IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI

T.A NO. 558 OF 2009
(WRIT PETITION (C) NO. 7327 OF 1999)

EX-SEP HARI CHAND
S/O. SHRI CHANDAN SINGH
VILLAGE: CHHAPROLA, P.O: DHATIR
DISTT: FARIDABAD.

THROUGH: MS. REKHA PALLI, ADVOCATE

... PETITIONER

VERSUS

1. **UNION OF INDIA THROUGH SECRETARY**
   MINISTRY OF DEFENCE,
   DHQ P.O., NEW DELHI-110011.

2. **CHIEF OF THE ARMY STAFF**
   ARMY HEADQUARTERS, DHQ P.O.,
   NEW DELHI-110011.

3. **COMMANDER**
   109 INFANTRY BRIGADE
   C/O 56 APO.

4. **COMMANDING OFFICER**
   9 JAT, C/O. 56 APO.

5. OFFICER IN-CHARGE (RECORDS)
THE JAT REGIMENT
BAREILLY (U.P)

THROUGH: LT. COL. NAVEEN SHARMA

...RESPONDENTS

CORAM

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

JUDGMENT
01.02.2010

1. The petitioner challenges his dismissal from service by Summary Court Martial held on 8.3.1997 and seeks to be reinstated in service with all consequential benefits.

2. The contention of the petitioner is that he was posted to a difficult area in Jammu & Kashmir, when this incident occurred. On 31st August 1996, he was awarded an illegal punishment of going on patrol by

his Company Commander who sent him from his post at Tanchi to a difficult post called Bhim. Such punishment is supposedly not authorised under any Act or Rules. Not only this, the next day, i.e. on 1st September 1996, the petitioner was again ordered to go to the same post i.e. Bhim. This caused undue harassment to him, which was compounded by the fact that on 1st September 1996, he was literally 'alone' since the only other soldier accompanying him was a Tradesman (Safaiwala), who had no weapon. This also is indicative of the bias and prejudice of his unit against him. Notwithstanding such prejudice, the petitioner commenced his move to the Post and during this journey, while they had halted to take rest, the petitioner's rifle was accidentally pressed resulting in the firing of a single bullet, which caused injury to the index finger of the petitioner. His weapon fired accidently and there was no terrorist within sight. He was evacuated, medically treated and subsequently given sick leave, after which he reported back to the unit. The petitioner was tried by Col. A.K Pandey, CO 9 JAT by Summary Court Martial on 8th March 1997 and arbitrarily punished with 'dismissed from service'.

3. A Court of Inquiry was ordered by the Station Headquarters. The Court of Inquiry violated the mandatory provisions of Army Rules 180 and was illegally constituted. In fact, it never assembled and the petitioner was given no opportunity to cross examine any witnesses in his defence. Also, till one year after his SCM, he did not know as to what had been stated against him and as such could not defend himself. Subsequently, a summary of evidence was illegally ordered by Lt. Col. P.B Gole, who was not the Commanding Officer of 9 JAT (the battalion to which the petitioner belonged). The petitioner contends that no witnesses connected with the incident were examined and that he did not hear any evidence and neither was he given an opportunity to make a statement or lead evidence in his defence. The culmination of this disciplinary proceeding was on 8th March 1997 when the petitioner was illegally tried by a Summary Court Martial by his Commanding Officer, Col. A.K Pandey. This Summary Court Martial violated the basic mandatory provisions of the Army Act/Rules as well as the principles of natural justice and he was illegally and

arbitrarily dismissed from service. On the date of dismissal, his character was exemplary and that this was his first offence. Even subsequent to his dismissal, on 8th March 1997, despite his persistent and continuous efforts, he was not supplied a copy of the Summary Court Martial proceedings or the summary of evidence till 14th March 1998. It was only thereafter that he was in a position to put up his statutory petition to the respondents on 15th December 1998, which was rejected.

4. The version of the petitioner was strongly contended by the prosecution stating that it was a clear case of 'self inflicted injury' which is one of the worst forms of malingering/shirking of duties as a soldier and cannot be tolerated under any circumstances. The injury was very minor in nature and had been very "exactly" incurred on the tip of his index finger, so that while he inflicted/incurred such injury on himself, thereby avoiding his move to a difficult post, it should not result in any serious damage to his life or limb. It was the plea of the respondents that the entire shooting

incident was carefully manipulated by the petitioner to avoid serving in a difficult area along the Indo-Pak border. The prosecution gave background to the entire incident which was that the petitioner had been serving in the Transport Platoon of the Unit and had never been detailed for any physically taxing duty. However, on arrival in this difficult area from a peace station, since the number of vehicles gets reduced, a lot of drivers are sent for infantry duties to Rifles Companies and the petitioner was also one of the individuals who were sent out of the transport platoon. This was not to the petitioner's liking and he repeatedly expressed his annoyance and dissatisfaction and had even stated that he should be sent on pension.

5. Sending an individual for patrolling is the sacred duty of a soldier and cannot, by any stretch of imagination, be construed to be a punishment. The individual was sent on patrolling on 31st August 1996 to Bhim Post, where he misbehaved with the Company Commander. The Company Commander, Maj. C.K Rajesh (PW 8 in Summary of Evidence)

felt that since the post where the petitioner was posted (Tanchi) was commanded by a junior non-commissioned officer, he might have found it a problem to control the petitioner who was arrogant in nature. The Company Commander, therefore, very correctly directed the petitioner to move up to Bhim Post where the Company Commander himself was located and would be in a position to ensure that the petitioner behaved himself. It is with this background that the petitioner was ordered on 1st September 1996 to move up to Bhim Post. The petitioner's move to Bhim Post on 1.9.1996 was fully justified, legal, without prejudice and in keeping with military norms and discipline/operational procedures.

