IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

T.A NO. 445 OF 2009
IN WRIT PETITION (C) NO.6005 OF 2003

EX CAPT K.GOVINDAN
(SL-01373)
FLAT NO.3, 2nd FLOOR
SRI SAI SADAN APARTMENTS
OHM SAI COLONY, P.O. ALWAL
SECUNDERABAD-500 010.

THROUGH: SH.C.M.KHANNA, ADVOCATE.

…PETITIONER

VERSUS

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

2. **THE CHIEF OF ARMY STAFF**
   ARMY HQ, SOUTH BLOCK, DHQ P.O.
   NEW DELHI – 110 011.

3. THE COMMANDANT
EME CENTRE
SECUNDERABAD.

THROUGH: MR.ANKUR CHHIBER, ADVOCATE

.. RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S KULSHRESHTHA, MEMBER
HON'BLE LT. GEN. S.S DHILLON, MEMBER

J U D G M E N T
Dated : 25.02.2010

1. The petitioner vide his petition seeks redress against the order of General Court Martial held on 19.3.1981, wherein he was dismissed from service. He also seeks quashing of the order of the COAS of 26.2.1982 confirming the sentence. On account of his dismissal from service, he has not been given any pensionary benefits which should be restored to him after setting aside the illegal sentence of dismissal by the GCM.

2. The petitioner was enrolled in the Army as a Sepoy in 1947 and after 21 years of exemplary service as a person below officer rank, he was granted an officers' commission on 1.1.1968. Thereafter, in May 1979, the petitioner joined duty in the rank of as a Captain as Battalion Quarter Master, of No.4 Training Battalion of No.1 EME Centre, Secunderabad. At this point of time, the petitioner had over 32 years of meritorious service. On joining the EME Centre, he noticed some glaring and serious irregularities in its functioning and accordingly set about in right earnest to correct the existing procedures. According to the petitioner, his actions were not appreciated by the superior officers resulting in creating a lot of friction as well as an ill-conceived decision by the Commanding Officer of the petitioner to initiate an adverse ACR on the petitioner.

3. There are two specific incidents which led to the GCM i.e. firstly, the petitioner, despite being ordered to do so, did not report to the Medical Officer to get himself examined and thereafter submit the ACR form duly endorsed by the Medical Officer to his Commanding Officer, and secondly, the petitioner dishonestly misappropriated an amount of Rs.343.30 in February 1980. From these two incidents, four charges were drawn i.e.

two charges under AA Section 41(2) for disobeying a lawful command, one alternative charge under AA Section 63 for an act prejudicial to good order and military discipline and the fourth charge under AA Section 52(b) for misappropriation. In the GCM, the petitioner was held guilty of three charges and not guilty for the alternate charge.

4. The petitioner urges that on 29.10.1979, without being given the statutory and mandatory warning for initiation of an adverse ACR against him, he was directed to report for medical examination and thereafter submit the ACR form to his Commanding Officer for initiation of an adverse ACR. Thereafter he received reminders to get himself medically examined and submit the ACR form on 1.11.1979, 2.11.1979, 5.11.1979, 7.11.1979, 9.11.1979, 10.11.1979, 21.11.1979, 3.12.1979 18.12.1979 and 29.1.1980. However, the petitioner urges that while the 29.10.1979 letter supposedly attached a blank ACR form, along with the letter, in actual fact the blank ACR form was not attached with the letter. He initialed the office copy of the letter as an acknowledgment for the letter per se and not for the ACR form that was supposed to be attached with it. He contends that during the recording of Summary of Evidence on 22.4.1980, he asked his Commanding

Officer in the cross examination at Questions No. 3 and 4 that only "covering letter" was received by him and also as to why the CO had not personally handed over the form to him and instead routed it through the second in command, Maj. Ananda Rao, who has no role to play in initiating ACRs.

