COURT NO. 2, ARMED FORCES TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

2.
OA 469/2013

EX Lt Gen Avadhesh Prakash … Applicant
Versus
Union of India and Others ..... Respondents

For Petitioner : Mrs Jyoti Singh, Sr. Advocate with Mr. Dinesh Yadav & Ms. TinuBajwa, Advocates
For Respondents : MrAnil Gautam, Advocate

CORAM:

HON'BLE MR JUSTICE VK SHALI, MEMBER (J)
HON'BLE LT GEN SK SINGH, MEMBER (A)

ORDER

Pronounced, signed dated 20.12.2017

1. This is an OA under Section 15 of the Armed Forces Tribunal Act, 2007 wherein the applicant has challenged the order dated 14.08.2013 of the respondents rejecting the post confirmation petition against the findings and sentence of General Court Martial through which the applicant has been dismissed from service.

2. The facts of the case in brief are as follows: -

(a) The applicant was commissioned in the Indian Army on 20.12.1970 and promoted to the rank of Lt Gen in October 2007. He was appointed as Military Secretary on 01.05.2008 at the Army Headquarters, New Delhi. During the tenure of the applicant as the Military Secretary at the

Army Headquarters, the so called ‘Sukna Land Scam’ case broke out in the end of year 2010, which is explained below.

(b) The Chumta Tea Estate (E) is co-located with the Sukna Military Station. It has approximately 2711 acres of land inside Military Station and surrounded by Army. It is contended by the respondents that the applicant herein, visited Chumta Tea Estate during his visit to and referred MrDilip Agarwal to Lt Gen PK Raththen the 33 Corps Commander and to look into his plan of constructing a Girls School on said land. MrDilip Agarwal wrote to Lt Gen PK Rath for a No Objection Certificate (NOC) explaining his plan to build a Girls School, affiliated to Mayo College. On 03.02.2009 MrDalip Agarwal requested for Army’s NOC. Lt Gen PK Rath allowed NOC to be given on 06.02.2009 and memorandum of understanding to be signed on 20.03.2009 with the builder. Headquarters Eastern Command was not informed of this. Headquarter Eastern Command learnt about the NOC given by Headquarter 33 Corps, when land Commissioner was approached on 28.08.2009 to expedite the case. HQ 33 Corps was asked to forward explanation. On not getting satisfactory reply, a Court of Inquiry was ordered on 30.09.2009. The name of the applicant figured in Court of Inquiry on 07.01.2009, when Army Rule 180 was applied against him. Court of inquiry was

completed on 05.12.2009. Chief of Army Staff initially directed Administrative Action against the applicant and a Show Cause Notice dated 11.01.2010 was served on him. The applicant submitted his reply to Show Cause Notice on 22.01.2010. However, just two days prior to his retirement on 31.01.2010, the applicant was informed about withdrawal of above Show Cause Notice and initiation of disciplinary proceedings against him. Provisions of Army Act Section 123 were invoked in applicant's case.

(c) The applicant filed OA No. 66 of 2010 before this Tribunal, challenging Court of Inquiry for non compliance of Army Rule 180, Para 518 of Regulations for the Army and change of directions. The Tribunal vide its order dated 22.02.2010, gave partial relief to the applicant. The applicant was given opportunity to cross examine six witnesses namely Lt Gen PK Rath, Lt Gen R Halgali, Maj Gen PC Sen, Col NK Dabas, Lt Col JijiVerghese and Sub Surjit Singh.

(d) The applicant approached Supreme Court on 16.03.2010 to set aside the complete disciplinary proceedings by filing SLP No. 7846 of 2010. The case was heard in Supreme Court on 09.04.2010 and SLP dismissed.

(e) Additional Court of Inquiry reassembled and completed on 02.05.2010. GOC-in-C Eastern Command directed

disciplinary action against the applicant. Summary of Evidence was completed on 07.10.2010. Report on Application for Trial (RAT) was issued by Deputy Judge Advocate General, Eastern Command. Further Report on Application for Trial was issued by Deputy Judge Advocate General, Eastern Command on 26.02.2011. On 07.03.2011, Endorsement of General Court Martial (GCM) by convening authority for trial by GCM was given. On 10.06.2011, this Tribunal issued order for change of location of GCM. GCM commenced on 27.06.2011 at Narangi (Guwahati) and concluded on 03.12.2011.

(f) The applicant was found 'Not Guilty' on charge one and 'Guilty' on charges 2, 3 and 4 and sentenced to "Dismissal from Service". The applicant submitted Pre-Confirmation Petition on 11.01.2012. The applicant also filed OA 19 of 2012 in this Tribunal for grant of leave pending confirmation of findings and sentence of GCM which was rejected vide order dated 30.01.2012.

(g) Pre-Confirmation Petition was rejected by Chief of Army Staff on 20.05.2012. Promulgation was carried on 21.05.2012. Post-Confirmation Petition was submitted by the applicant in July 2012 which has been rejected vide Government of India order dated 14.08.2013.

(h) The applicant has now filed this petition against rejection of Post-Confirmation Petition, setting aside GCM proceedings and payment of all retiral and consequential benefits.

Submissions on behalf of Appellant :

3. The important legal submissions made by Mrs Jyoti Singh, learned Sr. Counsel on behalf of the applicants are as follows: -

(a) Violation of para 518 of Defence Service Regulation (DSR): It is submitted that the Court of Inquiry the Presiding Officer should be senior and other members be of equivalent rank to the officer whose character or reputation is in question. Presiding Officer was of same rank but junior and both members were junior in rank to the applicant ie. Major Generals. Court of Inquiry was to enquire into issues of actions by Lt Gen PK Rath and his subordinates and hence, the composition of Court of Inquiry violated Para 518. No reasons were given by respondents for detailing junior members. The Army Commander, Eastern Command had an issue with the applicant and therefore having Major Generals and that too from Eastern Command led to command influence.

(b) Attachment to Headquarters Eastern Command, violative of AI-30/1986. Attachment is done when prima facie evidence emerges in the Court of Inquiry. The initial Court of Inquiry was partly set aside and the second Court of

Inquiry concluded on 24.04.2010. No fresh attachment order was issued on findings of the Court of Inquiry.

(c) GOC-in-C lacked Powers to Issue Directions on Court of Inquiry: Applicant was not legally attached to Eastern Command and therefore Lt Gen Bikram Singh could not have issued directions dated 04.06/2010 on the re-assembled Court of Inquiry.

(d) Chief of Staff Headquarters Eastern Command was not the Commanding Officer of the applicant: Army Order 17/2000 states that Commanding Officer may delegate power as Commanding Officer to staff Officer only when he does not wish to exercise these powers, and this delegation has to be in writing, giving full particulars of the officer and such delegation has to be promulgated in Part-I Orders. Army Act, Section 3(v) defines "Commanding Officer" and DSR Para 8 states that the GOC-in-C of a Command is a Formation Commander. No delegation of his powers as the Commanding Officerby Lt Gen Bikram Singh was ever produced despite repeated requests, nor any Part-I order produced. Powers of the Commanding Officer exercised by his Chief of Staff for hearing under Army Rule 22 and Summary of Evidence under Army Rule 23 were thus without jurisdiction and the proceedings stood vitiated.

(e) Lt Gen Bikram Singh, lacked powers to convene GCM: Defence Service Regulation Para 449 (b) and Note 3 (b) to

Army Act, Section 109 states that the Commanding Officer or the Investigating Officer cannot afterwards act as Convening Authority. Assuming the applicant was correctly attached to Headquarter Eastern Command, then Lt Gen Bikram Singh became his Commanding Officer and hence convening GCM by him is illegal.

(f) Key witnesses like Lt Gen PK Rath, Sri Gaj Singh, Mr. Pramod Sharma, Mr RD Singh and officers from Headquarter 12 Corps were not examined under Army Rule 22. It is thus not understood on what basis the Summary of Evidence was ordered. Col Chaturvedi and Col Ghai were examined on 1st and 2nd charges of tentative charge sheet, Bajoria for 3rd Major Gen Sen for 4th and Lt Gen Halgali for 5th. None of them supported the allegation in the charge sheet.

(g) Under Army Rule – 23 no material witness was examined. The tentative charge sheet differed completely from the final one. Charges 3, 4 and 5 related to in the tentative charge sheet and were dropped. Charges – 1, 3 and 4 of the final charge sheet were not part of the tentative one. The prime witnesses for the allegations in the final charge sheet could have been Lt Gen PK Rath, Gaj Singh and Pramod Sharma, but none of these were called and hence there was no evidence to frame the charge sheet.

