IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

T.A NO. 391 OF 2010
(WRIT PETITION (C) NO.301 OF 2008)

EX HAV ASHOK M RAO ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ...RESPONDENTS

ADVOCATES

MR. S.R KALKAL FOR THE APPELLANT
M/S. ANIL SRIVASTAVA & AMIT KUMAR
FOR THE RESPONDENTS

CORAM :

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. Z.U SHAH, MEMBER

J U D G M E N T
25.3.2011

1. The petitioner filed W.P No. 301 of 2008 before the Delhi High Court challenging the order dated 3.7.2006 passed by the Summary General Court Martial, whereby he was held guilty of having committed an offence under Army Act Section 69 and sentenced (a) to

be reduced to the ranks; (b) to be dismissed from service; and (c) to suffer rigorous imprisonment for three years in civil jail. The writ petition was transferred to this Tribunal and under Section 15 of the Armed Forces Tribunal Act 2007 the same is being disposed of by this judgment, treating it as an appeal.

2. The facts of the case in a nutshell are: The appellant was enrolled in the Army on 28.2.1990. On 7.3.2006, a surprise check was conducted in the unit of the appellant and a sum of Rs.95800/- was found from the box of the appellant. The said amount was seized and deposited in the Unit Treasury chest as directed by the Commanding Officer. A charge sheet was issued to the appellant. It reads:

> **ARMY ACT SECTION 69**
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> **COMMITTING A CIVIL OFFENCE THT IS TO SAY CRIMINAL MISCONDUCT CONTRARY TO SECTION 5(2) OF THE PREVENTION OF CORRUPTION ACT 2006 (1949 AD)(J&K).**
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> in that he,
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> at field, on 07 Mar 2006, being a public servant, was in possession of cash amounting to Rs.90,000/- (Rupees ninety thousand only), a sum disproportionate to his known sources of income, which he could not satisfactorily account for.

On pleading not guilty, the appellant was put to trial by the Summary General Court Martial, which, after sifting the evidence, found him guilty and sentenced, as aforesaid. The appellant filed W.P No. 1626 of 2006 before the Jammu & Kashmir High Court. The said writ petition was dismissed for not invoking the provisions of Army Act Section 164(2). Subsequently, on 20.5.2007, the appellant filed a petition under Army Act Section 164(2) to the Chief of Army Staff unsuccessfully. Hence the present appeal.

3. Learned counsel for the appellant was vehement that (a) the appellant was not afforded a chance to cross examine the witnesses, thereby Army Rule 22 was not complied with; (b) the appellant was tried under Army Act Section 69, for which the respondents were to take permission from the civil court under Army Act Section 125; (c) the appellant was denied the right to engage a civil counsel to defend his case; (d) the charge levelled against the appellant is very ambiguous as regards the amount alleged to have been found from his possession; (e) the appellant should have been arraigned under the Prevention of Corruption Act and not under Army Act Section 69 by the SGCM; and (e) the findings arrived at by the SGCM were

merely on conjectures and surmises and there was no evidence worth credence to prove that the amount of Rs.90,000/-, which was recovered from him, was disproportionate to his known source of income.

4. On the other hand, learned counsel for the respondents contended that in the surprise check conducted on 7.3.2006, a sum of Rs.95,800/- was found in the box of the appellant, the source of which he could not explain. The appellant being a public servant had no source of income other than his salary and a total amount of Rs.2,19,000/- was drawn by him between Nov 2003 and Mar 2006 evidenced by Exts. 6 and 7, out of which he remitted Rs.30,000/- and Rs.40,000/- by demand draft during September 2005 and December 2005 respectively. Apart from that, with the available amount of Rs.1,49,000/- from Nov 2003 to Mar 2006, he had to meet the day to day living expenses of his family and it was practically impossible for him to save the amount of Rs.90,000/- in cash by July 2005 in his box without depositing the same in bank. Moreover, the appellant gave a confessional statement regarding the source of money. Therefore, the charge against the appellant was adequately proved based on the evidence on record. Adequate opportunity was given to cross examine

the witnesses, but the appellant chose not to cross examine any of them. No such objection, whatsoever, was raised by the appellant during trial. In his confession statement, it was stated by him that he got this amount by selling diesel. The provisions of Army Act Section 125 were not attracted as the case never traversed beyond the jurisdiction of the Army authorities.