6. The fact that the petitioner shot himself is evident since the only weapon in the entire party moving up to Bhim Post belonged to him. Therefore, no other individual in the party could have shot him and also there was no firing on the party by any terrorists. This fact has also been admitted by the petitioner himself. Sep/Safai Anil Machhindra Barude of

HQ Company who accompanied the petitioner has stated that he heard the petitioner cock his rifle which is indicative of his intention to fire it. The rifle is only cocked (readied for firing) when there is a threat and since there was no threat as they were only resting, there was no need for him to cock his rifle. The fact that the single shot fired from the rifle of the petitioner was deliberate is also borne out by the fact that the petitioner admits he was holding the rifle from the barrel which is normally not done. It was also brought out that the burn marks on his hand were indicative of the fact that the bullet was fired from a close range. Immediately after the incident, the individual has also mentioned to Sub. Maj Nanu Ram (PW 6 in Summary of Evidence) that he shot himself because he felt that once he went to Bhim Post, the senior JCO at the post may send him across the border to Pakistan. The petitioner's contention that he was being sent 'alone' without any other armed soldier is irrelevant and infructuous. The responsibility for ordering such move is that of the Commanding Officer, who is fully empowered and competent to exercise his discretion, which cannot be questioned by the petitioner.

7. With regard to the procedural irregularities, it was admitted that while a Court of Inquiry has been held in February 1997, Army Rule 180 has not been applied. However, the individual has given his statement as a witness in the Court of Inquiry, so he cannot state that he has not participated in or was unaware of such Inquiry. Subsequently, proceedings under Army Rule 22 were conducted by the Commanding Officer on 13.2.1997 and summary of evidence duly recorded in accordance with Rules and Regulations on 28.2.1997. The summary of evidence was ordered by Lt. Col. Gole in his capacity as officiating CO, which is perfectly justified and permitted by law. The petitioner has participated in the hearing of charge and summary of evidence, wherein, on both occasions, he was provided an opportunity to cross examine witnesses, make a statement and to call witnesses in his defence. The Summary Court Martial has also been held as per Rules and Regulations and there is no irregularity in the Summary Court Martial proceedings. The accused pleaded guilty to the charge in the Summary Court Martial and has signed in acknowledgment of such plea of

guilt. Army Rule 115(2) has been complied with by the officer holding the Court of Inquiry. The contention of the petitioner that for one year after the SCM, he did not know what had been stated against him and he could not defend himself is totally false and baseless as he was given three opportunities i.e. at the hearing under Army Rule 22 by the CO, the summary of evidence stage and at the SCM itself. All in all, the only inconsistency is non-application of Army Rule 180 in the Court of Inquiry.

8. The effect of Army Rule 180 in disciplinary proceedings has to be viewed as distinct from non-application of Army Rule 180 when administrative action is contemplated wherein show cause notice could be issued based purely on the Court of Inquiry. However, during disciplinary proceedings, the individual has three distinct stages to put across his defence, hear witnesses, cross examine them and produce witnesses in his defence.

9. These three stages are hearing of the charge under Army Rule 22, recording of summary of evidence and finally at the trial. The petitioner has participated in all these three stages, wherein such opportunity was provided to him. Therefore, mere non-compliance of Army Rule 180 will not affect the disciplinary action fatally. The aforesaid view finds support from the judgment of the apex Court in **Prithi Pal Singh Bedi** v. **Union of India** (AIR 1982 SC 1413), wherein it was held that 'disciplinary proceedings commence from hearing of charge and that the Court of Inquiry is not a 'sine qua non' for disciplinary proceedings. Therefore, non-compliance with Army Rule 180 will not affect subsequent disciplinary proceedings, especially when the affected person, as accused, has fully participated in subsequent disciplinary proceedings. Underlying principle of law is that 'Rules are to promote justice and not to frustrate it'. Reliance may also be placed on the decisions in **Maj. Gen. Inder Jit Kumar** v. **Union of India and others** (AIR 1997 SC 2085) and **Union of India and others** v. **Maj. A. Hussain** (AIR 1998 SC 577), wherein the apex Court ruled that where there is sufficient evidence to sustain conviction, violation of some

pre-trial investigation does not invalidate the Court Martial unless it is shown that the accused has been prejudiced. In this case, the accused has participated in the Court of Inquiry, although admittedly AR 180 was not applied. In the subsequent pre-trial stages, i.e. hearing of charge under AR 22 and summary of evidence, he has participated in the proceedings and was provided full opportunity to defend himself. Subsequently, at the Court Martial, he has pleaded guilty. Also, it is nowhere on record that the accused had at any stage, during or after the Court of Inquiry, agitated against non-application of AR 180! Therefore, it cannot be pleaded that mere non-application of AR 180 has, in any manner, fatally prejudiced his defence or the Court Martial proceedings.

In view of the aforesaid, we do not find any merit in the petition. In the result, it is dismissed.

(LT. GEN. S.S DHILLON)
MEMBER

(JUSTICE S.S KULSHRESHTHA)
MEMBER