(h) Non compliance of Army Rule – 37. No evidence emerged during Army Rule 22 or Army Rule 23 proceedings in support of final charges alleged. Thus, there was non application of mind and there was no objective satisfaction to order trial by the convening authority. Thus, Army Rule 37 stood grossly violated.

(i) Violation of Army Rule – 40. This mandates members of GCM to be of equivalent rank of the accused. Except for Presiding Officer, all members were Major Generals. Objection was raised vide Exhibit – 3, of GCM. Witnesses in support of the plea were disallowed and objection was over ruled. 84 Lieutenant Generals were available on the strength and were made available in Lt Gen PK Rath's Court Martial, which had ended six months ago. Mere endorsement on record of non availability is not enough. No documents were produced to support any effort to appoint Lt Generals for GCM and for reasons for their non availability. Being Maj Generals, they were subjected to command influence as Chief of Army Staff was their Senior Reviewing Officer for Annual Confidential Reports and he was the one who had direct clash with the applicant on his date of birth issue.

(j) Under Army Rule 58 (3), the applicant asked for examining ten witnesses, out of which only two were allowed. Six

witnesses in support of plea to jurisdiction were requested for but were not allowed.

(k) Dilip Agarwal who was center of all charges was not called as prosecution or court witness. Applicant was debarred from calling him as defence witness due to earlier order dated 4.6.2010 in OA No. 360 of 2010. GOC-in-C South Western Command, Jaipur and GOC 12 Corps, Jodhpur were not called for the allegation relating to official duty.

(l) Sentence was confirmed by Gen VK Singh on 10.05.2012. He lacked powers to confirm the GCM proceedings in terms of Para 472 of Regulations of the Army. Since he as GOC-in-C, Eastern Command was applicant's Commanding Officer and had investigated the case against him.

4. Countering the legal submissions of the applicant the Senior Central Government Standing Counsel Shri KS Bhati, assisted by Shri Anil Gautam, have argued as follows: -

(a) The terms of reference of the Court of Inquiry reveal that it did not name the appellant but it was ordered to investigate into the circumstances resulting into rendering of 'No Objection Certificate' for establishment of an educational institution by representative of HQ 33 Corps, on 01.02.2009, and signing of memorandum of understanding on 20.05.2009 between the Station

Commander Sukna and some private companies, without making reference to HQ Eastern Command. Thus no particular person or rank could have been identified at the time of convening of Court of Inquiry for purpose of invoking of Para 518. It was on 07.11.2009, during the additional statement given by Lt Gen PK Rath, the appellant's name figured for the first time. Thereafter, on 18.11.2009, AR 180 was invoked against the appellant. It is further submitted that the appellant challenged the legality of the court of inquiry on various grounds including that of violation of para 518 of the Regulations, for the Army. However, none of the contentions of the appellant found favor with the Tribunal and vide judgment dated 22.02.2010 passed in OA No. 66 of 2010 by this Tribunal, a limited relief to re-assemble the court of inquiry and to permit the appellant to cross examine a few witnesses was given and thereafter the respondent authorities were left free to proceed with the case in accordance with law. The judgment dated 22.02.2010 was challenged by the appellant by filing SLP No. 7846 of 2010 wherein a specific ground was taken. The SLP was dismissed and thus the order dated 09.04.2010 was neither quashed/ set aside nor interfered by the Tribunal and the Apex Court. Pursuant to the directions of the Tribunal vide

judgment dated 22.02.2010 in OA No. 66 of 2010, the court of Inquiry reassembled on 15.04.2010 for compliance with the Tribunal orders and was concluded on 24.04.2010. The appellant again moved the Tribunal regarding non compliance of Army Rule 180 at the reassembled Court of Inquiry, however, the OA No. 360 of 2010 was also dismissed by the Tribunal vide order dated 04.06.2010. Thus rank structure of the Court of Inquiry did not cause any prejudice to the applicant.

(b) It is further submitted that the appellant was attached with HQ Eastern Command vide order dated 29.01.2010 pending final disposal of disciplinary case against him. The said attachment order was specifically challenged in OA No. 66 of 2010 by the appellant. However, the said challenge did not find favour with the Tribunal and only a partial relief to cross examine a few witnesses was allowed to the appellant. The said judgment dated 22.02.2010 was challenged by the appellant by filing SLP No. 7846 of 2010 wherein a specific ground was taken. However, as already submitted earlier, the SLP was dismissed and thus the order dated 29.01.2010 was neither quashed / set aside nor interfered by the Tribunal and the Apex Court. The Court of Inquiry reassembled on 15.04.2010 and was concluded on 24.04.2010. The appellant thereafter filed OA No. 360 of 2010 wherein the

issue was not raised. It is thus submitted that the order dated 29.10.2010 was neither quashed/ set aside by any Court/ Tribunal nor was cancelled/ revoked by any authority competent to do so and remained in vogue throughout till the finalization of the disciplinary case against the appellant.

(c) It is contented that the attachment order dated 29.01.2010 having remained in operation throughout the finalization of disciplinary case, GOC-in-C Eastern Command was competent to issue directions dated 04.06.2010 on the reassembled Court of Inquiry.

(d) It is further submitted that Army Order 17/2000 permits a Formation Commander to appoint a staff officer as Commanding Officer when he does not wish to exercise personally his power as Commanding Officer in respect of officers of his Headquarter and rather exercise powers of a superior officer ie. GOC-in-C. GOC-in-C, Eastern Command has delegated such powers vide Part I Order No. 42/2002 and vide Para 181 (a) of Standing Order, to Chief of Staff (COS), HQ Eastern Command, and the Chief of Staff was appointed as Commanding Officer of the Officers of the rank of Colonel and above at HQ Eastern Command. Since the appellant was attached to HQ Eastern Command, the Chief of Staff, HQ Eastern Command, became his Commanding Officer. Regulation

9 of the Regulations for the Army is also relied upon. Thus, the Chief of Staff, HQ Eastern Command, legally performed the duties of the Commanding Officer of the appellant.

(e) There was no illegality in convening of the GCM by GOC-in-C, Eastern Command since he did not exercise the powers of Commanding Officer in respect of the appellant, which were delegated to and exercised by the Chief of Staff, HQ Eastern Command. The GOC-in-C, Eastern Command, being holder of A1 Warrant, was empowered to convene GCM of the appellant.

(f) It is further submitted that in terms of Army Rule 22 (1) proviso, if Army Rule 180 had been complied with at the Court of Inquiry, Commanding Officer could have dispensed with examination of witnesses at hearing of charge under Army Rule 22 altogether. In the instant case, the provisions of Army Rule 180 were complied with in respect of the appellant at Court of Inquiry. Nevertheless, as a matter of caution and to give additional opportunity to the appellant, the Commanding Officer admittedly heard the witnesses including one defence witness at hearing of charge under Army Rule 22.

(g) The appellant had duly participated in the Summary of Evidence by cross examining the witnesses and had also

made a detailed statement therein. After the recording of Summary of Evidence, the Commanding Officer of the appellant referred the case to superior military authority ie. GOC-in-C, Eastern Command in terms of Army Rule 24, who, after due application of mind to the evidence recorded in Summary of Evidence framed the charges and convened the GCM in respect of the appellant.

(h) The Chief of Staff, HQ, Eastern Command exercised the powers of Commanding Officer of the appellant. The convening authority, after receipt of application for trial, duly considered the matter with due application of mind to the facts of the case and evidence on record and was of the opinion that a prima-facie case existed against the appellant. Accordingly, the charge sheet of the appellant was duly endorsed and the convening order for his GCM was issued. Further, the convening order had been signed by the convening officer after satisfying himself that it was a fit case to be tried by a GCM on the charges as framed.

(i) The Convening officer had also endorsed his opinion with regard to members and the Judge Advocate of equivalent rank as petitioner being not available to serve on the GCM due to exigencies of service and the said opinion forms part of the convening order. Army Rule 40 (2) provides that the members for the trial of an officer

shall be of the rank not lower than the appellant unless, in the opinion of the convening officer, officers of such rank are not (having due regard to exigencies of public service) available. Such opinion shall be a recorded in the convening order.

(j) The appellant's request for examining defence witnesses was dealt with in accordance with law.

(k) The relevant witnesses were examined on all charges and there is sufficient evidence on record to sustain conviction. Furthermore, there was no impediment on Gen VK Singh to confirm the proceedings as he had not investigated the case as Commanding Officer of the appellant. It is also argued by the respondents that there was no impediment on the appellant to examine Shri DilipAgarwal as defence witness if he so desired.

