

21. For offences committed under the Railways Act (supra), specific provision has been made by the Parliament in the Railways Act as

envisaged under Sections 180 to 182. Under Section 180F, the courts have been debarred from taking cognizance of an offence under the Act except on a complaint made by the officer authorised. In case any incident or scuffle had taken place in the coach, there was no option for the respondents except to proceed in accordance to the provisions contained in Sections 180, 181 and 182 of the Railways Act and not otherwise. Such offender could have been arrested under Section 179 of the Railways Act also. For convenience, Sections 180F, 180G, 181 and 182 of the Railways Act are reproduced as under:

> ***"180F. Cognizance by Court on a complaint made by officer authorised.—****No court shall take cognizance of an offence mentioned in sub-section (2) of section 179 except on a complaint made by the officer authorised.*
>
> ***180G. Punishment for certain offences in relation to inquiry.—****Whoever intentionally insults or causes any interruption in the inquiry proceedings or deliberately makes a false statement before the inquiring officer shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.*
>
> ***181. Magistrate having jurisdiction under the Act.—****Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try an offence under this Act.*
>
> ***182. Place of trial.—****(1) Any person committing an offence under this Act or any rule made thereunder shall be triable for such offence in any place in which he may be or which the State Government may notify in this behalf, as well as in any other place in which he is liable to be tried under any law for the time being in force.*
>
> *(2) Every notification under sub-section (1) shall be published in the Official Gazette, and a copy thereof shall be exhibited for the information of the public in some conspicuous*

*place at such railway stations as the State Government may direct."*

22. The provisions contained in the Railways Act are statutory in nature, under which action could have been taken against the applicant as well as Major A.P.Gupta for creation of unruly atmosphere in the Railway coach. Trial of such offence, to the extent it is made out under the provisions contained in Sections 145, 154, 155, 175, etc of the Railway Act should have been done in pursuance to power conferred by Sections 180 to 182 of the said Act on the complaint filed by the Railways. The Railways Act and the Army Act both are special laws. The Railways Act covers the field of offences committed under the Railways Act whereas the Army Act covers the offences committed by the Army personnel under the Army Act. Since the applicant as well as the complainant Major A.P.Gupta were not on active duty; they were in civil dress and travelling like ordinary citizens, at the first instance, they should have been tried under the Railways Act and not under the Army Act. FIR should have been lodged and during course of trial, it was open to Army to make a request to the magistrate concerned for trial of offenders by Court Martial under the Army Act. Unless provided by Army Act itself, it was not open for the respondents to proceed for trial, if any, of the applicant for an offence committed under the Railways Act. Thus, the trial of the applicant seems to suffer for want of jurisdiction. Special law, like the Railways Act, should be dealt with according to the provisions contained therein and not by the general law. (Vide: *AIR 1961 SC 1170* **J.K.Cotton Spinning & Weaving Mills Co. Versus State of U.P.**, *(1981) SCC 315* **L.I.C versus.J. Bahadur**, *(1990) 2 SCC 562* **Vijay**

**Kumar Sharma versus State of Karnataka**, *(1984) 3 SCC 127* **Ajoy Kumar Benerjee versus Union of India,** *(1990) 4 SCC 438* **Ashoka Marketing Ltd versus Punjab National Bank**, *(2001) 8 SCC 289* **Jasbeer Singh versus Vipin Kumar Jaggi** and *(2001) 7 SCC 728*, **State of Karnataka versus B. Suverna Malini.)**

23. In view of above, the applicant could not have been punished through SCM unless some order was passed by a Magistrate authorised under the Railways Act. It is a well settled proposition of law that a thing should be done in the manner provided by the Act or the statute and not otherwise vide ***Nazir Ahmed vs. King Emperor,*** AIR 1936 PC 253; ***Deep Chand vs. State of Rajasthan,*** AIR 1961 SC 1527***, Patna Improvement Trust vs. Smt. Lakshmi Devi and ors,*** AIR 1963 SC 1077; ***State of U.P. vs. Singhara Singh and others,*** AIR 1964 SC 358; ***Barium Chemicals Ltd vs. Company Law Board,*** AIR 1967 SC 295; ***Chandra Kishore Jha vs. Mahavir Prasad and others,*** 1999 (8) SCC 266; ***Delhi Administration vs.Gurdip Singh Uban and others,*** 2000 (7) SCC 296; ***Dhananjay Reddy vs. State of Karnataka,*** AIR 2001 SC 1512; ***Commissioner of Income Tax, Mumbai vs. Anjum M.H. Ghaswala and others,*** 2002 (1) SCC 633; ***Prabha Shankar Dubey vs. State of M.P.,*** AIR 2004 SC 486 and ***Ramphal Kundu vs. Kamal Sharma,*** AIR 2004 SC 1657.

