IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

T.A NOS. 442 OF 2009 AND 433 OF 2010

T.A NO. 442 OF 2009 (WRIT PETITION (C) NO. 7497 OF 2009)

LT. COL. JAGMOHAN SINGH
THROUGH HIS WIFE AND PAROKAR MRS. KALPANA SINGH
R/O 2095, SECTOR 4, URBAN ESTATE,
GURGAON, HARYANA.

THROUGH : MR. R. BALASUBRAMANIAN, ADVOCATE

...PETITIONER

VERSUS

1. UNION OF INDIA THROUGH THE SECRETARY,
MINISTRY OF DEFENCE, SOUTH BLOCK,
DHQ P.O., NEW DELHI-110 011.

2. CHIEF OF THE ARMY STAFF THROUGH ADJUTANT GENERAL,
INTEGRATED HQ OF MINISTRY OF DEFENCE (ARMY),
DHQ P.O., NEW DELHI-110 011.

3. GENERAL OFFICER COMMANDING
HQ MADHYA BHARAT AREA, JABALPUR.

4. GENERAL COURT MARTIAL
THROUGH COL. DEEPAK TYAGI,
PRESIDING OFFICER, GCM, MHOW.

5. LT. COL. MUKUL DEV
JUDGE ADVOCATE, GCM, MHOW.

THROUGH : MR. SANJEEV SACHDEVA, ADVOCATE
WITH LT COL NAVEEN SHARMA

...RESPONDENTS

T.A NO. 433 OF 2010 (WRIT PETITION (C) NO. 849 OF 2009)

LT. COL. JAGMOHAN SINGH,
ON ATT
PUNJAB REGIMENTAL CENTRE
RAMGARH, C/O 56 APO.

THROUGH: MR. R. BALASUBRAMANIAN, ADVOCATE

…PETITIONER

VERSUS

UNION OF INDIA,
NEW DELHI

…RESPONDENT

CORAM :

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

COMMON JUDGMENT
16.04.2010

1. In both the petitions, common questions of law and facts are involved and so, they are taken together for disposal by this common judgment. In these petitions, the prayers are confined to limited issues. T.A No.442 is filed for quashing the GCM proceedings against the petitioner on the ground that those proceedings are based on frivolous charges. The basis of the charge against the petitioner is the complaint of a transport contractor without any supporting evidence. The trial is being conducted in violation of the statutory provisions where his rights are being prejudicially affected. Even under the scheme of the Army Act, the Judge Advocate plays a very important role in the conclusion of the trial in a fair manner providing necessary assistance in the conduct of GCM. If the Judge Advocate is not legally qualified, there would not only be an unfair trial causing irreparable and irretrievable injury to the accused person, but at the same time, he would also be disqualified from acting and sitting as a Judge Advocate at the Court Martial.

2. The petitioner was posted as a Mechanical Transport Officer, Infantry School, Mhow with effect from 1.10.2004 to 29.3.2007 until his posting out from there to Firozpur. A Court of Inquiry was ordered against

the petitioner on the basis of the complaint of the transport contractor for non-payment of the amount due to him and for demanding bribe. The petitioner pleaded his innocence on the ground that the charges levelled against him are frivolous. On 18.5.2007, the second respondent issued an attachment order to the Punjab Regimental Centre for finalisation of the disciplinary proceedings against the petitioner. From June 2007 to December 2008, the summary of evidence and the additional summary of evidence were recorded wherein the statement of the petitioner was also given and documents were produced to substantiate the innocence of the petitioner. The petitioner made a request to grant sufficient time to engage a legally qualified person. He was given only a short period presumably under the wrong advice of the Judge Advocate, who is not legally qualified. His further prayer for grant of time was also denied. Therefore, the petitioner had to approach the Delhi High Court by filing a writ petition, where he was given adequate time till the availability of Maj. S.S Pandey, who was due to retire on 28.2.2009 (retiring) on 2.3.2009. Further, the objections with regard to the admissibility of the evidence were also not considered by the GCM on the advice of the Judge Advocate.

3. The allegations were resisted by the respondents contending, inter alia, that the GCM was conducted as per the Rules and the Regulations. The allegation regarding the ineligibility or disqualification of the Judge Advocate is uncalled for since the same was settled in W.P (C) No. 849 of 2009. The petitioner, with a view to delay the conclusion of the GCM proceedings, got the matter adjourned on one or other grounds.