5. Having countered the applicant point by point on legal issues, the respondents have rejected the Post Confirmation Petition of the applicant on the basis of Armed Forces Tribunal order dated 22.02.2010 in OA No. 66 of 2010 and dismissal of SLP by the Apex Court. Learned Senior Counsel for the applicant has contended that the above OA No. 66 of 2010 was filed with a limited prayer of seeking this Tribunal's intervention in examining the witnesses for the benefit of the applicant and the SLP on this issue before the Hon'ble Supreme Court was

dismissed in limine and not on the merits. As argued by the learned Senior Counsel for the applicant, merit issues of the SLP cannot be taken as decided by the Apex Court. She has argued that the judgment of Apex Court of not granting Special Leave to petition under Article 136 of India does not amount to rejection of the issue raised by the applicant. In this connection she has relied upon the judgment of *Supreme Court order dated 21.10.1986 in the case of Mir Osman Ali Khan vs. CWT (186 Supp SCC 700), judgment dated 24.04.1987 in the case of Pratap Singhji Ran Singhji (1987-167 ITR 2010) and judgment dated 10.04.1990 in the case of Scientific Advisor, MoD vs S. Daniel (1990 Supp SCC 374*) are referred. It is argued that perusal of Central Govt. order dated 14.08.2013 will make it evident and abundantly clear that issues raised by the applicant in the post confirmation petition and justifications given therein by way of exhibits, references to various Army Orders, policies issued by Army Headquarter and case laws have not even been considered and addressed by Ministry of Defence. The Central Government order of 14.08.2013 is a reproduction/ replica of order issued by Gen VK Singh while rejecting the applicant's pre-confirmation petition of the applicant. In fact, the word 'accused' used while rejecting the pre-confirmation petition of the applicant had also not been changed to the word 'petitioner' while rejecting the post confirmation petition of the applicant, which shows the

mechanical manner of its treatment. It also amply demonstrates non application of mind on the part of concerned authorities.

Evidence

6. The applicant has been tried on following charges: -

(a) The first charge was laid under Army Act Section 69 for 'COMMITTING A CIVIL OFFENCE THAT IS TO SAY CRIMINAL MISCONDUCT CONTRARY TO SECTION 13 (2) READ WITH 13(1) (D) (II) OF THE PREVENTION OF CORRUPTION ACT 1988', the particulars averring that he, between July 2008 and March 2009, while holding the office of 'Military Secretary' at the Integrated Headquarters of Ministry of Defence (Army), by abusing his position as such public servant, obtained pecuniary advantage for the following companies by facilitating tendering of No Objection by Headquarters 33 Corps to Government of West Bengal for establishment of an educational institution with residential facility on New Chumta Tea Estate land, adjoining the Military Station:

(i) M/s Akshara Vanijya Pvt. Ltd.
(ii) M/s Mata Vaishno Devi Mercantile Pvt. Ltd.
(iii) M/s SheetlaVyapar Pvt. Ltd.
(iv) M/s JF Low & Company.

(b) The second charge was laid under Army Act Section 45 for 'BEING AN OFFICER BEHAVING IN A MANNER

UNBECOMING HIS POSITION AND CHARACTER EXPECTED OF HIM’, the particulars of the said charge averring that he, at Jodhpur, on 22 August 2008, while being the Military Secretary, Integrated Headquarters of Ministry of Defence (Army), with intent to obtain a favourable outcome for the proposed education institution of Shri Dilip Agarwal, his friend, met Shri Gaj Singh, President, Mayo College Governing Council, alongwith said Shri Dilip Agarwal and sought franchise of Mayo College, while being on an official visit to Jodhpur.

(c) The Third charge was laid under Army Act Section 52 (f) for ‘SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (F) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD’, the particulars of the said charge averring that he, at New Delhi, between 14 August 2008 and 22 August 2008, while being the Military Secretary, Integrated Headquarters of Ministry of Defence (Army), with intent to defraud, organized his move to Jodhpur on temporary duty by falsely showing purpose as ‘Military Secretary interaction at Headquarters 12 Corps’ well knowing that the purpose of his visit to Jodhpur was to meet Shri Gaj Singh, President, Mayo College Governing Council, for seeking franchise of Mayo College for the proposed educational institution of Shri Dilip Agarwal, his friend.

(d) The Fourth charge was laid under Army Act Section 52 (f) for 'SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (F) OF SECTION 52 OF THE ARMY ACT, WITH INTENT TO DEFRAUD', the particulars of the said charge averring that he, at New Delhi between 26 August 2008 and 30 August 2008, while being the Military Secretary, Integrated Headquarters of Ministry of Defence (Army), with intent to defraud, organized his move to Ajmer on temporary duty by falsely showing purpose as 'Military Secretary interaction at Headquarters South Western Command, Jaipur' well knowing that the purpose of visit to Jaipur was to further proceed to Ajmer for visiting Principal, Mayo College.

(e) The applicant was found 'Not Guilty' on First Charge but 'Guilty on charges 2, 3 and 4 and sentenced to Dismissal from service'.

7. It has been argued by the learned senior counsel for the applicant Mrs Jyoti Singh that: -

(a) A holistic view of the GCM proceedings will reveal the frivolousness of the 2nd, 3rd and 4th charges for which the applicant has been held guilty. The main and first charge against the applicant could not be sustained and fell through. While giving its findings on the first charge, the

GCM has stated that it was ‘vague’ and ‘hypothetical’. It is worth noting that more than 90% of the GCM proceedings, out of a total 932 pages, pertain only to the first unproved charge against the applicant and other procedural aspects. It is just the remaining 10 % of the proceedings through which the GCM has found the applicant blameworthy of all the remaining three charges put together, for which he has been awarded the grossly disproportionate sentence of dismissal from service. This itself would reveal the frivolousness of the remaining three charges against the applicant. The essence of all the remaining three charges is essentially the same, that the applicant has been held blameworthy for his interaction with certain civilians while he organized his move on official temporary duty.

(b) It is submitted that anyone having even the basic knowledge of Army functioning will know that its senior most to the junior most soldier has at some time or the other, during his/her official duty move, carried out interaction with civilians or others as his/ her own personal requirement, in his/ her spare free time without compromising the requirements of his/her spare free time of his/ her official task. No law of the land prohibits such interaction, which not infringe upon the boundaries of law or transgresses on others rights. Whether such interaction constitutes an

unbecoming act needs to be verified upon the touchstone of supportive evidence and has to be established conclusively by the prosecution. It is a cardinal principle of criminal law in India that an accused person is presumed to be innocent until the contrary is proved and this burden never shifts to the accused. If two versions are available or if the evidence is of only one person's word against the other, then the benefit of same goes to the accused and the court cannot arbitrarily accept the version which suits it.

It has held in the case of ***Pershadi vs. State (AIR 1955 All 443)*** that –

> *"Any hypothesis or explanation tending to show the innocence of the accused must be taken into consideration while deciding an issue of a charge. The test is of probabilities upon which a prudent man may base his opinion".*

In this regard, the applicant also relies upon para 11 of the Delhi High Court judgment in the case of ***State vs. Shaqila - 2001 (2) RCR (Criminal) 339*** in which it was held –

> *"it is the cardinal principal of criminal justice that fouler the crime, higher the proof required. A golden thread which runs through the web of administration of criminal justice is to the effect that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to his innocence, the latter is to be adopted. This principle has a special relevance in cases where the guilt of the accused is sought to be established by circumstantial evidence".*

Regarding standard of proof required to prove the Defence versions, the Apex Court held in ***Dr SL Goswami VS State of MP – 1997 SC Cases (Cr) 258*** that –

> *"We have occasion to observe earlier that the standard of proof of evidence that the accused may adduce in support of his plea in Defence is not the same which the prosecution is required to adduce. Once the probability of the accused plea is established. We must give him the benefit of doubt".*

As such, the GCM failed in giving credibility to the statements of Mr. Promod Sharma (PW-13) while disregarding the statements of Brig Rajeshwar Singh (DW-2) which proved that the applicant could not have met MR. Promod Sharma as he was with DW-2 at that time. Moreover, there was no independent witness to corroborate the stand of PW-13 and yet the GCM believed his version in total disregard to the applicant's submissions which were supported by an independent witness in DW-2.