**F.I.R**

24. Now, it is a settled proposition of law that in case of commission of any cognizable offence, registration of FIR is mandatory. In this regard, a Constitution Bench of Hon‘ble Supreme Court in a case reported in *(2014)*

*2 SCC 1* **Lalita Kumari vs. Government of Uttar Pradesh and others** held that in case the cognizable office is made out then in such situation the registration of F.I.R. is mandatory. For convenience Para-119 from the judgment of **Lalita Kumari** (supra) is reproduced as under :-

> *"119. Therefore, in view of various counterclaims regarding registration or non- registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible, etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."*

25. In the case of **Lalita Kumari** (supra), Hon'ble Supreme Court in Para- 120 concluded with their finding with regard to registration of F.I.R. and variety of cases dealing with different circumstances. For convenience, Para-120 to 120.8 are reproduced as under :-

> *"120. In view of the aforesaid discussion, we hold :*
>
> *120.1 The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a*

*cognizable offence and no preliminary inquiry is permissible in such a situation.*

*120.2 If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.*

*120.3 If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases when preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.*

*120.4 The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.*

*120.5 The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.*

*120.6 As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under: (a) Matrimonial disputes/family disputes*

*(b) Commercial offences*

*(c) Medical negligence cases*

*(d) Corruption cases*

*(e) Cases where there is abnormal delay/latches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

*The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.*

*120.7 While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time- bound and in any case it should not exceed 7 days. The*

*fact of such delay and the causes of it must be reflected in the General Diary entry.*

*120.8 Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above."*

26. The principles flowing from the judgment of Lalita Kumari (supra) have been reiterated by Hon'ble Supreme Court in *(2015) 6 SCC 287,* **Priyanka Srivastava and another vs. State of U.P.** and (*2017) 2 SCC 779,* **State of Telangana vs. Habib Abdullah Jeelani and others.**

27. Registration of FIR also appears to be mandatory to determine the question as to whether the case should be tried by Court Martial or by a civil court. Sections 124, 125 and 126 of the Army Act deal with the trial by criminal court or court martial. For convenience, these provisions are 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.*

***125. Choice between criminal court and court-martial****.-*
*When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and if that officer decides that they should be instituted before a court martial, to direct that the accused person shall be detained in military custody.*

> ***126. Power of criminal court to require delivery of offender****. — (1) When a criminal court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government.*
>
> *(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."*

28. It was, therefore, necessary to lodge an FIR to ascertain as to whether the trial should be done by court martial or by criminal court. Moreover, as we have already seen, the Railways Act debars other courts to proceed with the trial of such offences except on a complaint lodged by railway authorities. To deal with such offences, the Railways have their own Magistrates for trial of offenders and punishment. It may be noted that the alleged offence committed by the applicant did not occur when both, the applicant and Major A.P.Gupta, were on active army duty, hence also it was necessary that FIR should have been lodged so that the authorities concerned could have exercised their power by application of judicial mind. A Division Bench of Hon'ble Delhi High Court in the case of **Ranjit Singh, Ex Sepoy versus Union of India**, decided on 18.05.2002, has dealt with a question with regard to trial by court martial or criminal court as under:

> *"35. Section 125 of the Act speaks of a decision. Such a decision to the effect that the proceedings should be instituted*