5. The plea of the petitioner was that firstly no intimation for adverse ACR had been given to him. According to Army Order No.9/S/71, which pertains to "instruction for rendering CRs on officers" at Paragraphs 43 to 46 detailed instructions are given as to how such adverse report is to be initiated. The essence of the procedure is that the officer is required to be warned in writing of all his shortcomings, he should also be informed in writing that an adverse ACR was contemplated; next higher HQs has to be mandatorily informed of such intention of initiating an adverse ACR and lastly the officer is required to be given a period of 60 days to show improvement, after which the Initiating Officer may initiate an adverse CR. None of these actions was taken by his CO. He was never informed on which date he was placed on notice of 60 days to show improvement and no other written communication was ever given to him to indicate that an adverse ACR is to be communicated. The only intimation he had of such intention was

from the letters addressed to him directing him to report for medical examination wherein the subject heading “adverse confidential report officers” was typed. The petitioner also contends that no blank ACR form was given to him and in the absence of such form, there was no method by which he could get himself medically examined or obtain the doctor’s endorsement on the form. The petitioner also argued that there has to be a difference between counselling an officer and placing such officer on adverse report. While the superior officer is at liberty to counsel any of his subordinates, however, if he intends to place such subordinate on an adverse CR there is a specific stipulated and mandatory procedure which was totally brushed aside. In fact till date no such record of intimation of initiating an adverse CR has been produced by respondents. Lastly, when the date of notice for initiating adverse CR has not been specified, it was not feasible for him to work out the 60 mandatory days that he gets to show improvement in his performance. In the absence of such dates, there was no great hurry or urgency for him to immediately get medically examined and submit the ACR form. All this was being done to harass him because he had pointed out certain wrong procedures in accounting, which was not liked by his superiors. The petitioner also contends that the order to report for medical

examination was not a lawful command as defined in Army Act Section 41(3). The petitioner had nothing against getting himself medically examined. However, it was not feasible for him to comply with the orders without the ACR form and he had time and again requested for such ACR form to be given to him. The petitioner does admit that his requests to obtain blank ACR Form were verbal and he has never given any written request for the same.

6. With regard to the fourth charge, i.e. under Army Act Section 52(B) dishonestly misappropriating property belonging to Government in that he between 1.2.1980 and 29.2.1980 dishonestly misappropriated Rs.343.30. The petitioner urges that this charge clearly establishes the bias, vengeful and arbitrary actions on the part of his superior officers to crucify him for no fault of his. The sequence of events commenced with a letter written by the petitioner himself on 11.2.1980 to his CO, Lt. Col. Manohar Singh, stating that he had mistakenly deposited Rs.909.61 in excess of the amount he was required to deposit on account of sale of ration and clothing. Based on this letter, the CO ordered a Court of Inquiry to ascertain the facts and while the Court of Inquiry for some reason was not conducted, a board

of officers was ordered to scrutinise the sale record of ration and clothing items for the entire month of February 1980. This board of officers went into the complete details of transactions for the month of February and concluded that the petitioner's calculations were incorrect and that in actual facts, there was a short-fall to the tune of Rs.343.30. When this was brought to the notice of the petitioner, he in all humility again wrote to his CO on 15.3.1980 accepting that there was no over/under deposit and that no action should be taken on his earlier letter of 11.2.1980. In his statement, which he gave to the board of officers, the petitioner explains the complete transactions and accepts that it was an inadvertent mistake. Thereafter, this amount has been deposited in the treasury by him. Therefore, it cannot by any logic be construed to be "dishonest misappropriation" and can at best be termed as an accounting error or a genuine inadvertent mistake.

7. The petitioner is also aggrieved that since he had been deprived of his pension and pensionary benefits for reasons of his illegal trial and award by GCM, he seeks to be given his pensionary and other terminal benefits as due to him. The so called offences for which he was tried were in

any case petty and did not justify withholding of his pension and other terminal benefits.

8. The petitioner has also placed on record the fact that he was placed under close arrest from 1.3.1981 to 9.3.1982 i.e. for a period of over one year when the punishment that he was given was only dismissal from service and did not entail even a single day's imprisonment/arrest.