(c) The Second charge is framed under Army Act Section 45 for Unbecoming Conduct which is contrary to law. As per the Charter of duties of Military Secretary "he is responsible for management of officers cadre of the Army less Army Medical Corps (AMC), Army Dental Corps (ADC) and Military Nursing Services (MNS) from the time of commissioning to retirement of officers". The applicant, as Military Secretary, is required to visit formations to discuss policies and planning in the matter of Officers' Cadre

management with Formations Commanders which is aimed at firstly, to disseminate the policy decision and to discuss the problems and suggestions, if any, from formation's perspective point of view and secondly to improve the system and bring transparency. The applicant had a meeting with officiating GOC, Maj Gen DK Mehta, Chief of Staff 12 Corps, where the matters pertaining to MS Branch were discussed. The applicant was also to make a courtesy call on Shri Gaj Singh (PW-15) ex Maharaja of Jodhpur due to his linkage with Jodhpur State Forces, and not in his capacity as President Mayo College Governing Council, and the meeting was arranged by Headquarters 12 Corps. The prosecution had examined Shri Gaj Singh (PW-15), Shri RD Singh (PW-8), Col Ghai (PW-5), Col Pandey (PW-4) and Lt Col Suraj Singh (PW-3) and brought on record some documentary evidence. Further, regarding the second charge, the GCM has relied upon Exhibits 90, 91, 152, 92 and 89 to hold the applicant guilty. Col Pandey (PW-4) has stated that Chief of Army Staff (COAS) was the competent authority to sanction temporary duty move of the PSOs including the Military Secretary. Col Ghai (PW-5) gave out the detailed procedure commencing with the obtaining of verbal sanction of Chief of Army Staff which was followed by moving of Noting Sheet by the MS to the Chief of Army Staff seeking his formal move sanction which used to be

signed by the applicant personally. The purpose of visit used to be mentioned by the applicant in the Nothing Sheet on which sanction from Chief of Army Staff used to be obtained, which have not been produced by the prosecution. The cross examination of PW-4 was deferred on 25.07.2011 and he was called in again after more than three months on 02.11.2011 by the GCM. Even then the Defence Counsel's request to produce the correspondences from MS Secretariat, based upon which the movement orders was issued to the applicant, was turned down and the vital piece of evidence which would have clarified everything in favour of the applicant was not produced before the GCM by the prosecution. Nowhere during the entire process of obtaining the applicant's move sanction had it been mentioned that the applicant's purpose of temporary duty move was 'MS Interaction' except the movement order which is as per the department's procedural requirements and procedures. As per illustration (g) to Section 114 of the Indian Evidence Act, the court should presume that documentary evidence which has not been produced would, if produced, be unfavourable to the prosecution and this presumption is conclusive in favour of the defence. As per Section 103 of the Indian Evidence Act, the prosecution was required to discharge the burden of proof in support of their allegation that the applicant had

organized his move on temporary duty to Jodhpur by falsely showing purpose as 'MS interaction' at Headquarter 12 Corps. However, not a single document signed by the applicant had been produced by the prosecution in order to prove that the applicant had organized his move on temporary duty by falsely showing his purpose of move as "MS Interaction" at Headquarter 12 Corps. Moreover, the move was organized by the Chief of Army Staff, General Deepak Kapoor, and not by the applicant. Even as per Shri Gaj Singh, the applicant did not seek franchise from him, as alleged. In August 2008, based on the move sanction of Chief of Army Staff, the applicant visited 12 Corps to discuss MS Matters with GOC. PW-5 accompanied him. 12 Corps had arranged a courtesy call on Shri Gaj Singh Ex Maharaja of Jodhpur. The applicant met Maj Gen DK Mehta, Offg. GOC and discussed MS matters with him. Thereafter, he made courtesy call on Shri Gaj Singh (PW-15). PW-15 had also brought out during his deposition that the applicant did not personally seek a meeting with PW-15, which was arranged by 12 Corps. It has also been brought out by the same PW-15 that the applicant has not sought any franchise for setting up any school during the said meeting as alleged. Moreover, the event being deposed on was more than three years prior and PW-15 had conceded that there was no record of the said meeting of 22.08.2008,

and that most of the deposition was based upon his memory. It seems very farfetched that when all the discussions regarding the requirements of setting up the said school by the applicant's friend. MrDilip Aggarwal, had been completed in July 2008 itself with Mr. RD Singh (PW-8), Chairman, Mayo College Collaboration Committee, then how was it possible for the applicant to seek any fresh franchise during his meeting on 22.08.2008. Mr. RD Singh (PW-8) had stated during his deposition that "Shri Dilip Agarwal was supposed to be opening a school through a trust. They said it would be near Siliguri. No grant of franchise was given or promised".

(d) All the exhibits named in the second charge, except one are dated before 22.08.2008, thus implying that the stated contents pertained to before the stated date of meeting on 22.08.2008. Shri Dilip Agarwal, a friend of the applicant who belongs to Rajasthan, was facing problem in getting his daughter admitted to Mayo College at Ajmer and he was also present at Jodhpur and had come, on a reference from Thakur Kesari Singh, to meet Shri Gaj Singh. Shri Dilip Agarwal spoke to the applicant and requested him if, in his personal capacity, he could help him in the matter of admission of his daughter in Mayo College at Ajmer. The applicant apprised him about his scheduled programme and as a friend, he agreed to his request. Accordingly, the

applicant reached Umed Bhawan Palace accompanied by his staff officer Col Rajiv Ghai (PW-5) where Shri Dilip Agarwal was also present. During cross examination, Shri Gaj Singh did not deny that the civilian gentleman had sought his help in getting his daughter admitted in Mayo College Girls School at Ajmer but expressing his inability he had advised him to meet the concerned principal. He also admitted that Thakur Kesari Singh, on whose reference the civilian had come, was on the Board of Governors of Mayo College. Thus, the main purpose of visit of Shri Dilip Agarwal was to seek admission of his daughter in Mayo College School for Girls, Ajmer and not for seeking franchise. On perusal of the Court of Inquiry proceedings it will be observed that it was conducted with prejudiced and biased mind in violation of Army Rule 179 on non issues to involve the applicant in false case. The Court of Inquiry had asked the applicant a question, "Did you help Shri Dilip Agarwal in any way to secure the franchise of Mayo College to which he had replied, 'No'. This question was in no manner covered within the terms of reference. In the entire Court of Inquiry proceedings, it is no where mentioned by any witness that the applicant had visited and met Shri Gaj Singh on 22.08.2008 and sought grant of franchise of Mayo College. It was a creation by the Headquarter Eastern Command when there was no case against the applicant.

As per PW-15, he had received a letter dated 06.02.2010 from Headquarter Eastern Command signed by Maj Gen AK Mishra along with a questionnaire. In paras 1 and 2 of the ibid letter it is specifically mentioned.

"*1. It has come to our notice consequent to an Army Court of Inquiry, that Lt Gen Avadesh Prakash, PVSM, AVSM, VSM had an audience with His Highness Maharaja Gaj Singh Ji along with some other persons on 22.08.2008 at Jodhpur with regard to grant of franchise of Mayo College.*

2. It is requested that information as per the Questionnaire attached herewith may please be provided. The said information is required for the purpose of further investigation into the matter relating to land at Chumta Tea Estate, (Siliguri, Darjeeling)."

No further investigations were held by any authority.

(e) The above paras and the very first question in the questionnaire, "Did Lt Gen Avadesh Prakash, PVSM, AVSM, VSM visit His Highness Maharaja Gaj Singh Ji at Jodhpur on 22.08.2008?"reflect the malfide intentions of the HQs Eastern Command to involve the applicant in this case. It has been contended that after going through the so called evidence on which the GCM had relied upon to hold the applicant blame worthy for second charge, it has been conclusively stands proved: -

(i) That Shri Diliup Aggarwal had already met Shri RD Singh in mid July 2008.

(ii) That Shri RD Singh had explained in detail the requirements, modalities and the procedure for submission and processing of application and grant of franchise to Shri Dilip Aggarwal.

(iii) Shri Gaj Singh was fully aware of his meeting with Shri RD Singh.

(iv) The school near Siliguri was to have been established by Shri Dilip Aggarwal.

(v) Even as per PW-15, the applicant had not sought any franchise for setting up any school from him and he has himself proved the charge to be false.

(vi) Shri Dilip Aggarwal had not accompanied the applicant to Umaid Bhawan palace for the stated meeting on 22.08.2008.

(vii) Shri Gaj Singh had very limited peripheral role to play and was not competent to give franchise since it was the collaboration committee set up by board of Mayo College on whose recommendations franchise was accorded. In the instant case "Nothing was received and nothing was recommended.

(viii) Shri Dilip Agarwal met Shri Gaj Singh to seek his help for the admission on his daughter in Mayo College Girls School.

(ix) Once the requirements, modalities and procedure for Mayo College franchise had already been discussed

by Shri Dilip Agarwal in mid July 2008 in detail and the required documents not submitted to the collaboration Committee Chairman, the question of seeking franchise from Shri Gaj Singh did not arise.