4. T.A No. 433 of 2010 is for quashing the recommendation of the Court of Inquiry in terms of the order dated 30.1.2009 and also the attachment of the petitioner dated 18.5.2009. Identical averments are made in this petition also. However, it is contended that the petitioner while posted as Mechanical Transport Officer was briefed about the procedure for hiring transport vehicles in view of the orders of the Station HQ Mhow and the Station Commander who being the competent financial authority. The rates and the destination of the civil transport were fixed as per the Station Board of Officers order published vide Order No.195/05 dated 19.3.2005. On a complaint from a civil contractor, a Court of Inquiry was initiated. The petitioner was called in as a witness. The Court of

Inquiry assembled at Infantry School, Mhow on 14.8.2006 and on subsequent dates by order of HQ Central Command dated 17.5.2006 for investigating into the financial irregularities and misappropriation of funds alleged to have been committed by the petitioner in hiring trucks from Mhow to Jabalpur for transporting ammunitions.

5. During the Court of Inquiry, the procedure under Army Rule 180 was not complied with. The petitioner was not afforded opportunity of remaining present throughout the inquiry. The documents which were necessary for arriving at a conclusion were not taken into consideration by the Presiding Officer. The material witnesses were not examined during the Court of Inquiry and all these facts would vitiate the GCM proceedings.

6. The main questions that arise in these two petitions are: (a) Whether the petitioner was afforded full opportunity during the Court of Inquiry? (b) Whether there was any impropriety or illegality in the conclusion of the Court of Inquiry? (c) Whether there was any evidence to frame the charges against the petitioner and if so, what is its effect?

7. As regards the impropriety and illegality in the conduct of Court of Inquiry, the allegations of the petitioner are confined only to (i) the obligation on the part of the Presiding Officer that during the Court of Inquiry, if the character or the military reputation of a person under the Army Act is likely to be affected, he must be afforded full opportunity of being present throughout the inquiry and making any statement and giving any evidence, he may wish to make or give and cross examine any witness whose evidence would affect his character or military reputation; (ii) No opportunity to call the witnesses was afforded to the petitioner; (iii) Though the statement of Tiwari made during the Court of Inquiry blamed many persons, but the recommendation in the Court of Inquiry was confined against the petitioner only. Sri. Tiwari was a habitual liar and was a man of deceitful character. His statement cannot be relied upon. To the contrary, it is stated by counsel for the respondents that the petitioner was afforded full opportunity to ventilate his grievances. He was also afforded opportunity to cross examine the witnesses.

8. We do not find any force in the contention that the petitioner was not afforded any opportunity in the Court of Inquiry. The

report of the Court of Inquiry in giving all necessary details comprising the evidence, findings, opinion and recommendations finally submitted to the authority to take a decision thereon. The Commanding Officer initiated disciplinary action by following the procedure of hearing on charge, recording of summary of evidence and remand of the accused in accordance with Army Rules 22 and thereafter referred the case for trial by Court Martial. Here, in this case, the Commanding Officer heard the witnesses and the accused though the recording of the evidence at this stage under Army Rule 22 was dispensed with. The accused was given opportunity to cross examine the witnesses and make any statement in defence. On conclusion of the hearing under Army Rule 22, the Commanding Officer exercised the option for adjournment of the case for the purpose of evidence being reduced in writing called the 'summary of evidence'. We do not find any illegality in the conduct of the Court of Inquiry, and this would not vitiate the trial.

9. It is next contended by counsel for the petitioner that it was obligatory on the part of the Commanding Officer to have taken into consideration the summary of evidence before a GCM is convened as

provided under Army Rule 37. Having taken into consideration the summary of evidence, the Commanding Officer had three options viz. (i) remand the accused for trial by a Court Martial; (ii) refer the case to a proper authority; and (iii) if desirable, re-hear the case and either dismiss the charge or dispose of summarily. Here, in this case, it is said that the Commanding Officer was swayed by irrelevant considerations and the charges which were framed against the petitioner after recording the summary of evidence are not borne out from the summary of evidence. In order to appreciate the points raised by learned counsel for the petitioner, it shall be useful to quote the charges levelled against the petitioner, which read as under:

First Charge Army Act Section 52(f)	SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 WITH INTENT TO DEFRAUD, in that he, At Mhow, between October 2005 and March 2006, which came to the knowledge of the authority competent to initiate action on 13 April 2007, while performing the duties of Melchanical Trlansport Officer, the Infantry School, Mhow, with intent to defraud, hired two civil trucks of Ten Ton capacity, well knowing that trucks of Seven Ton capacity were actually utilised.
Second Charge SECTION 52 Army Act Section 52(f)	SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF WITH INTENT TO DEFRAUD, In that he,

