

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

**TA/456/10
[Writ Petition (C) no.9441/09]**

**LT COL OP PHARSWAN
DCWE (E/M)
HQ CWE (HILLS) DEHRADUN
MALL ROAD
DEHRADUN CANTT-248 003.**

THROUGH : MAJOR K.RAMESH, ADVOCATE

...PETITIONER

VERSUS

- 1. UNION OF INDIA
THROUGH THE SECRETARY
MINISTRY OF DEFENCE
NEW DELHI-110 011.**
- 2. CHIEF OF ARMY STAFF
ARMY HEADQUARTERS (THROUGH MS)
NEW DELHI-110 011.**
- 3. THE ADJUTANT GENERAL (ADG/DV)
ARMY HEADQUARTERS
NEW DELHI 0110 011.**

THROUGH : DR. ASHWANI BHARDWAJ, 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

DATE : 01st April, 2010

1. This petition has been brought for quashing the findings accorded by General Court Martial (GCM) holding the petitioner guilty for the offences u/ss.52 (f) and Section 63 of the Army Act R/w. Section 34 of Indian Penal Code and awarded sentence of dismissal from service and the order passed by the Chief of Army Staff dated 08.09.2004 wherein converting the sentence into the punishment of forfeiture of five years of service for the purposes of pension and promotion, further also awarding 'severe reprimand'. The petitioner was not afforded fair trial even from the initial stage. In view of the arrangement under Rule 35 of the Army Rule, representation was made by him that his trial should be separated with that of co-accused Col S.K.Mishra under whose orders he shifted the rejected stores to Bikaner. Identical prayer has also been made by Major K.P.Jose and he was accommodated by separating his trial. It is also contended that in the recording of Summary of Evidence, Col S.K.Mishra Commanding Officer of the petitioner owned his responsibility that the petitioner in compliance of his orders made the arrangement for shifting the rejected stores to Bikaner. Even otherwise in the matter of petitioner, Col S.K.Mishra was the material witness and he ought to have been examined in the case of the petitioner separately. While adopting the procedure of making joint trial the opportunity to cross examine Col S.K.Mishra was not given to the petitioner even otherwise, Col S.K.Mishra could not be

produced as a witness in the trial when he himself was the accused. It has further been contended that the petitioner was discriminated in the matter as the identical prayer made by Major K.P.Jose was allowed and he was tried separately and was given a minor punishment taking into consideration the statement of Col S.K.Mishra.

2. This petition has been resisted by Union of India contending that the attending circumstances would refer about the conspiracy between Col S.K.Mishra and petitioner. In that situation the joint trial is permissible and he was not prejudiced in any way. As regards the case of Maj K.P.Jose is concerned his prayer was considered looking into the facts and circumstances of the case and the petitioner cannot take advantage of what relief was given to him. In order to appreciate the points agitated by the parties it shall be useful to make brief narration of the case. The petitioner was tried jointly alongwith Col S.K.Mishra on two charges as under:

<p><u>First Charge</u></p> <p>Army Act Section 56(f) (read with section 34 of Indian Penal Code, against both the accused)</p>	<p>SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD</p> <p>in that they together, at field, during October 1999, while performing the duties of Commanding Officer 267 Engineer Regiment and Officer Commanding</p>
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	299 Field Park Company of 267 Engineer Regiment respectively, with intent to defraud, moved the Operational Work Stores kept at Boom and mentioned in the schedule to this charge sheet, to Bikaner.
<u>Second Charge</u> Army Act Section 63(read with section 34 of Indian Panel Code, against accused no.1 & 2 and alternative to the first charge)	AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE in that they together, at field, between 01 October 1999 and 03 November 1999, when performing the duties of Commanding Officer 267 Engineer Regiment and Officer Commanding 299 Field Park Company of 267 Engineer Regiment respectively, improperly ordered the move of stores as mentioned in the schedule attached to this charge sheet from Boom to Bikaner without informing the superior formation Headquarter.

3. The allegations against the petitioner and Col S.K.Mishra were confined to shifting the rejected stores with intention to defraud. In that regard, when the petitioner was tried jointly with Col S.K.Mishra referring the provisions as contained in Army Rule 35, an application was moved that his case be separated. In that context, the decision taken by the Convening Authority in the case of Major K.P.Jose was referred. Now this petition has been kept confined that by joint trial the rights of the petitioner for having fair trial were prejudiced. Thrust of the arguments from the side of petitioner is that he was working in the capacity of

Lieutenant Colonel and was answerable to the command/orders given by his superior. Co-accused Col S.K.Mishra gave some directions for shifting of rejected stores to Bikaner though his advice was to the contrary and he had no option except to make arrangement for its shifting. Reference to the statement of Col S.K.Mishra has also been made where he categorically stated that whatever action had been taken by the petitioner was in obedience to his directions. His statement given in Summary of Evidence may be extracted here under:

Maj KP Jose and Maj OP Pharswan are good and upright officers. In all the transactions pertaining to the stores under reference, both these officers merely complied with my orders and have not played any role on their volition or had acted in any manner in pursuance of any pre-arranged plan. These two officers have implicitly executed my orders.”