(f) It has been argued by the Senior Counsel for the applicant that the third and fourth charges against the applicant are even technically incorrect and contrary to official records. The applicant has been blamed for his ‘intent to defraud’ while ‘organising’ his temporary duty move to Jodhpur and Jaipur. The move sanctions of the applicant to Jodhpur and Jaipur were sanctioned by the Chief of Army Staff through proper nothings on file well before the applicant’s actual move on temporary duty, which has also been corroborated by PW-4, PW-5 and PW-6. Despite the applicant’s request to produce such nothing sheets during the GCM, the same were not brought forward. The relevant noting sheets may please be called for production before this Tribunal, which will reveal the purpose of applicant’s move on temporary duty. None of the applicant’s move was sanctioned state the purpose of the applicant’s move on temporary duty as ‘MS Interaction’ at both the duty stations of Jodhpur and Jaipur, for which he has been blamed as showing a wrong purpose of visit. On perusal of Internal Official Note(ION) it may be observed that for obtaining move sanction from GS (SD) Branch, the purpose for visit was never shown as “MS

Interaction" as alleged. The MS Secretariat ION dated 14.08.2008 and 27.08.2008 to GS (SD-4A) for visit to Jodhpur and Jaipur respectively the purpose of visit has been shown as "official" and not as MS Interaction. Similarly the move sanction accorded by GS (SD) Branch states the purpose of visit as Secret. The applicant's purpose of moves as 'official' or 'secret' as per the service procedural requirements. Similarly, the movement order states the purpose as MS interaction as per the department's own procedural requirement of following established procedures.

(g) It has been argued that as per illustration (g) to Section 114 of the Indian Evidence Act, the court should presume that documentary evidence which has not been produced would, if produced, be unfavorable to the prosecution and this presumption is conclusive in favour of the defence. The noting providing the approval of Chief of Army Staff for applicant's move sanction to Jodhpur and Jaipur, and the correspondence (MS Programme) from MS Secretariat, based upon which the movement order was issued to the applicant were not produced in the GCM despite the applicant's request to bring them on record. Hence, the allegation that the applicant had, with intent to defraud, organized his visit to Jodhpur and Jaipur is false and contrary to official records.

(h) It has also been contended that the Third and Fourth charges have been framed under Section 52 (f) of the Army act and hence have to meet the twin criteria of proving the 'intent to defraud' and 'wrongful gain or loss'. Thus, there has to be an element of deceit coupled with an actual loss. In the instant case there was no wrongful gain to the applicant or any wrongful loss to the State or any other person. The 'intent to defraud' has not been proved as it has not been sustained that the applicant did not have the move sanction from competent authority or that he did not carry out his official duties for which his move was sanctioned. Section 52 of the Army Act pertains to offences in relation to property. On perusal of Section 52 of the Army Act, it may be further observed that the ibid provision deals with offences committed in relation to property that belongs to Government or Regimental Institutions, and the heading itself reads as "Offences in respect of property". Clauses (a) to (e) deal with (a) theft, (b) misappropriation, (c) Criminal breach of trust, (d) dishonesty receiving or retaining and (e) willfully destroying or injuring any property whereas clause (f) deals with "doing any other thing" and it has to be understood, appreciated and applied to cases where an accused odes any other thing with regard to property belonging to Government or Regimental Institution with intent to defraud or cause wrongful gain to one person

or to cause wrongful loss to another person. Offence under Section 52(f) involves such ‘Property’. The alleged action of the applicant did not pertain to any property belonging to the Government or any Regimental Institution of Army, Navy or Air Force.

(i) It has also been argued that as far as Fourth Charge is concerned, as brought out earlier it is a matter of record and that the applicant and MrDilip Agarwal had a meeting with Mr. RD Singh, who was the Chairman of the Council of Mayo College for Franchise, during July 2008 while on a private visit. Mr. Promod Sharma PW-13 was nowhere in the chain of entire process of seeking any franchise, as propagated. As such, it seems very farfetched to have a meeting with PW-13 on the issue of seeking Mayo College franchise from him.

(j) It is thus vehemently contended by the Senior Counsel for applicant that the ‘evidence’ on which the GCM has relied upon to hold the applicant blameworthy does not measure up to the requirements of the provisions of Indian Evidence Act, 1872. The statutory provisions of Indian Evidence Act have been further enhanced through the case law laid down by the Apex Court and other courts. The three cardinal principles of criminal jurisprudence which are well settled are: -

(i) The onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from the weakness or falsity or the defence version while proving its case.

(ii) In a criminal trial the accused must be presumed to be innocent unless he is proved guilty.

(iii) The onus of the prosecution never shifts.

(k) While under Section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, this section does not indicate the nature and standard of the proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigor as the prosecution is required to prove a criminal charge. In fact, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by Section 5 of the Evidence Act, as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubts on the prosecution case and, therefore, the prosecution cannot be said to have established the case beyond reasonable doubt. It is sufficient for the defence to give a version which competes in probability with that of prosecution version, and that would be sufficient to throw suspicion on the

prosecution case entailing its rejection. The Apex Court has held that the court has to probe and consider the materials relied upon by the defence instead of raising an adverse inference against the accused, for not producing evidence in support of his defence, because the prosecution cannot derive any strength of support from the weakness of defence case. The prosecution has stand on its own legs, and if it fails to prove its case beyond reasonable doubt, the entire edifice of the prosecution would crumble down (***Rabinder Kumar Dey vs State of Orissa, AIR 1977 SC 170***). Similarly, if there are two pieces of evidence in regard to the same fact, both uncontroverted and uncorroborated, then the benefit of doubt must be given to the accused (***Bhilm Singh vs State of Haryana, 2003, Cril LJ 857 SC***). Additionally, in order to sustain conviction such evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence (***D'Souza vs State of Karnataka, 2003 I SCC 256***).

(l) Learned Senior Counsel for the applicant has summed up by emphasizing that in the instant case, the main charge against the applicant was not substantiated and fell through. The everyday routine functioning of the Army and military parlance would reveal that the remaining three charges were absolutely frivolous for which he had been held blameworthy. The evidence relied upon by the GCM to

convict the applicant has already been discussed in foregoing paragraphs. The authority for applicant's move sanction to Jodhpur and Jaipur flowed from the Chief of Army Staff and had been properly accorded through noting on file, which were not allowed to be checked by the GCM to ascertain its veracity. The authenticity of the applicant carrying out his official duties as mandated by the stated two temporary duty moves were also not checked out by the GCM through substantiation by the GOC 12 Corps at Jodhpur and GOC-in-C South Western Command at Jaipur and hence it cannot substitute its own arrival at the finding as per its own interpretations. The interaction of the applicant with civilians and that too in his personal capacity, cannot constitute an offence of unbecoming conduct as alleged in the charge sheet. The 'intent to defraud' has also not been substantiated as the applicant had performed his official duties for which he had received the mandate and the move sanction. The GCM has carried out its own interpretation and selective reliance on material before it to assign culpability to the applicant, in total disregard to the submissions of the defence. While the applicant stated that MrDilip Aggarwal did not accompany him to the meeting with H.H. Maharaja Gaj Singh, which was substantiated by the staff officer of the applicant who was present on the occasion, the GCM chose to ignore his submission and

accepted its own interpretation of events to record a finding of guilty. Similarly, the applicant stated that he had not met Mr Pramod Sharma, the principal of Mayo College for Boys and also for which no records of his meeting are available, yet the GCM did not give credence to the applicant and relied upon its own interpretation, which was against the provisions of the Indian Evidence Act. Even assuming that the applicant did meet the concerned individuals in his private capacity and did put in a good word to consider the request of his friend, did the act become an offence of unbecoming conduct warranting a gross sentence of dismissal from service? In so many official meetings also the officers do put in a word or a request to help out any individual without making their action as an unbecoming conduct. And probably in the entire history of Army, no officer had ever been dismissed from service for offences relating to his authorized temporary duty moves and bonafide interaction with civilians during such moves. The gross disproportionate sentence of GCM itself is an indicator of the predetermined mindset of authorities.

8. The respondents in their counter have contended as follows: -

(a) It is submitted that the circumstances, under which the court of Inquiry was convened, had nothing to do with the applicant. The role of the applicant emerged during the

Court of Inquiry at a later stage when many witnesses had already been examined. On completion of the Court of Inquiry, Lt Gen VK Singh the then GOC-in-C, Eastern Command, recommended administrative action for termination of service in respect of the applicant. However, said recommendation was not agreed to by Gen Deepak Kapoor, the then Chief of Army Staff, who directed administrative action at the level of Chief of Army Staff against the applicant. The said directions were later modified and fresh directions were issued by Gen Deepak Kapoor for initiation of disciplinary action against him. Pursuant to the orders dated 22.02.2010 passed by this Tribunal in OA 66/2010, the Court of Inquiry was reassembled and on conclusion of the proceedings for reassembled Court of Inquiry, directions for initiation of disciplinary action against the applicant were issued by Lt Gen Bikram Singh, the then GOC-in-C, Eastern Command. After the completion of Summary of Evidence, it was Lt Gen Bikram Singh the then GOC-in-C, Eastern Command who satisfied himself regarding the prima facie existence of charge against the applicant based on the evidence as contained in the Summary of Evidence and thereafter convened the General Court Martial. Gen VK Singh neither issued the directions for initiation of disciplinary action against the applicant nor

he convened the GCM against him. The applicant was found guilty on three charges by the GCM, based on the evidence on record. The allegations leveled by the applicant appear to be misconceived and misleading. This issue of Gen VK Singh being biased against him was also raised by the applicant during the GCM as well as his pre and post confirmation petition and were rejected at each stage.