At Mhow, between June 2005 and March 2006, which came to the knowledge of the authority competent to initiate action on 13 April 2007, while performing the duties as mentioned in the first charge, with intent to defraud, caused to be paid Rs.3,85,000/- (Rupees three lakhs eighty five thousand only) to Shri Chetendra Tiwari for hiring of 35 trucks at the rate of Rs.11,000/- (Rupees eleven thousand only) per truck, well knowing that the actual payment due to him was Rs.2,97,500/- (Rupees two lakhs ninety seven thousand five hundred only) per truck.

Third Charge
Army Act
Section 69

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, BY ABUSING HIS POSITION AS A PUBLIC SERVANT OBTAINING FOR HIMSELFPECUNIARY ADVANTAGE CONTRARY TO SECTION 13(2) READ WITH SECTION 13(1)(D)(II) OF THE PREVENTION OF CORRUPTION ACT, 1988,

In that he,

At Mhow, during the month of Aujgust 2005, which came to the knowledge of the authority competent to initiate action on 13 April 2007, while performing the duties as mentioned in the first charge, abused his position as a public servant and obtained for himself Rs.67,500/- (Rupees sixty seven thousand five hundred only), a gratification other than legal remuneration, as a motive, from Shri Chentendra Tiwari to clear his payment for supply of trucks to Infantry School, Mhow.

Fourth Charge
Army Act
Section 63

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,

At Mhow, on 11 March 2006, which came to the knowledge of the authority competent to initiate action on 13 April 2007, while performing the duties as mentioned in the first charge, improperly and without authority, hired 23 feet long body truck at the rate of Rs.24,500.00 (Rupees twenty four thousand five hundred only), well knowing tht such rate was

applicable for load carrier trailer long body (Dozer) vide Station HQ, Mhow Order No.195/2005 dated 19 March 2005.

Fifth Charge Army Act Section 63	AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE, In that he, At Mhow, between June 2005 and March 2006, which came to the knowledge of the authority competent to initiate action on 13 April 2007, while performing the duties as mentioned in the first charge, improperly offered Rs.33000/- (Rupees thirty three thousand only) through Maj. Manav Deshwal, Veterinary Officer, Military Farm, Mhow to Shri Chetendra Tiwari, Proprietor of Shri Ganesh Road Lines, Indore, to withdraw his complaint against him.

10. It is strenuously argued by counsel for the petitioner that even if the entire evidence adduced in the summary of evidence are taken into consideration, it would not make out a prima facie case against the petitioner for his trial under the above charges. Not even a single witness in the course of summary of evidence whispered about the involvement of the petitioner for which he is being tried by the GCM on the charges so framed. To the contrary, it is submitted on behalf of the respondents that the provisions of Army Rules 34 and 37 were adhered to for the purpose of framing charges against the petitioner. There is also no inhibition under

Army Rule 181(2) in considering the evidence or statement recorded in the Court of Inquiry for the purpose of framing of the charge.

11. As regards enclosing a copy of the Court of Inquiry while sending papers to the authority empowered to convene a GCM, it shall be useful to quote the 'form' on which the papers are transmitted to the convening authority. It reads:

APPENDIX III
PART I(A)

FORM OF APPLICATION FOR A COURT MARTIAL

Place……dated…20……

Application for a Court-Martial

Sir,

I have the honour to submit…….charge/s……..against No……Rank……., Name……of the …… (unit) under my command, and request you to obtain sanction of ……..that a …….. court-martial may be assembled for his trial at ……. (place).

The case was investigated by (a) ……..

A court of inquiry (b) was held on …….(date) at ……(station).

Presiding Officer…… Ranks…….Names and Corps Members…… The accused is now at …….. (place).

His general character is (c) …….. enclose the following documents(d):

1. Tentative Charge-sheet (in duplicate).
2. Summary of Evidence original and …….. copy/copies.
3. Original exhibits.

4. List of witnesses for the prosecution and defence (with their present stations of addresses).

5. List of exhibits.

6. Correspondence.

7. Statement as to character (IAFD-905) and the conduct-sheet of accused (e).

8. Statement by accused as to whether or not he desires to have an officer assigned by the convening officer to represent him at the trial (AR 33(7).