9. Counsel for the respondents contended it to be a clear-cut case of disobedience of lawful command and misappropriation, both of which had been proved during the trial by GCM. With regard to non-compliance with the requirement of a medical examination for initiating an adverse ACR, the respondents state that the blank ACR form was handed over to the petitioner on 29.10.1979. In fact, this letter itself says "**blank ACR form is attached. Please take action for completion of medical examination ……**". The petitioner has initialed the office copy of this letter in token of having received this letter supposedly with all the attachments/enclosures. Therefore, at this point of time, for him to contend that blank ACR was not enclosed is a blatant lie. Furthermore, despite the numerous written

reminders given to the petitioner to complete the medical formalities, not once ever has the petitioner replied to say that he had not received the blank ACR form. This is an after-thought which he is indulging in to confuse the facts of the case. Also, the petitioner was very much aware of the fact that an adverse ACR was to be initiated against him, this is borne out from the petitioner's letter to his CO on 29.10.1979 wherein he says "it is understood that you are initiating an adverse CR officers on me". There was no ambiguity in the petitioner's mind that an adverse ACR was being initiated against him and he is only resorting to these tactics because it is a very old case and all the documents pertaining to it are not readily available, therefore, he is taking advantage of such ambiguity. The respondents clarified that the order given to the petitioner to appear before the Medical Officer was a "lawful command" and its disobedience tantamounts to impeding, delaying or preventing a military proceeding. However, counsel for the respondents was unable to provide any inputs with regard to compliance of mandatory procedures for initiating adverse CR, as given in Special Army order 9/S/71.

10. With regard to the misappropriation of Rs.340.30, it was argued that not only has the petitioner misappropriated this amount, in fact,

the board of officers, which investigated the matter, also faulted him for late depositing of sale proceeds, at times even delaying it by 10/12 days, which was contrary to all existing instructions. However, the charge against the petitioner confined itself to that of misappropriation only. This fact was established beyond doubt and the effort of the petitioner to resort to excuses of lack of transport, over-writing, wrong figures in the cheque books, etc. etc. are only excuses to cover up his misdeeds.

11. Regarding the imprisonment, the respondents stated that at that point of time the law stipulated that on completion of the GCM, the accused must be kept in custody till the sentence is confirmed by the competent authority. In this regard, a copy of the Regulations for Army (Para 392), as in vogue at that point of time, was shown and is extracted below:

> "392. ARREST.—
>
> (a) ....
> ....
>
> (k) In any case the accused will be placed under close arrest before the commencement of a court-martial and he will remain under close arrest after trial by court-martial until the proceedings are promulgated."

According to this, while the Court Martial was held between 2nd and 19th March 1981, it was only confirmed by the Chief of Army Staff on 26.2.1982. Therefore, they had no other option but to retain the accused in custody from 1.3.1981 to 9.3.1982 (date of promulgation). There has been no infringement of any law or any arbitrariness in this regard.

12. To appreciate whether there was lawful command to the petitioner to undergo medical check up for the purpose of initiating an adverse ACR, it would be appropriate if the relevant guidelines, as contained in SAO 9/S/71, are extracted, which read thus:

> "**Adverse Report**
>
> 43. An Adverse Report is initiated by the immediate Commanding Officer to record cases in which an officer's service is considered unsatisfactory viz., when it is desired to recommend release of an officer from service, or removal from an appointment/employment in his acting rank for reasons of professional incompetence, inefficiency or inherent traits of character which make his utility to the service doubtful.
>
> 44. Before an Adverse Report is initiated, the following will be ensured:--

(a) The officer will be warned in writing of all his short comings which are intended to be reflected in the Adverse report.

(b) The written warning as in (a) above will specifically mention that the same has been issued for the purpose of initiating an Adverse Report.

(c) The next higher headquarters will be informed of the fact that the officer has been warned. A copy of the warning letter will also accompany the Adverse Report, if and when initiated.

(d) The officer will be given a period of 60 days' notice to show improvement. During this period, the officer will not be sent on leave/duty exceeding 10 days without obtaining prior permission from the Military Secretary's Branch.

45. The period of 60 days prescribed in para 44 of this Order may be waived by a formation commander not below Divisional/Area Commander, or a Principal Staff Officer at Army Headquarters, in cases of gross professional inefficiency or when the retention of the officer in his unit/appointment is considered inadvisable in the larger interests of the service. Such sanction will be accorded n writing before the Adverse Report is initiated and a copy thereof will accompany the report.

46. The Military Secretary's Branch will be informed by signal as soon as an officer is placed on an Adverse Report. The report will be marked "Adverse Report" in red ink and must reach the Military Secretary's Branch within 30 days of initiation."