*before a Court Martial must be in writing. Only by reason of an order in writing, a direction can be issued by the competent authority that the accused person shall be detained in military custody. An ordinary court has the jurisdiction to initiate the trial of a criminal case. Sections 69 and 70 of the Act curb out an exception thereto. The jurisdiction of the criminal court and the Court Martial being coordinate it was obligatory on the part of the respondents is strictly comply with the provisions of Section 125 of the Act. Exercise of discretion in terms of Section 125 of the Act would require application of mind on the part of the Competent Authority and while applying mind in that behalf, the said authority must take into consideration all aspects of the matter including respective advantages and disadvantages of getting the accused tried by a criminal court vis-a-vis in a Court Martial. A discretion conferred upon the appropriate authority cannot be exercised arbitrarily or whimsically. The Apex Court while upholding the constitutionality of Section 125 of the Act in Ram Sarup's case (Supra) held:-*

> *"22. In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary Criminal Court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed.*
>
> *23. Lastly, it may be mentioned that the decision of the relevant military officer does not decide the matter finally. Section 126 empowers a criminal court having jurisdiction to try an offender to require the relevant military officer to deliver the offender to the Magistrate to be proceeded against according to law or to postpone proceedings pending reference to the Central Government, if that Criminal Court be of opinion that proceedings be instituted before itself in respect of that offence. When such a request is made, the military officer has either to comply with it or to make a reference to the Central Government whose orders would be final with*

> *respect to the venue of the trial. The discretion exercised by the military officer is therefore subject to the control of the Central Government."*
>
> *It was held that Section 125 does not contain any guideline. The Apex Court, however, held that the nature of offence, the person accused, by whom the offence is committed, discipline in the Army and exigency of service are the relevant criteria."*

29. In view of above, since the respondents did not lodge any FIR, hence they have failed to comply with the statutory provisions contained in the Railways Act (supra) read with Section 154 of the Cr.P.C, which vitiates the trial. By no stretch of imagination, it may be held that any effort was made for compliance with the statutory provisions of the Army Act (supra).

## COURT OF INQUIRY (CoI)

30. In the present case, admittedly CoI was held but in spite of repeated orders passed by the Tribunal, the respondents have failed to produce the original or photo copy of record, hence an adverse inference may be drawn that CoI if held against the applicant was an ex parte inquiry and the respondents have attempted to conceal the material facts. The submission made on behalf of the respondents is that the record of CoI has been weeded out.

31. It is well settled proposition of law that to hold a CoI, provisions contained in Army Rule 180 should be followed and the applicant should have been given an opportunity to cross-examine the witnesses and also lead evidence in defence, which seems to be missing.

32. It is trite law that non-compliance of Army Rule 180 vitiates the trial. From the pleadings on record, there is nothing to show that the applicant

was ever called for or asked to cross-examine the witnesses. Rule 180 of the Army Rules provides that whenever any inquiry affects the character or military reputation of a person, 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. For convenience, Rule 180 of the 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."*

33. As observed above, the applicant at no stage was permitted to lead evidence in defence or cross-examine the witnesses in CoI in compliance of Rule 180 of the Army Rules, which is mandatory in view of law settled by Hon'ble the 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 applicant's conduct which affects his reputation. Accordingly, the finding recorded in CoI on account of non-compliance of

statutory mandates vitiates and deserves to be set aside. An inference may be drawn that no inquiry as per law was ever held against the applicant.

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.*

35. Hon'ble Supreme Court in the case reported in ***State, Inspector of Police vs. Surya Sankaram Karri,*** 2006 AIR SCW 4576 held that a document being in possession of a public functionary, who is under a statutory obligation to produce the same before the Court of Law, fails and/or neglect to produce the same, an adverse inference may be drawn against him. The law gives exclusive discretion to the court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-à-vis the facts of the particular case. The discretion conferred by Section 114 of the Evidence Act is an inference of a certain fact drawn from other proved facts. The Court applies the process of intelligent reasoning which the mind of a prudent man would do under similar circumstances unless rebutted.

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

37. What prompted the respondents, or the authorities concerned, to weed out the record may be inferred from the material on record, i.e. to save their neck. Burden was on the respondents to establish genuineness of weeding out the record which they have failed to do. (Vide AIR 2006 SCW 6155 ***B. Venkatamuni vs. C.J., Ayodhya Ram Singh)***

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

39. In view of above, an inference may be drawn that the provision contained in Army Rule 180 has not been complied with, which vitiates the trial.