5. Before appreciating the evidence, it may be mentioned that the charge under Army Act Section 69 related to committing a civil offence under the Prevention of Corruption Act 2006 (J & K) (which is pari materia to the Prevention of Corruption Act 1988), i.e. for having possessed cash amounting to Rs.90,000/- disproportionate to his known sources of income. In this situation, the provisions of Section 13 of the Prevention of Corruption Act 1988 (49 of 1988) (hereinafter referred to as the "1988 Act") would be attracted. Section 13 reads:

> "**13. Criminal misconduct by a public servant**.—(1) A public servant is said to commit the offence of criminal misconduct,--
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> (a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification

other than legal remuneration as a motive or reward such as is mentioned in section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do; or

(d) if he,--

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or

pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

Explanation.—For the purposes of this section, "known sources of income" means income received from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine."

Section 13 of the 1988 Act deals with various situations, wherein public servants who are involved in corrupt practices are brought within its purview. Section 13(1)(e) states that "if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known

sources of income." As per the Explanation appended to Section 13, the prosecution is relieved of the burden of investigating into "source of income" of an accused to a large extent, as it is stated in the Explanation that "known sources of income" means, income received from any lawful source, the receipt of which has been intimated in accordance with the provisions of law, rules or orders for the time being applicable to public servant. The expression "known sources of income" has reference to the sources known to the prosecution after thorough investigation of the case. It is not, and cannot be contended that "known sources of income" means sources known to the accused. The ingredients of the offence under Section 13(1)(e) of the 1988 Act are:

(i) the accused is a public servant;

(ii) the nature and extent of the pecuniary resources of property found in his possession;

(iii) his known sources of income i.e. known to the prosecution;

(iv) such resources or properties found in possession of the accused were disproportionate to his known sources of income.

The expression "known sources of income" in Section 13(1)(e) *qua* the public servant would be what is attached to his office or post, commonly known as remuneration or salary. The prosecution seems to have calculated the 'known sources of income' of the appellant only on the basis of the salary he drew when he had worked in the present unit. On the basis of the salary statement from November 2003 to March 2006 when he had been posted in the unit, the prosecution worked out his total income out of salary to be Rs.2,19,000/-, out of which he had spent Rs.70,000/- by drawing demand drafts, with a balance of Rs.1,49,000/-. Based on this, the prosecution came to the conclusion that after deducting his family expenses during this period, it would not be possible for him to save Rs.90,000/-.

6. In support of its case, the prosecution examined PW 1 Maj Sandeep Kumar, PW 2 Sub /Skt Kesa Ram, PW 3 Nk/Skt Prabir Dalal, PW 4 Maj V.P Singh, PW 5 Sub Tulsa Singh, PW 6 Hav/Skt Shreekumar, PW 7 Nb Sub P.C behera, PW 8 Maj Pooja Nautiyal and PW 9 Lt Col B.S Goraya. All these witnesses have unequivocally stated that when Maj Sandeep Kumar (PW 1) had asked the appellant in their presence as to how much money he had in his possession, it was stated by him that he

had approximately Rs.5000/- and when they searched, a total amount of Rs.95,800/- was recovered from his box. Further, these witnesses have also stated that when the appellant was asked to explain about him possessing the amount of Rs.95,800/-, it was confessed by him that the said money was obtained by him prior to 16.7.2005 by selling diesel to BPL drivers. The appellant retracted from this alleged confession when he was examined under Army Rule 58. Pertinently, the appellant admitted the recovery of Rs.90,000/- from his box.