(b) On conclusion of the Court of Inquiry, General Officer Commanding in Chief, Eastern Command recommended "Administrative Action for Termination of Services" of the applicant in terms of Army Act Section 19 read with Army Rules 14. The Chief of Army Staff, however directed "Administrative Action at his (Chief of Army Staff Level" against the applicant. The Government of India, Ministry of defence vide their letter dated 27.01.2010 duly approved by the Raksha Mantri, while concurring with action taken by the Chief of Army Staff in respect of other officers involved in the case, noted that both GOC-in-C, Eastern Command and JAG (Army) have inter-alia found that the applicant was the main figure behind the scenes which led to change of stand of HQ 33 Corps, thus seriously jeopardizing the interest of the Army and security aspects. From the material available on record, the active involvement of the applicant in the case was

clearly established, and as such the decision to close the case against him by award of Censure' would not have met the ends of justice particularly in view of the fact that the officer was retiring on 31.01.2010. the Government had, therefore, vide letter dated 27.01.2010 only advised the Chief of Army Staff that Disciplinary Action should be initiated against the applicant in the interest of justice and fair play. Reconsidering the entire issue and after due application of mind, the Chief of Army Staff directed 'Disciplinary Action' against the applicant. Therefore, the contention of the applicant that the Chief of Army Staff had altered his decision without application of mind is baseless. It is pertinent to mention that the Government, by the said letter, only provided additional advice to the Chief of Army Staff. Moreover, this advice vide letter dated 27.01.2010 was given only after conclusion of the Court of Inquiry and Recommendation thereon by Commanders in chain, and thus did not interfere with due process of Inquiry and decision making by intervening Competent Authorities. And, therefore the background against which the Advisory was issued by the Army Headquarter vide letter dated 11.05.1993 is not applicable to the facts and circumstances of present case. Moreover, the aforesaid letter dated 11.05.1993 cited by the applicant is not a

Statutory Rule' but only an 'Advisory' and even that is not applicable to the facts and circumstances of this Case. As such, action of respondents was totally bonafide considering the entire facts and circumstances of the case. Further, it has been incorrectly averred by the applicant that change from Administrative to Disciplinary Action was malafide or based on arbitrary whims and media hype and reasons not recorded in writing. To the contrary, reasons were clearly recorded on Noting dated 27.01.2010, which was concurred with by JAG and approved by the Chief of Army Staff on 28.01.2010.

(c) Thus recourse to change from 'Administrative to Disciplinary Action' was taken because Administrative action was not considered adequately proportionate to and commensurate with the offence.

(d) The applicant has also questioned the timing of cancellation of Show Cause Notice i.e. just two days prior to his retirement. It is highlighted that the timely decision making on any ongoing case of an officer retiring from service is in the interest of both, the officer as well as the organization. Therefore, this decision making just two days prior to the retirement of the officer cannot in any way be construed to be detrimental to his interests, as all decision making was as per due procedures elaborated. Moreover, this plea by the

applicant goes against the logic of his own contention, because if an officer is retiring after two days, Administrative Action through Censure would have practically no effect. This would have defeated the very purpose for which action was being taken keeping in view the magnitude of offence, senior rank of the officer and the precedence it would set as deterrent for future.

(e) Further, it has also been incorrectly averred by the applicant that there was illegal interference by Ministry of Defence which forcefully took away the powers of Competent Disciplinary Authority. The Note of Ministry of Defence was only 'advisory' in nature, where-after the Chief of Army Staff after due application of mind, has taken an independent decision to take disciplinary action.

(f) Moreover in his earlier communication to Ministry of Defence the Chief of Army Staff had stated that his judgment in regard to primacy of guilt, severity of punishment and its proportionality to individual culpability are somewhat at variance to recommendations of GOC-in-C, Eastern Command. Hence, the alleged illegal, forceful and extraneous interference by Ministry of Defence was neither illegal or forceful, nor extraneous.

(g) It has also been incorrectly averred by the applicant that the respondents went against their own policy dated 11.05.1993. Apart from the fact that the policy

mentioned vide supra is only advisory and not 'statutory', its applicability cannot be considered in isolation but in the backdrop of totality of facts and circumstances of the case. In Para 3 ibid letter dated 11.05.1993, it is stated that in the case mentioned therein Summary of Evidence was recorded before issuance of Show Cause Notice, whereas in the instant case no Summary of Evidence was recorded before issuance of Show Cause Notice to the applicant. Moreover, the purpose the very raison de etre behind issuance of aforesaid letter dated 11.05.1993 was to ensure that principles of natural justice and fair play are not undermined, as is clearly evident from the explicit contents of Para 5 of ibid letter itself. The basis of natural justice is the 'opportunity to be heard'. In disciplinary action that followed, the applicant had adequate opportunity to be heard not only during Trial, but also by way of Pre-Confirmation and Post Confirmation Petitions. The principle of natural justice was not undermined. To the contrary, the actions of respondents only ensured that the applicant was afforded full opportunity to defend himself. Such adequate opportunity to be heard also disproves the allegation of arbitrariness leveled by the applicant. Thus letter and spirit of ibid letter dated 11.05.1993 is not

applicable to the facts and circumstances of the instant case.

(h) It is submitted that the record of the GCM proceedings shows that there was sufficient cogent and reliable oral and and documentary evidence on record to prove the second charge beyond reasonable doubt and the finding of 'Guilty' arrived at by the court on the second charge are duly supported by the evidence on record. The record of the GCM proceedings shows that the finding of 'Guilty' arrived at by the court on the third charge are supported by the evidence on record. The arguments advanced by the applicant are found to be misplaced. Even if the applicant has stated organizing his move prior to 14.08.2008, the non inclusion of the period prior to 17.08.2008 in the particulars of the charge would not affect the legal validity of the charge. The Court in its brief reason in support of the finding of 'Guilty' on the third charge has brought out that the applicant never visited Headquarter 12 Corps on 22.08.2008 and no MS interaction of the applicant, as Military Secretary, took place at Headquarter 12 Corps. It has also been stated by the Court that the applicant's having lunch with the Chief of Staff, Headquarter 12 Corps did not amount to MS interaction. During the trial, even the applicant has not disputed that fact that he did not formally visit

Headquarter 12 Corps on 22.08.2008. The third charge is found to have been proved beyond reasonable doubt and the finding of 'Guilty' arrived at by the court on the same is found to be legal. The record of the GCM proceedings show that there was sufficient cogent and reliable oral and documentary evidence on record to prove the fourth charge beyond reasonable doubt and the finding of 'Guilty' arrived at the evidence on record. Notwithstanding the fact that the applicant had started organizing his move prior to 26.08.2008, the non inclusion of such period in the particulars of the fourth charge would not affect the legal validity of the charge. The contention of the applicant was found to be devoid of merit. The particulars of the charges as averred in the third and the fourth charge clearly show that the act of applicant to organize his move on Temporary Duty for private purposes at Government expense by falsely showing the purpose as official/MS interaction amounts to an act with intent to defraud; hence, there was no illegality in framing the said charges under Army Act Section 52(f). The contention of the applicant that the third and fourth charge was bad in law is devoid of merit. The applicant has raised this issue in pre and post confirmation petitions and the same was rejected being devoid of merit.

(i) It is submitted that the Central Government after detailed examination of every issue agitated by the applicant in his Post Confirmation Petition rejected the same being devoid of merit. The judgments cited by the applicant are not applicable to the fact and circumstances of the instant case. Similarly, the allegation of arbitrariness is also contrary to facts as in Disciplinary Action, the applicant had adequate opportunity to be heard not only during Trial, but also by way of Pre-Confirmation and Post Confirmation Petitions. The principle of natural justice was not undermined but the respondents have ensured that the applicant is afforded full opportunity to defend himself. It is submitted that order dated 14.08.2013 has been passed in accordance with law after considering the entire material on record and the contentions raised by the applicant and the same does not suffer from any infirmity.