## MATERIAL WITNESSES

40. It is vehemently argued by learned counsel for the applicant that material witnesses were not produced, which seems to be correct, for the reason that an officer of the Indian Army of the rank of Colonel i.e. Col Mishra, two constables of RPF, Mr Rajinder Dy Comdt BSF, TTE and some civilians were very well available to be produced, but why the respondents have not called them during SoE and SCM is not understandable. Conducting a court of Inquiry, Summary of evidence and subsequent SCM on the primary evidence of only one officer as prosecution witness who himself has put allegations and charges against the applicant and his colleague, without giving any credibility to the evidence of applicant and his colleague and not making any attempt to get independent witnesses, does not meet the requirements of Principles of natural justice. **Even** the doctor, who examined the complainant, was not examined to prove injury report with liberty to the applicant to cross-examine the witnesses in compliance with the principles of natural justice. Non-production of material witnesses and material documents makes the trial arbitrary and violative of principles of natural justice, vide **Ramaswamy vs. Muthu** *{Madras High Court 1976-MAD LJ-1-282} Para-5 and 8*, Supreme Court in **State of U.P. vs. Jaggo** (*1971-AIR(SC)-0-158* and Supreme Court in **Ishwar Singh vs. State of U.P.** (*AIR 1976 SC 2423*), Para-6. The

applicant seems to have been prejudiced on account of non-production of material witnesses during SoE and SCM, which vitiates the trial.

**SUMMARY COURT MARTIAL (SCM)**

41. Undoubtedly the Commanding Officer (CO) has got powers to proceed with SCM in pursuance to powers contained under Sections 108 to 110, 112 to 116 and 118 to 120 of the Army Act. However it is always desirable for the accused to be tried by his own CO. In this case the accused has been attached to the unit of Major A.P.Gupta and has been tried by his officiating commanding officer. Such a trial may be justified on technical grounds but is against the spirit of SCM. Additionally powers conferred on CO to try an army personnel through SCM is a power which may be used only in emergency. In a recent judgment reported in *(2016) 8 SCC 641*, **Union of India and others versus Vishav Priya Singh,** their Lordships of the Supreme Court has dealt with the power of CO with regard to SCM. After considering the provisions contained in Army Act elaborately, their Lordships held what kind of offences may be tried by SCM. For convenience, paras 23, 24 and 25 of the said judgment are reproduced as under:

> *"23. We now deal with the question as to what kind of offences can be tried by an SCM. An SCM can try any offence punishable under the Act by virtue of sub-Section (1) of Section 120but this general principle is subject to the provisions appearing in sub-Section (2) of Section 120. Sub-Section (2) of Section 120 deals with some offences in respect of which certain restrictions are applicable. The offences so stipulated are those punishable under Sections 34, 37 and 69 of the Act or those against the Officer holding the Court. Apart from Sections 34, 37and 69 of the Act, there are various other*

*provisions where different kinds of offences are spelt out and dealt with. For example in Chapter VI of the Act, Section 38 deals with offence of desertion, Section 39 deals with offence of absence without leave, Section 40 deals with striking or threatening a Superior Officer, Section 41 deals with disobedience to the Superior Officer, Section 42 deals with insubordination and so on. Out of multitude of such offences, only Sections 34, 37 and 69 are mentioned in sub-Section (2) in respect of which restrictions stipulated in sub-Section (2) apply. Additionally, one more category, namely "any offence against the officer holding a Court" is also specified. Such of the offences as are directed against the officer holding the Court, may include those under Sections 40, 41, 42 and so on, depending upon facts of the case.*

*24. Sub-Section (2) of Section 120 prescribes that in respect of such stipulated offences, in normal circumstances, an SCM shall not try the accused without making a reference to the officer who is otherwise empowered to convene a DCM in regular course or an SGCM while on active service. It further states that if there is no grave reason for immediate action, such reference to the concerned officer must be made and no person should be tried without such reference in respect of any offence so stipulated i.e. those under Sections 34, 37 and 69 of the Act or those against the officer holding the Court. However no such restriction applies in cases other than Sections 34, 37, and 69 of the Act or offences against the officer holding the Court. This provision thus categorizes the offences in two compartments i.e. those which require a reference and those which do not. This distinction is also noticeable from sub Rule 2 of the Rule 22 which mandates that CO shall not dismiss a charge in respect of offences which require a reference to superior authority in terms of Section 120 (2) of the Act. We must therefore accept the submission that the sentence appearing in Paragraph No.20 of the judgment of the High Court to the effect that only offences under Sections 34,37 and 69 of the Act could be tried by an SCM is not correct.*

