

the SCM proceedings as well as reconstitution of the Medical Board to assess the disabilities suffered by the appellant while in service.

2. The appellant was enrolled as a Sepoy in the Garhwal Rifles on 24.9.1983 and at the time of his enrolment, he was medically examined and found to be physically fit. Thereafter, he was posted to 12 Battalion Garhwal Rifles and continued to serve with this unit till his dismissal from service. From 1983 when he was enrolled till he was dismissed on 7.12.1994 he has served in hard area as well as participated in the Indian Army operations in Sri Lanka i.e. Op PAWAN. The appellant argued that he received a bullet injury in his left thigh in July 1998 while deployed for Op PAWAN and for his outstanding courage and bravery, he had been awarded the Vishisht Sewa Medal (VSM). Thereafter, the appellant was posted to the Regimental Centre at Lansdowne, where he was imparting training to recruits.

3. The specific incident that gave rise to his dismissal was that he was discharged from Military Hospital, Roorkee on 28.10.1994 and directed to report to the unit, did not do so since he was not fully recovered. Therefore, the appellant came to his home

town and took private treatment on his own in a nursing home and reported back to his unit on 27.11.1994 i.e. after approximately one month.

4. The first and foremost argument put forth by learned counsel for the appellant was that the appellant has not signed the plea of guilt on the SCM proceedings and that his signatures do not appear either under the plea of guilty or under the mandatory certificate under Army Rule 115(2). It was also argued by the appellant that the provisions of Army Rule 22, which were mandatory, were not complied with in his case and he was not given an opportunity to cross examine any witness. It was also argued that the provisions of Army Rule 23 were not complied with, in that the summary of evidence was not correctly recorded and he was not afforded an opportunity to be present during the recording of summary of evidence. Counsel for the appellant also argued that the appellant was denied the opportunity to defend himself suitably by refusing him a legally qualified person despite the fact that the appellant gave in writing to his Commanding Officer that he desired to be assisted by an Advocate during the trial. Instead, an Army

Officer from the same unit was detailed as his “friend of the accused” contrary to the principles of natural justice and equity. It was further argued that the Commanding Officer, in his capacity as Interpreter under the provisions of Army Rule 109 did not comply with the mandatory requirement of taking an oath/affirmation in his capacity as an Interpreter. And lastly it was submitted that the summary of evidence was not read over to him at the trial after he pleaded guilty.

5. The brief facts of the matter are that, when the appellant was discharged from Military Hospital on 28.10.1994 at 1800h, he was specifically directed by a movement order to report back to his unit. Instead, the appellant went home and did not report to the unit till 27.11.1994 at 1435h, thereby absenting himself for 30 days. The charge sheet that was framed against the appellant is as given below:

ARMY ACT
AA Sec 39(a)

ABSENTING HIMSELF WITHOUT LEAVE

in that he,

when discharged from MH Roorkee on 28 Oct 94 at 1800 h, instead of reporting back to unit, absented himself without leave till he rejoined voluntarily on 27 Nov 94 at 1435h. Thus absenting himself without leave from 29 Oct 94 to 27 Nov 94.

6. Learned counsel for the respondents commenced his argument by stating that the appellant has not come to the Tribunal with clean hands and has based his appeal on lies and fabrication. To substantiate such grounds, counsel for the respondents argued that Army Rule 22 was complied with and the record of the original Army Rule 22 hearings was produced before the court, wherein it was ascertained that the hearing was conducted on 28.11.1994. The respondents also argued that the biggest lie of all was that the appellant was not a battle casualty and neither has he been awarded any medal least of all, a VSM for any act of bravery in Sri Lanka during Op PAWAN or at any other point in his entire service. The fact of the matter is that the appellant accidentally injured himself on the foot and was evacuated for such minor injury. He has not been declared a "battle casualty", but has been declared as a "battle accident". It was also argued that such frivolous injuries normally occur when soldiers attempt to immobilise themselves by

self inflicted injuries so as to avoid the hardship of combat. It was also reiterated that no bravery award or VSM was ever awarded to the appellant. In fact, VSM is awarded for meritorious service and not for acts of gallantry. Therefore, this entire claim of being a battle casualty and being awarded a VSM is a total lie and vehemently denied. The appellant is attempting to take advantage of Court's sympathy by indulging in such lies.