(j) It is submitted that the GCM considered and relied upon the independent and trustworthy evidence brought on record and found that the second, third and fourth charges were proved. There is sufficient cogent and corroborated oral and documentary evidence on record to prove the second, third and fourth charges against the accused beyond reasonable doubt and the GCM while recording brief reasons for its findings has brought out

the evidence relied upon the GCM. Hence, the accused had rightly been found 'Guilty' by the GCM on the aforesaid charges and findings of the court are supported by credible evidence on record.

Deliberations by the Tribunal

9. We have heard the learned counsels for the parties and perused the records. Firstly we proceed to analyse the legal submissions for the parties.

10. The first submission put forward by the learned Senior Counsel for the applicant Ms Jyoti Singh is that the composition of Court of Inquiry violated Para 518 of Regulations for the Army as the members of the said Court of Inquiry were junior in rank to the applicant. The respondents in their counter have clarified that the said Court of Inquiry was ordered to investigate into the circumstances resulting into rendering 'No Objection Certificate (NOC)' for establishment of an educational institution in a civil land near Headquarter 33 Corps between the Station Commander Sukna and some private companies. Therefore, it was not possible to identify any particular person or rank at the time of convening the said Court of Inquiry for the purposes of invoking Para 518. It was only during the additional statement by Lt Gen PK Rath that the applicant's name figured for the first time on 18.11.2009 and Army Rule 180 was invoked in respect of the

applicant. However, the legality of the composition of the said Court of Inquiry has already been challenged by the applicant in OA No. 66 of 2010, where the applicant was given relief by ordering reassembly of the Court of Inquiry and permitting the applicant to cross examine additional witnesses. This judgment dated 22.02.2010 was challenged by the applicant by filing SLP No. 7846 of 2010 which has been dismissed by the Apex Court on 09.04.2010. Therefore, we are of the view that no illegality in composition of the Court of Inquiry is sustainable at this stage and no prejudice has been caused to the applicant. Moreover, once the issue of Court of Inquiry both with regard to its procedure and the constitution has been raised by the appellant and rejected by the Tribunal as well by the Hon'ble Apex Court, it is not open to the appellant to raise the said issue again. However, de hors the same it may be mentioned to begin with Court of Inquiry was initially ordered to investigate into the circumstances resulting into rendering of no objection for establishment of an educational institution by representative of HQ 33 Corps and signing of memorandum of understanding on 20.05.2009 between Station Commander Sukna and some private companies without making reference to HQ, Eastern Command. No particular person or rank could have been identified at the time of Court of Inquiry for purpose of invoking para 518. It is only when additional statement given by Lt. Gen. P.K. Rath was recorded that the name of the appellant figured

that Army Rule 180 was invoked and the witnesses were made available for the purpose ofcross examination to the appellant.

11. It was also contended by the learned Senior Counsel that Lt. Gen. P.K. Rath was exonerated whereas the Appellant was convicted.

12. This fact is not disputed but the nature of charges are totally different. So far Lt. Gen.Rath is concerned, he had given permission to particular school to open a school in the adjourning parcel of land. Even this MoU was made in-effective and the consent for MoU itself was withdrawn. Therefore, nothing survived to be implemented and he was acquainted. As against this, the Appellant was espousing the cause of one private person, namely Mr. Dilip Aggarwal to set up a school. Therefore, thesetwo cases are totally not comparable.

13. The next legal contention of the applicant is that the applicant's attachment to Headquarter Eastern Command came to an end with partial setting aside of first Court of Inquiry on 24.04.2010. Once the question of alleged violation of Regulation 518 has been raised and adjudicated right upto highest forum, it is not open to the applicant to raise the said issue again. It is argued on behalf of the applicant that no fresh attachment order was issued, thus making the re-assembled Court of Inquiry violative of Army Instructions 30/1986 and untenable in law. The

respondents have pointed out that this objection was also raised by the applicant in OA No. 66 of 2010 whose order dated 22.02.2010 was challenged in Apex Court in SLP No. 7846 of 2010, which was dismissed vide order dated 29.10.2010, and therefore, the legality of initial attachment for remaining operational throughout the conduct of disciplinary proceedings has been upheld by this Tribunal as well as the Apex Court. We feel that merely because the court of inquiry has been held to be bad on account of some violation of principles of natural justice or violation of Statutory Rule or Regulation, it does not make the order of attachment also as bad or unsustainable in law. Moreover, if this was the contention of the learned Senior Counsel, it ought to have been raised in the first round of litigation. Having chosen not to raise the same now, it is not open to contend that the order of attachment is bad. Moreover, in the G.S. Sodhi vs. Union of India, AIR 1991 SC 1617, it has been held that minor irregularities in complying with the Army Rule 22 to 25 does not vitiate the trial would be equally applicable this argument also. Therefore, we also feel that there is no illegality in the attachment order and no prejudice has been caused to the applicant whatsoever.

14. It is argued by the learned Senior Counsel for the applicant that the Chief of Staff, Headquarters, Eastern Command could not be the Commanding Officer of the applicant for the purposes

of hearing the charges under Army Rule 22 and Summary of Evidence under Army Rule 23. She has contended that the record of delegation of powers and Part-I order delegating the powers by the GOC-in-C Lt Gen Bikram Singh to his Chief of Staff was never produced in the Court. The respondents have relied upon Army Order 17/2000 which permits a Formation Commander to appoint a Staff Officer as Commanding Officer when he does not wish to exercise his powers personally as Commanding Officer. The respondents have relied upon Part I Order No. 42/2002 in which vide Para 181 (a) of the Standing Order, powers of Commanding Officer for the officers of the ranks of Colonels and above have been vested in Chief of Staff of Headquarters, Eastern Command.

15. We have seen these orders. Par I Order No. 42/2002 does not pertain to the period of Lt Gen Bikram Singh in the strict sense, delegation of powers must be carried out in Part I orders on change of each formation commander, but what we have to see is that was any prejudice caused to the applicant by this alleged routine lapse? We feel the answer to this question isin the negative, as delegation of powers in big Headquarters is a norm as per the provisions of Army Order 17/2000 which has been correctly followed up in Part I Order 42/2002 during the command of one of the predecessors of Lt Gen Bikram Singh. However, since this Part I Order has never been cancelled or

amended thereafter, it is deemed to be remaining in force during the conduct of current proceedings. We say so because, the delegation in Army Order 17/2000 and Part I Order 42/2002 are by appointments and not by name, and thus would remain valid as the designation of appointments have not changed, despite regular/ periodic changeover of the holders of these appointments. Since the appellant was attached to HQ, Eastern Command, the Chief of Staff, HQ, Eastern Command became his Commanding Officer, Regulation 9 of the Army Regulation is also relied upon. Thus the Chief of Staff, HQ, Eastern Command legally performed the duties of the Commanding Officer of the Appellant. Therefore, we conclude that no prejudice has been caused to the applicant due to non publication of delegation by name in Part I Orders.

16. It flows from above, since the Army Commander Lt Gen Bikram Singh did not exercise the powers of Commanding Officer for hearing of charges under Army Rule 22 and Summary of Evidence under Army Rule 23, and delegated the same to his Chief of Staff, there was no illegality in Army Commander convening the GCM as he is a holder of A1 Warrant empowering him to convene GCM and the Chief of Army Staff confirming the proceedings later, apart from the applicability of principle of G.S. Sodhi’s case (supra).

17. Learned Senior Counsel for the applicant, Mrs Jyoti Singh has also argued that the respondents should have complied with the provisions of Army Rule 40 (2) while detailing the members of the GCM, who were all Major Generals in the instant case.

18. The respondents have relied upon the proviso that they were free to detail junior officers under the proviso that such junior officers can be detailed with endorsement of "having due regard to exigencies of public service". We tend to agree with Mrs. Jyoti Singh that the Respondents could have tried to make Lt Gens available from over 80 such Lt Generals in the Indian Army as members of the GCM. Moreover, Lt Generals were made available for the GCM of Lt Gen PK Rath which was held a few months earlier. We have perused the file. It has been recorded in the file that applicant is a retired officer, Major General rank officers would be good enough. Notwithstanding this, we do not find any legal infirmity in constitution of the General Court Martial, as the provisions of Army Rule 40 (2) have been complied with.

19. We now proceed to analyse the evidence based on the pleadings of the parties. The applicant has been found 'Not Guilty' for First Charge under Section 69 of the Army Act which blamed him for abusing his position as Military Secretary at Army Headquarters for facilitating the issue of No Objection Certificate by Headquarters 33 Corps for construction of an educational

institution in New Chumta Tea Estate Land, adjoining the Sukhna Military Station. It may be worthwhile to mention here that the main accused in the Sukhna case, ie. Lt Gen PK Rath has been exonerated by This Tribunal vide judgment dated 05.09.2014 in OA No. 214 of 2012 which has since already been accepted and executed by the respondents.