It is an undisputed fact that the above guidelines have not been adhered to in this case for the initiation of an adverse ACR. In fact, no aspect of this order has been complied with. Therefore, to perpetuate illegality while accepting legality from one's subordinate is contrary to all established norms of justice or administrative principles. It is also apparent that at no point of time has the CO even communicated his intention to the petitioner who was his ratee about his intention of placing him on adverse report. Routing such communication of adverse report through second in command, Maj. Ananda Rao was unnecessary, especially considering that an ACR is a matter to be dealt with directly between the IO and the ratee, especially in such a sensitive situation as initiating an adverse report. The respondents have not been able to indicate what is the date on which the ratee was placed on adverse report warning and correspondingly on which date such adverse ACR would be initiated. On the face of such arbitrariness, to deluge the petitioner with periodic written reminders to report for medical examination do not stand the test of logic. Such "illegitimacy" apparently got aggravated by the Commanding Officer, Lt. Col. Manohar Singh (who would be the Initiating Officer of such CR) conveniently remaining out of the picture and permitting the incident to degenerate into a clash of egos and petty squabble between

the second-in-command, Maj. Ananda Rao and the petitioner. To subvert the law to suit one's dictatorial and arbitrary behaviour cannot be accepted from a responsive, mature and accountable authority such as the Army.

13. When certain guidelines, which have the force of law, are formulated, the authority, with whom the powers are vested to initiate adverse ACR, is under obligation to do certain thing in a certain way. The same must be done in that way or not at all and the other methods of performance are necessarily forbidden (see **Nazir Ahmed** v. **King Emperor** (AIR 1936 PC 253(2). This view was reiterated in **Capt. Virendra Kumar** v. **Union of India** (1981 (1) SCC 485), wherein it was held that where the statutory rule or the prescribed procedure was not followed, termination of service of the employee was illegal. It is well settled rule of administrative law that the executive authority must be rigorously held to the standards by which it professes its action and it must scrupulously observe those standards by which it professes actions. This rule was enunciated by Justice Frankfurth in **Vitarelli** v. **Seaton** (3 L.Ed. 2T 1012/359 US 358 (1958), wherein, it was observed that "**an executive agency must be rigorously held to these standards by which it professes to …….. Accordingly, if dismissal from**

employment is based on a defined procedure even though generates beyond the requirements that binds such agency that the procedure must be scrupulously observed ….. The judicially involved rule of administrative law is now established and if I may add rightly so, he that takes the procedural sword shall perish with that sword" (these observations were approved and followed in **Sukhdev Singh and others** v. **Bhagatram Sardar Singh Raghuvanshi and another** (1975 (1) SCC 421) and **Dr. Amarjit Singh Ahluwalia** v. **State of Punjab and others** (1975(3) SCC 503).

13. Regarding the alleged misappropriation of Rs.340.30, there is no denial that the issue was initially raised by the petitioner, premised on false accounting. On being corrected, he has accepted his mistake and deposited the desired amount. Even considering that there was a difference in depositing sale proceeds to the tune of Rs.340.30, it cannot by any stretch of imagination be termed as "misappropriation" It has been accepted by the petitioner that it was a genuine inadvertent calculating mistake for which he atoned and paid this money to the treasury. At no point has any evidence or statement been produced to prove "misappropriation". There was never any intent on the part of the petitioner to play fraud or to dishonestly

misappropriate such petty amount. To sensationalise such inadvertent accounting error into a supposed “dishonest” “misappropriation” is reflective of the bias against the petitioner.

14. For the above two incongruous “misdeeds” to sentence an officer to be dismissed and with one stroke to eradicate 32 years of dedicated service appears to be grossly unjustified. This injustice has been further perpetuated by one year’s detention in military custody. While rules may permit such detention: certain responsibility, application of mind and logic is expected from mature and highly placed authorities. To this extent, we set aside the punishment of dismissal. The petitioner shall be deemed to have retired on the date of his dismissal and he shall be paid all pensionary and other benefits for the period of limitation i.e. three years from the date of institution of this petition till the date of finalisation of the pensionary benefits with interest @ 12% per annum. He shall continue to draw pensionary benefits in future.

S.S DHILLON
MEMBER

S.S KULSHRESHTHA
MEMBER