Yours faithfully,
Signature of Officer Commanding

(a) Here insert the name of—

(i) Officer who investigated the charge.

(ii) Company, etc., Commander who made preliminary enquiry into the case.

(iii) Officer who took down the Summary of Evidence (Army Rule 39(2)(c).

(b) To be filled in if there has been a court of inquiry respecting any matter connected with the charges; otherwise to be struck out (Army Rule 39(2)(c).

(c) To be filled in by the Commanding Officer personally in accordance with Army Regulations para 17.

(d) Any item not applicable to be struck out.

(e) 3, 4, 5, 6, 7 and 8 to be returned to the Officer Commanding the unit of the accused with the notice of trial.

MEDICAL OFFICER'S CERTIFICATE

I certify that No……., Rank……., Name…….. of……. (unit), is fit/unfit to undergo trial by Court-Martial.

Place…….
Date…….

Signature of the Medical Officer

xx xx xx xx"

In the form, the names and ranks of the Presiding Officer and the Corps Members associated with the Court of Inquiry should be stated. The logic behind it is to protect the rights of the individual.

12. The next question that arises is, how far the evidence collected in the Court of Inquiry could be considered for the purpose of framing charge against an individual. Army Rule 182 makes it clear to what extent the evidence collected in the Court of Inquiry is admissible in evidence. Army Rule 182 reads as under:

> "**182. Proceedings of court of inquiry not admissible in evidence**.— The proceedings of a court of inquiry, or any confession, statement, or answer to a question made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for wilfully giving false evidence before that court:
>
> Provided that nothing in this rule shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witness."

There is a specific inhibition under Army Rule 182 that the statement and other materials collected in the course of inquiry 'shall be' inadmissible in evidence against the person subject to the Act. This puts a clear bar against using such evidence except to contradict the witness. However,

arguments were advanced that the evidence collected under Rule 180 would have the effect of evidence as defined in Section 3 of the Evidence Act. We do not find any force in such contention, because there is prohibition in the use of the evidence taken in the course of Court of Inquiry in any other manner against an accused i.e. even for the purpose of framing of the charges. If the GCM uses the statements recorded in the Court of Inquiry for contradicting the witnesses, the same must be done in the manner provided under Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain, after drawing his attention to the statement which is intended to be used for contradiction. The interdict contained in Army Rule 182 debars the Commanding Officer from using it as part of the evidence. The convening authority/Commanding Officer can use the recommendation of the Court of Inquiry for his satisfaction to pass a convening order but not as an evidence. The power of the convening authority to consider the Court of Inquiry for the purpose of charge is not unfettered. In light of the inhibition contained in Section 182, it is not open to the Commanding Officer to place reliance on the Court of Inquiry as piece of evidence directly or indirectly to frame charge.

13. It has next been contended that the expression 'evidence' used in Army Rules 177, 180 and 182 is defined in Section 3 of the Indian Evidence Act. It reads as under:

> "3. **Interpretation clause**.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:--
>
> xx xx xx xx
>
> "**Evidence**".—"Evidence" means and includes—
>
> (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,
>
> Such statements are called oral evidence;.
>
> (2) (all documents including electronic records produced for the inspection of the court),
>
> Such documents are called documentary evidence.
>
> xx xx xx xx"

It is submitted on behalf of the respondents that the Legislature has purposely used the term 'evidence' and it cannot be ignored while framing charge. It may be remembered that the Army Act is self contained. Section 133 of the Act provides that the Indian Evidence Act 1872 shall be applicable to proceedings before the Court Martial subject to the

provisions of this Act. Under Section 182, there is a specific bar against using the evidence collected in the course of Court of Inquiry and it can only be used for the purpose of contradiction. This Tribunal cannot, under the guise of interpretation, make additions in the law and to read into it something that is just not there. The apex Court in **Union of India** v. **Deoki Nandan Aggarwal** (1992 Supp (1) SCC 323) sounded the note of caution against the Court usurping the role of legislator in the guise of interpretation. The apex Court has held as under:

> "14. ……. It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. The court of course adopts a construction which will carry out the obvious intention of the legislature but could not legislate itself. But to invoke judicial activism to set at naught the legislative judgment is subversive of the constitutional harmony and comity of instrumentalities."

Identical view was taken by the apex Court in **Raghunath Rai Bareja** v. **Punjab National Bank** (2007(2) SCC 230). From these decisions, it is clear that when provisions are clear and unequivocal, interpretation should not

be made which would lead to interpolation and evisceration. Thus the evidence collected in the Court of Inquiry cannot be looked into for the purpose of framing charges.