20. But the equation which sought to be drawn by Ms Jyoti Singh between Rath's case and the present case is totally inapt. The reason for this is that the charge against Rath was that of only issuing No Objection Certificate while the charge against the Appellant was much more serious. It was in fact of espousing effectively the case of Dilip Aggarwal to set up a franchisee school of Mayo College, Ajmer at Chumta Tea Estate.

21. The truth has an uncanny property of conning to the surface. The charge against the Applicant is not only espousing the cause of a private person in setting up a school but also the fact that he is not truthful. This is evident from the fact that his staff officer issued a tour programme to meet Gaj Singh while at Jodhpur whereas there was no official status or the business to be transacted at the place or with the individual whom he wanted to meet. Similarly, his visit to Ajmer was to be accompanied by Mr. Dilip Agarwal as stated in his first tour programme, which was rightly withdrawn or cancelled and a fresh order issued. Gaj Singh has been met with whom the Appellant discussed about

the school. He referred him to some members of the Governing Body. Similarly, he met the Principal of Mayo College also. He has testified against the Applicant and he was not cross examined.

22. The Applicant has taken all lame excuses to give for non-cross examination of one of them. Unplanned examination of the witness, lack of time to cross examine, request for adjournmentand allthis, rightly has been turned down.

23. There is absolutely no reason not to rely on the testimony of both these witnesses. They have no personal enmity qua the applicant to testify against him. Therefore, their testimony can be safely relied upon which establishes the guilt of the Applicant on counts beyond reasonable doubt.

24. The Applicant was a holder of a very high and prestigious position in the Army. Therefore, it did not behove such a high official to use his position, the platform and official status to curry favours for the benefit of a private individual for setting up a school adjoining the military area in Chumta.

25. Such officials are holders of public trust and have to act with great deal of propriety and rectitude so that no individual is able to raise a finger on their conduct so far as official functioning is concerned and whereas the Appellant has acted totally opposite.

26. However, since the issue of No Objection Certificate for planned establishment of an educational institution with a franchise of Mayo College Ajmer is linked to the other three charges on which the applicant has been found guilty. Learned counsel on both sides have taken help of the incidents to make their submissions.

27. The essence of charges 2, 3 and 4 on which the applicant has been found guilty is organizing official visits to Jodhpur and Ajmer with the aim to help Shri Dilip Agarwal in obtaining franchise of the Mayo College for opening an educational institution adjacent to Sukhna Military Station. The main thrust of arguments by the counsels for the respondents is that the applicant being a very senior military officer and holding a very prestigious assignment of Military Secretary was not expected to espouse the cause of a business person, Shri Dilip Agarwal and he went out his way in his efforts to do so. This was denied by the learned Senior Counsel for the applicant who contended that the Appellant had actually metGaj Singh in order to get the daughter of his colleague admitted in Mayo College. It is in this context that the meeting had taken place.

28. The learned Senior Counsel has focused her argument other than the alleged procedural irregularities as discussed above, that the applicant met Shri Gaj Singh at Jodhpur on

22.08.2008 and visited Ajmer on 30.08.2008, in his spare time, after completion of his official duties in both stations. It has also been contended that the purpose of his meeting with Shri Gaj Singh at Jodhpur on 22.08.2008 was to request his assistance in seeking the admission of Shri Dilip Agarwal's daughter in Mayo College, Ajmer, as Shri Gaj Singh was the President of Mayo College Governing Counsel. However, the statement of Shri Gaj Singh is quite contrary to the averments made by the applicant wherein he has very categorically stated that the purpose of applicant's visit to him along with Shri Dilip Agarwal was to request for franchise of Mayo College and to support his statement Shri Gaj Singh has produced documentary evidence to the fact that he had also received a recommendation to help the applicant from Brig Bhawani Singh (Retired), ex Maharaja of Jaipur. The fact that the applicant approached various members of Governing Body of Mayo Collegefor franchise of the school is also brought out by the statement of Shri RD Singh (PW-8) Chairman Mayo College Coordination Committee. The applicant has totally denied his visit to Mayo College and meeting with its Principal Shri Pramod Sharma, who in his statement as PW-13, has stated that the applicant met him in connection with franchise of Mayo College for Sukhna. It is unfortunate that the cross examination of this essential witness did not take place. But this witness was made available to the accused for the purpose of

cross-examination but he chose not to do the same at his own peril. Therefore, testimony of this witness cannot be ignored.

29. We are of the opinion that the applicant being a senior military officer of the rank of Lt Gen and holding the prestigious appointment of the Military Secretary at the Army Headquarters should have exercised discretion in helping a civilian in trying to obtain franchise of Mayo College for opening an educational institution near Sukhna Military station, as it was none of his business and the whole episode brought a lot of flak on the Army. The fact that the applicant met Shri Dilip Agarwal in Delhi, Sukhna and Jodhpur and intended to accompany him to Ajmer as per the initial signal,it is a clear indication of his close affinity with Shri Dilip Agarwal and the applicant's visit to Jodhpur on 22.08.2008 and to Ajmer on 30.08.2008 were mainly to help his friend in the garb of or in conjunction with his official duties, which cannot be condoned. However, it is also the fact that the whole issue of opening of an educational institute near Sukhna Military Station came to end with cancellation of the No Objection Certificate by Headquarters 33 Corps on the directions of Headquarters Eastern Command and the fact that the main accused in Sukhyna Land scam, Lt Gen PK Rath has been honorably acquitted vide this Tribunal order dated 05.09.2014 (Supra), which has also been executed by the respondents, the gravity of offence by the applicant is greatly reduced. In this

case, the applicant has rightly been held guilty on Charge Two under Section 45 of Army Act, ie "Unbecoming Conduct" for going out of his way to recommend setting up of educational institution and franchise of Mayo College for Shri Dilip Agarwalwhich is unbecoming of his rank and position. However, we have not been able to find any 'intent to defraud' on the part of the applicant as stated in Charges Three and Four under which the applicant has been found guilty under Army Act 52 (f) as no financial transactions or case of pecuniary gains/loss or for that matter loss of reputation have been brought to our notice by the Respondent.

30. We, therefore, feel that though the applicant is guilty of 'Unbecoming conduct' under Army Act, Section 45 for the second charge, he is not proved to be guilty for charges three and four.

31. Now coming to the punishment, lastly, Ms. Jyoti Singh, has raised the question of proportionality of sentence. It has been contended by the Learned Senior Counsel that the punishment of dismissal which has been imposed on the Appellant is very harsh in comparison to the punishment of "severe reprimand" given to the other officials involved in the matter.

32. We have thoughtfully considered the submission made by the learned Senior Counsel. There is no comparison, as has been observed by us between the case of the Applicant on the

one hand and that of General Rath or for that matter Halgali etc. The present Appellant was the focal point of espousing a case of a private party in establishing its school at Chumta and if one goes to the testimony, there is noteven an iota of doubt that he did his level best to use his official position with a view to advance Dilip Aggarwal's case to set up a school. Therefore, in our considered view, the punishment of dismissal was just, fair and reasonable as the actions of the Appellant had brought dis-repute to the Organization as whole and created a kind of image reflected in national dailies that all is not well within the Army. In this light of the fact, though dismissal is upheld, however, we feel that the Respondents ought to have qualified the dismissal by permitting the Appellant to get his pensionary benefits. It is not in dispute that the Appellant had rendered more than 39 years of service which is stated to be unblemished except that present indiscretion having been committed by him towards the fag end of his service. In our view, the past service of the Appellant having been unblemished does not get completely eroded, nor the Appellant deserves to be deprived of the benefits which he would have earned by retiring in normal course. It should not be taken that the Bench is advocating that though holding Appellant guilty of the offence and the sentence, yet it should not result in windfall to the Appellant by getting to the pensionary benefits in the form of arrears. Therefore, the Appellant need not be given the arrears of pension from the date of his dismissal till today

(date of order) and the same shall be given to him w.e.f. 20.12.2017, the date of pronouncement of the aforesaid order, meaning thereby that the Appellant must be given the pensionary benefit w.e.f. 20.12.2017 onwards so that he is able to survive. The aforesaid order is passed in view of the peculiar facts and circumstances of the case and shall not be quoted as precedent.

33. The OA is disposed of with above orders. No order to costs.

(JUSTICE V. K. SHALI)
MEMBER (J)

(LT. GEN. S. K. SINGH)
MEMBER (A)

20.12.2017 Court 2 Rao/VKU