*25. The aforesaid provision in Section 120(2) requiring a reference to the superior authority which thought is again echoed in proviso to Rule 22 (3) of the Rules, is a salutary provision and a check on the exercise of drastic power conferred upon a CO and must be scrupulously observed. A case for non-adherence to this requirement must be made out*

*on record and any deviation or non observance of statutory requirements must be viewed seriously. Offences under Sections 34, 37 and 69 of the Act are special categories or kinds of offences where a reference to the officer empowered to convene a DCM or an SGCM is considered imperative unless there are grave reasons for immediate action. Similarly, the offences against the officer holding the Court, where that officer could possibly "be a judge in his own cause", are also put at the same level and similar reference under sub-Section (2) ought to be made. The exercise of power in seeking such reference and consequent consideration in respect thereof must be in keeping with the seriousness attached in respect of these offences."*

42. While appreciating the present controversy in the light of the judgment of the Apex Court in the case of **Vishav Priya Singh** (supra), we feel that the case in hand does fall within the four corners of the observations made and directions given in the said judgment. In the present case, the respondents did not apply mind to the provisions of the Railway Act and to the fact that the incident had taken place in the train compartment where Major A.P.Gupta was in civil dress and initially he was not known to the applicant and that he being an officer of Indian Army, no conscious decision had been taken with regard to lodging of FIR. Thus, the statutory mandates of Railways Act with respect to trial by holding SCM proceedings against the applicant have not been complied with. As held by the Hon'ble Supreme Court in para 35 of the said judgment, it was necessary to record reason for holding SCM. To quote:

*"33. In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM*

*in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions. We fully endorse and affirm the view taken by the High Court that SCM is an exception and it is imperative that a case must be made out for immediacy of action. The reasons to convene an SCM must be followed by well articulated reasons or the record itself must justify such resort."*

43. In view of above, trial of applicant by SCM is not only vitiated for non-compliance with the provisions of Railways Act, but also the lack of urgency coupled with adhering to SCM proceedings without recording any reason invalidates the trial.

**FACTUAL MATRIX**

44. During the course of SCM, Major A.P.Gupta appeared as witness No.1. In paras 9,10,11,12 and 13 of his statement in SoE, he made serious allegations against the applicant which indicate that 9-10 persons alongwith the applicant had beaten him with motorcycle chains, rods and wooden sticks, but admittedly as per medical report, he had a bruise on his forehead with complain of pain over his body, etc. The allegations, thus, do not seem to be supported by medical evidence. Major A.P.Gupta has admitted in his statement that he was not having a reserve ticket and no effort was made by him to lodge a report in writing; he had not reported the incident to Station Officer, Manikpur, but stated that all facts have been enumerated in the CoI, record of which is not available. His statement that he was beaten by 9-10 persons along with the applicant, because of which he suffered injuries on his forehead and started bleeding; also is not supported by medical evidence though at Allahabad, he was immediately taken over

by the military police and subjected to medical examination and treatment. The Medical Officer, who examined the complainant, was not produced, hence the applicant could not get an opportunity to cross-examine him in utter disregard to the principles of natural justice.

45. In his statement Major AP Gupta has admitted that he prevented the applicant and his colleague to remove their luggage at their destination station, he wanted them to come upto Allahabad so that they could be arrested by Military police. This act of the officer in our opinion was an extreme provocation and an illegal act and could have been the main trigger for the avoidable skirmish between the officer and the applicant and his few relatives who had come to receive him at his destination station.