7. Now the question that arises for consideration is, whether the prosecution has established the ingredients of the offence under Section 13(1)(e) of the 1988 Act or not, so far as the appellant is concerned? The burden shifts on to the appellant only when the ingredients of Section 13(1)(e) of the 1988 Act are established by the prosecution. Reliance may be placed on the decision in **M. Krishna Reddy** v. **State Deputy Superintendent of Police, Hyderabad** (1992(4) SCC 45), wherein the apex Court enunciated the principles of law, which read:

> "7. To substantiate a charge under Section 5(1)(e) of the Act, the prosecution must prove the following ingredients, namely, (1) the prosecution must establish that the accused is a public servant, (2) the nature and extent of

> the pecuniary resources or property which were found in his possession, (3) it must be proved as to what were his known sources of income, i.e. known to the prosecution, and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once the above ingredients are satisfactorily established, the offence of criminal misconduct under Section 5(1)(e) is complete, unless the accused is able to account for such resources or property. In other words, only after the prosecution has proved the required ingredients, the burden of satisfactorily accounting for the possession of such resources or property shifts to the accused."

A perusal of the counter affidavit and the evidence adduced by the prosecution would show that the appellant had a total income of Rs.2,19,000/-, out of which after spending Rs.70,000/-, there was a balance of Rs.1,43,000/-. Therefore, the burden of proof is shifted to the prosecution. In **P. Nallammal and another** v. **State represented by Inspector of Police** (1999(6) SCC 559), it was held by the apex Court that for the purpose of proving the offence on the one hand, known sources of income must be ascertained vis-a-vis the possession of property or resources which were disproportionate to the known sources of income of public servant and the inability of the public servant to account for it, on the other. The prosecution could not

ascertain the known sources of income of the appellant and they tried to prove the case based on his salary statement, which showed that after drawing two demand drafts, the appellant had Rs.1,43,000/- to his credit. It is difficult to assume that the appellant had spent this amount on his family. The initial burden was on the prosecution to establish whether the accused had acquired property disproportionate to his known source of income. Learned counsel for the respondents, however, tried to draw our attention to the confession supposedly made by the appellant that he had obtained the money by selling diesel to BPL drivers. It is to be noted that confession must be voluntary. All the attending circumstances, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise must be taken into account. PW 2 Sub/SKT Kesa Ram made it clear that the confession was made by him before Maj Sandeep Kumar (PW 1), when he recovered money from the box of the appellant. Identical is the statement of PW 3 Prabir Dalal, who has stated that on PW 1 Maj Sandeep Kumar asking about the source of money recovered from him, it was stated by him that he got the money by selling FOL to BPL drivers. PW 4 Maj VP Singh has stated

that the appellant told him that the said money had been in his possession prior to the incident dated 16.7.2005 and it was obtained by selling diesel to the BPL drivers. The fact situation and the surrounding circumstances of making confession would cast a doubt on the veracity or voluntariness of the confession. Such a confessional statement cannot be relied upon. Except this extra judicial confession, there is no other substantive evidence. It is the settled legal position that extra judicial confession is evidence of weak nature, as was held in **Kuldeep Singh and another** v. **State of Punjab** (2002(6) SCC 757). The statement evidenced by Ext.2 confined only to the recovery of the amount of Rs.95,800/-, that too in the presence of the prosecution witnesses. Therefore, we are constrained to hold that the prosecution failed to prove that the appellant had amassed income disproportionate to his known sources of income. The charge under Army Act Section 69 read with Section 5(2) of the Prevention of Corruption Act 2006 (1949 AD)(J&K), which is *pari materia* to Section 13(1)(e) of the 1988 is not established against the appellant.

8. Viewed in this light, the appeal is allowed. The conviction and sentence under Army Act Section 69 read with Section 5(2) of the

Prevention of Corruption Act 2006 (1949 AD)(J&K) is set aside. The appellant shall be deemed to have been discharged from service and is entitled to all pensionary benefits from the deemed date of his discharge.

(Z.U SHAH)
MEMBER

(S.S KULSHRESTHA)
MEMBER