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**IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

TA/323/09
IN W.P.C. No. 11987/1996

**EX RECT BIRENDRA YADAV
E-580A, WEST VINOD NAGAR
GALI NO.11, DELHI-110 092.**

THROUGH : MAJ (RETD) K.RAMESH, ADVOCATE

...PETITIONER

VERSUS

- 1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF DEFENCE
NEW DELHI-110 011.**
- 2. THE CHIEF OF ARMY STAFF
THROUGH ADJUTANT GENERAL (AG/DV-3)
ARMY HEADQUARTERS
NEW DELHI-110 011.**
- 3. THE GOC-IN-C
THROUGH MG ADM/DY JAG
HQ CENTRAL COMMAND
MG ROAD, LUCKNOW CANTT
UTTAR PRADESH**
- 4. THE COMMANDANT
KUMAON REGIMENTAL CENTRE
RANIKHET, UTTRANCHAL
PIN 263 645**

THROUGH : SH. ANKUR CHHIBER, ADVOCATE

...RESPONDENTS

CORAM :

HON'BLE SH. S.S.KULSHRESTHA, MEMBER
HON'BLE SH. S.S.DHILLON, MEMBER

J U D G M E N T

DATED : 01.12.2009

1. This petition has been brought against the order dated 15.10.2004 where in the Summary Court Martial Proceedings he was held guilty for making false declaration that at the time of his enrolment in the service concealing the fact about the pendency of Criminal case against him and was sentenced by way of dismissal from service. It is said that the Court Martial has not properly appreciated the materials and evidence on record and even in the statutory complaints and other representations it was categorically mentioned that petitioner was not having knowledge of pendency of the criminal case. His name if added in the FIR because of Village enmity, he cannot be assumed to having knowledge of that case. Moreover he was not served with any summons/warrants issued by Magistrate. Further in the course of investigation or trial he was also not asked to furnish any bail bonds. In as much when the trial commenced he was not served with any summons. It is further said that unless it is established from the side of the prosecution that he was well aware of the pendency of the criminal proceedings at the time of giving declaration for

his enrolment in the service his culpability cannot be fixed. Much thrust has been laid that the entire case has been fabricated and the petitioner was not afforded opportunity to rebut all such allegations.

2. This petition has been resisted on behalf of UOI. It is said that at the time of his enrolment in service he was asked whether any Civil or Criminal case is pending against him or whether he is facing trial for any offence. On that his clear reply was in negative but when the papers were sent to the District Magistrate, Chandoli, Uttar Pradesh for verification he reported about the pendency of the Case registered at Cr.No.15A/01 under sections 325, 323 and 504 of IPC. It is also appearing to be a cross case and further in the trial court, his presence was noted, though eventually he was acquitted for the offence.

3. In order to appreciate the salient pointes raised by the Learned Counsels for the parties, a brief resume may be made. The petitioner Birendra Yadav appeared in the written test for his recruitment and he qualified all the tests including the physical test and at the time of the verification of his credentials, the local police of Chandoli District informed with regard to the pendency of the case. There is also a letter

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from the side of the District Magistrate enclosing therewith the report of the Police with regard to the pendency of the case. On that basis, the petitioner was tried summarily and in the course of summarily trial, witness no.4196125A Sep Clerk Devendra Singh Dhakar of Kumaon Regiment was examined and he stated that at the time of enrolment the petitioner was asked whether any Civil or Criminal case is pending against him or he is facing any trial for any offence and his reply was in negative. Further prosecution examined no.4178955N CHM Sajjan Singh of Kumaon Regimental Centre who stated about the communication with regard to the pendency of a criminal case against the petitioner which was received from the District Magistrate Chandoli. This was also clarified by him that in the report of District Magistrate there was reference of pendency of the Case registered vide Cr.No.15A/01 under sections 325, 323 and 504 of IPC. The accused did not prefer to cross examine both the witnesses. Even in his statement, he did not prefer to make any explanation as to under what circumstances such information was sent by the District Magistrate or in what manner his name figured in that case. Further no evidence in defence was produced by the accused.

4. The first and foremost point raised from the side of Learned Counsel for petitioner challenging the finding of the Conviction Order

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passed by SCM is that the court proceeded with the assumption about the pendency of the case. The court ought to have ascertained from the evidence adduced that the petitioner had the knowledge of pendency of that case or not. Unless that knowledge part is established it is not possible to arrive at the conclusion that it was wrongful declaration deliberately made by the petitioner. In this regard it may be mentioned that the petitioner entered into service in 2004 and this criminal case relates to the year 2001 as also ascertainable from case crime no. 15A/01 under sections 325, 323 and 504 of IPC. It is not believable that the petitioner could not know about the pendency of this case for this long period of three years before to his enrolment in Army, especially since it was a cross case.

5. There is also the judgment given by Learned Magistrate in Case Crime no.15A/01, P.S.Chandoli wherein he was also shown to be one of the accused. His presence was also noticed otherwise there could be observation from the side of the court about his absconding and splitting of his case. There was no such observation in the judgment and the judgment itself imply that the accused faced that trial. Now at this stage contending that he could not attend the courts proceedings would imply that he either played fraud by getting his presence marked through

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some other person or in other way he managed his non presence in the court proceedings. The fact remains that the judgment ascertaining his presence was given by the trial court and in view of arrangement made u/s.43 of the Evidence Act it would be read in evidence. The provisions of Sections 42, 43, 57, 35, 74 and 84 of Evidence Act deals with matters such as reliance of judgment, mode of proof, the presumption as to the genuineness to be drawn. The presumption could not be rebutted by the petitioner.

6. However from the side of the petitioner certain papers regarding the grant of bail by High Court of Punjab & Haryana have been referred pertaining to Criminal Application no.64817/06 in criminal appeal no.756 DB/06. Such grant of the bail on certain grounds ascertained in that case would not rebut the findings recorded by Learned Magistrate in that criminal case where the presence of the accused was noted. Even otherwise if the bail was granted it was a sort of interim relief.

7. It is next contended that the presence of the accused was noted there by the Trial Magistrate on 14.10.2004 when virtually he was

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facing summary of Court Martial. This would not be helpful to the petitioner. To the contrary it would reflect that he managed his proxy and further his subsequent presence. The crux of the case is that at the time of the enrolment criminal case was pending against him. There is ample evidence on record showing the pendency of the case right from the year 2001 against the petitioner.

8. In the given circumstances, the findings of the Summary Court Martial do not require any interference. Petition is, therefore, dismissed.

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

**PRONOUNCED IN THE OPEN COURT
TODAY ON DATE 01.12.2009**