Even in cross examination, he admitted in para-40 which may also be quoted here under:

Q-1 Is it is a fact that these stores as mentioned in the schedule 1 of the tentative charge sheet (schedule 1 is almost the same as att to the charge sheet at this trial) were not part of any op wk stores belonging to any formation/ Northern Command?

A-1 Yes.

Q-2 Did I create the said stores as surplus?

A-2 No.

Q-4 It is a fact that the said stores were moved from previous loc to new loc Bikaner by a civ truck as per your instructions?

A-4 Yes.

Q-5 Is it a fact that the stores for the Barrack damage and Regt, were procured on credit as per your instructions?

A-5 Yes.

Q-8 Is it a fact that all the Reports and Returns with regard to move of the stores is the responsibility of RHQ and OC Fd Pk Coy cannot correspond with the formation HQ directly?

A-8 Yes.

Q-13 Did you come to visit Boom and were aware about the rejected stores?

A-13 Yes.

Q-14 Is it a fact that when you ordered me to move the said stores from fd area to Bikaner, I did advise you otherwise?

A-14 Yes.

4. This all indicates that petitioner was not at fault at any point of time and he was under obligation to obey the command of his superior. In that regard, petitioner has also given statement as an accused in Summary of Evidence proceedings which would also ensure that from the very beginning his plea was that he gave advice to the Commanding Officer not to shift the stores but because of the orders of his superior he had to shift the stores. In that circumstances, it is argued that the culpability of the petitioner cannot be remotely fixed and at the same time he ought to have been given opportunity to cross examine the witness

(Col S.K.Mishra) who gave such directions. From the materials on record including evidence and also from Summary of Evidence it is clear that Col S.K.Mishra gave directions to the petitioner. In that situation prosecution of the petitioner ought to have been separated from Col S.K.Mishra, who was to be examined as main witness in that case. By making the joint trial with that of material witness, the petitioner was deprived of the opportunity to cross examine the material witness (Col S.K.Mishra). In a normal rule (Army Rule 35) it was obligatory on the part of the GCM/ SCM to have given the opportunity to the petitioner where he intends to get him separately tried when the offence committed appeared to be distinct of the co-accused. As already referred above, Col S.K.Mishra throughout stated that it was his directions to the petitioner to shift the rejected stores. There appears to be no doubt that the charge against the petitioner is distinct with that of the co-accused Col S.K.Mishra. There is no reason for the joint trial. Reliance may be placed in the case of *(1964) 3 SCR 297 and AIR 1963 SC 1850*, in that case the Hon'ble Supreme Court observed that the separate trial is the normal rule and joint trial is the exception where the offence is appearing to be distinct. Here the conspiracy on the part of the petitioner is not appearing from the record and even the charge does not convey conspiracy between him and his Commanding Officer (Col S.K.Mishra). Reliance may be placed in the case of *M/s.Bhagwan Das Jagdish Chandra Vs. Delhi*

Admn. & Others, AIR (1975)S.C.1309 wherein it was held that where the accused is deprived of his valuable right by joint trial, it ought to have been separated. Here in this case by joint trial of the accused along with Col S.K.Mishra his rights have been adversely affected. He could not have a fair trial to cross examine the material witness. There was also observation of the GOC-in-C Western Command to the effect that “*there was no prohibition to examine Col S.K.Mishra, an accomplice, as defence witness during the trial.*” Though legally it was not permissible that an accused who was facing trial may be asked to appear witness for or against himself or against co-accused in the same trial. Further he was also discriminated by rejecting his application for separating his trial. **The impugned order is not sustainable. The petition is allowed and the findings of the General Court Martial (GCM) and Chief of Army Staff are set aside.**

5. The respondents are at liberty to initiate fresh proceedings against the petitioner having taken into consideration the above observations with regard to the statement of Col S.K.Mishra sticking to his direction to the petitioner.

S.S.DHILLON
(Member)

S.S.KULSHRESHTA
(Member)

**PRONOUNCED IN OPEN COURT
ON 01st APRIL, 2010**