14. The next point to be considered is, how far the charges framed against the petitioner are sustainable? Learned counsel for the respondents is specific in his submissions that as regards Charges 1 to 4, the summary of evidence is silent, but, on the other hand, Charge No.5 is prima facie sustainable from the statement borne out from the additional summary of evidence, in particular from the statement of PW 8 Tiwari, wherein he has categorically stated that:

> "(j) As regards improperly offering Rs.33000/- (Rupees thirty three thousand only) through Major Manav Deshwal, veterinary officer, Military Farm, Mhow to me. I have the following to state:
>
> (i) I hereby produce the letter number SGRL/0321 dated 13 May 2006 addressed to the Commandant, the Infantry School, Mhow and attaches the same as Exhibit – II.
>
> (ii) The officer recording the S of E peruses the document and attaches the same as Exhibit – II".

He has also attached Exhibit 2 (Letter No. SGRL/0321 dated 13.5.2006 addressed to the Commandant). The statement of PW 8, coupled with the complaint, would prima facie make out Charge No.5 against the petitioner.

However, from the side of the petitioner, much stress has been laid that this part of the statement of PW 8 is not reliable as even in the summary of evidence, in particular Question No.16, he was controverted with the earlier part of the statement recorded in the Court of Inquiry. Further, PW 5 (Maj. Manav Jaiswal) denied about the offer of money. This was in the context of the complaint - Exhibit 2 - made at the time of recording additional summary of evidence. Army Rule 37 provides that an officer before convening a general or district court martial, 'shall first satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act, and that the evidence justifies a trial on those charges'. This would show that the convening authority is not a mere authority to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the fact of the case in order to determine whether a case for trial has been made out from the evidence or not. To assess this, it is not necessary for him to enter into the pros and cons or weighing the balance of probabilities which is the function of the Court after trial starts. He has merely to sift the evidence to find out whether or not there is sufficient ground to proceed against the accused. In other words, sufficiency of the ground to take within its object, the nature of

evidence recorded in the summary of evidence or the documents produced before the Presiding Officer prima facie disclose that there are suspicious circumstances to frame charge against the accused. As has rightly been pointed by counsel for the respondents, as regards Charges 1 to 4, there is no evidence to make out a prima facie case. As regards Charge No.5, there is prima facie evidence. There is the settled legal principle that if on the basis of the material on record the authority could form an opinion that the accused had committed an offence, it can frame charge though for conviction it is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of charge, the probative value of the material on record cannot be gone into and the material on record by the prosecution has to be accepted as true. Such principle was illustrated by the apex Court, though in reference to the provisions under Section 227 of the Code of Criminal Procedure. Reliance may be placed on **State of Bihar** v. **Ramesh Singh** (1977(4) SCC 39), **Union of India** v. **Prafulla Kumar Samal and another** (1979 (3) SCC 4), **Niranjan Singh Karam Singh** v. **Jitendra Bhimraj Bijjaya and others** (1990(4) SCC 76) and **Soma Chakravarty** v. **State through CBI** (2007(5) SCC 403).

15. Before the Court Martial proceeding is convened, the legal requirement of satisfaction of the officer concerned must be emphasised on the finding of evidence during trial on those charges. Such satisfaction cannot be recorded without any evidence. Here, on Charges 1 to 4, there is no evidence and so, they deserve to be set aside. However, since the witnesses have stated about Charge No.5, the GCM may continue the trial of the petitioner. Reliance may be placed in the case of **Rajiv Arora** v. **Union of India and others** (2008(15) SCC 306), wherein it was held that:

> "14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review. Before a court martial proceeding is convened, legal requirements therefor must be satisfied. Satisfaction of the officer concerned must be premised on a finding that evidence justified a trial on those charges. Such a satisfaction cannot be arrived at without any evidence. If an order is passed without any evidence, the same must be held to be perverse.
>
> 15. …….
>
> 16. We, therefore, are of the opinion that the impugned judgment in regard to Charges 1, 2 and 3 cannot be sustained."

16. In view of the aforesaid discussion, Charge Nos. 1 to 4 framed against the accused-petitioner are quashed. With regard to Charge No. 5, the GCM proceedings can be proceeded with. Both the petitions are disposed of accordingly.

(S.S DHILLON)
MEMBER

(S.S KULSHRESTHA)
MEMBER