46 . One strange feature borne out from the record is that Hav Anil Kumar Mishra, co-accused was tried and punished separately. He was also produced as PW-2. He stated that he had had seen Major A.P.Gupta shouting and two RPF approaching him and that the applicant was sitting on a seat with his lips swollen and some blood near his noise. For convenience, paras 26, 27 and 28 of the statement of this prosecution witness are reproduced as under:

> *"26. On checking also what was going on I was told that two people from army were having a fight. I went inside to see and saw Maj AP Gupta shouting and two RPF were apch him. I saw Sep BK Singh was sitting on a seat with his lips swollen and some blood near his noise. On checking I was told that there had been a fight between Maj AP Gupta and Sep BK Singh.*
>
> *27. I found Maj AP Gupta in a foul mood and requested him to calm down. Maj AP Gupta told me that he was an offr and since a Sep had behaved with him in an incorrect manner he*

*would not spare him. I then told Sep BK Singh to apologize to Maj AP Gupta which he did. Maj AP Gupta said if he apologises loudly three times in front of the complete public I will forgive him Sep BK Singh then apologized to Maj AP Gupta three times loudly in front of the complete public.*

*28. I saw two RPF constables then talking to Maj AP Gupta and saying that if Maj AP Gupta had a complaint he should give it in writing, as they were seeing Sep BK Singh sitting there bruised. They then advised Maj AP Gupta to resolve the problem in house since it was an internal army matter. After the two constables left Maj AP Gupta and Sep BK Singh started arguing again, I then took Sep BK Singh to some other seat and made him sit down there on seat No 1."*

46. The aforesaid statement of PW-2 Hav AK Mishra contradicts the statement given by Maj AP Gupta, which makes the prosecution case unworthy of credence. It is noteworthy that the applicant, during his statement under Army Rule 180, had submitted his blood-soaked handkerchief, which is marked as Material Exhibit-2.

Further, how and under what circumstances, a co-accused (Hav AK Mishra) without due approval, has been treated as prosecution witness, is not understandable.

47. To find out the truth, it was incumbent upon the respondents to produce other material independent witnesses who were party to the incident in question, but there appears to be deliberate attempt on the part of the respondents to withhold the material witnesses, which at the face of record, seems to be fatal to the prosecution case. No finding could have been recorded merely on the statement made by Major A.P.Gupta, that too in the absence of compliance of the statutory provisions (supra).

## DISCRIMINATORY TREATMENT

48. It is not disputed that the applicant was charged with the aid of Section 34 of the IPC which deals with the common intention of two or more accused to cause injury. In the present case, co-accused Hav AK Mishra has been punished with imprisonment of two months in military custody and reduction to rank. On the other hand, the applicant has been punished with dismissal from service. It does not seem to be a correct approach to law by the respondents. Learned counsel for the applicant has relied upon a judgment of Hon'ble Supreme Court, reported in *2002 (4) AWC 2946 SC*, **State of U.P and others versus Raj Pal Singh,** wherein the Apex Court has held that when the charges are same and identical in relation to one and the same incident, then awarding punishment of dismissal to some persons and to others lesser punishments amounts to discriminatory treatment and is denial of justice. In this view of the matter also, the punishment awarded to the applicant suffers from arbitrariness, hence not sustainable.

49. To sum up, the factual matrix on record makes out and constitute an offence under the Railways Act and the Railways Act being a special Act, trial should have been proceeded in accordance to the provisions contained therein. Apart from this, on account of non-compliance of Rule 180 of the Army Rules and non-lodging of FIR as well as for reasons given in preceding paras of this judgment, the punishment awarded to the applicant besides being discriminatory in nature suffers from the vice of arbitrariness, hit by Article 14 of the Constitution of India.

50. Accordingly, the OA deserves to be allowed and is hereby **allowed.** The impugned orders dated 03.02.2011 and 08.02.2012 are set aside with all consequential benefits. In case the applicant has not completed his pensionable service, he shall be restored back to services with back wages and continuity of service till the date of superannuation in the rank he was holding at the time of dismissal. In case he has already completed service tenure, then he shall be deemed to have continued in service with back wages till the date of superannuation and shall be paid arrears of back wages, pension and other consequential benefits in accordance to rules within a period of four months from today. However, under the peculiar facts and circumstances of the case, the arrears of salary are confined to 50% admissible in accordance to rules.

No order as to costs.

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

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

Dated: Dec. 04, 2017
LN/-