7. The extent of fabrication of the appellant can be made out from the fact that the summary of evidence was duly recorded on 29.11.1994, wherein the officer recording the summary of evidence, Maj AS Bedi, has certified to the compliance of Army Rules 23(1) to (4). Two witnesses were produced in the summary of evidence and below the testimony of both the witnesses, the appellant's signature appear testifying to his presence and to the fact that he was given an opportunity to cross examine the witnesses. The appellant was also asked whether he wished to make a statement, wherein he has made a statement as under:

“On 29 Sep 94 I was admitted in MH Roorkee as a case of injury in Lower Chest region. I was treated in MH Roorkee till 28 Oct 94, on which date I was

discharged from the hospital. However in spite of the treatment in the MH, I had not fully recovered from the injury.

On 28 Oct 94 after discharge from MH Roorkee, I went to my house in village Mathana, District Pauri, Garhwal for further treatment. I stayed in my village till 21 Nov 94 and took treatment from a civil doctor. I left my village on 21 Nov 94 and reached Delhi on 22 Nov 94. I stayed with my family at Delhi till 26 Nov 94. I finally left Delhi on 26 Nov 94 and joined the unit on 27 Nov 94.”

Counsel for the respondents, therefore, stated that the appellant was given an opportunity of being present throughout the proceedings, of cross examining the witnesses, of producing defence witnesses and of making his own statement. Counsel for the respondents went on to state that at no point of time has the appellant ever sought the services of any civil lawyer to represent him at the SCM. In fact, he was at full liberty to do so and could have hired any civil lawyer if he wanted to. No evidence of any kind has been produced to state that he ever asked for a civil lawyer and at this stage to just make an unsubstantiated statement is of no relevance. In actual fact, a commissioned officer, Capt. Sameer, was appointed as “friend of the accused”, who performed his duty in

accordance with the Army Act and the Rules. With reference to the oath by the Commanding Officer in his capacity as Interpreter, the respondents indicated that the original certificate by the Commanding Officer as an affirmation by the Interpreter under Army Rule 109 is as extracted below:

AFFIRMATION BY INTERPRETER

I, IC-30813I Lt Col NS Samant solemnly, sincerely and truly declare and affirm that I will faithfully interpret and translate, as I shall be required to do, touching the matter before this court martial.

Station: Gandhinagar
Dated : 07 Dec 94

Sd/- (NS Samant), Lt Col
Interpreter

It was also argued that there is a specific endorsement in the SCM proceedings on Page "C" that "the summary of evidence is read (translated), explained, marked Exhibit K, signed by the court, attached to the proceedings." This record has not been contested by the appellant and such document has to be taken at its face value. Counsel for the respondents also stated that the plea of the appellant that the sentence given to him was harsh and disproportionate is unsubstantiated because he had three earlier red ink entries to his credit as well as one black ink entry in his short

span of 11 years. Accordingly, the sentence given to him was judicious.

8. Counsel for the respondents argued that while it was correct to say that the appellant has not signed his plea of guilty, which is an essential requirement, the gravamen of the charge or the substance of the accusation against the appellant has been more than established in this case. The fact that he proceeded on leave instead of going to his unit has been specifically accepted by him in the summary of evidence as has been reproduced at Para 7 of this judgment. At the SCM proceedings, he had again accepted “I will not commit such offence again”. In fact there is a specific averment made in the current writ petition at Paragraph 7 also to this effect. Accordingly, when the gravamen of the charge has been established, the respondents argued that the mere technicality of his non signature should not be enough to exonerate him from such offence.

9. Regarding the issue of Release Medical Board, Respondents stated that a long time has expired since the

petitioner's dismissal in 1994. However, no disability pension is entitled to PBOR who are dismissed from service.

10. Keeping the above facts in view, especially the fact that he has admitted to the guilt in the summary of evidence, we do not find any reason to set aside the proceedings on the mere technicality that the plea of guilt has not been signed by the appellant. It is evident from the appellant's own statement that he has accepted the fact that he was absent from the unit for 30 days from 29.10.1994 to 27.11.1994.

10. Therefore, we do not find any reason to interfere with the findings and sentence of the SCM. Respondents are directed to consider holding a Medical Release Board in accordance with the rules, should there be any such request from the appellant. Accordingly, the appeal is dismissed. No order as to costs.

(S.S DHILLON)
MEMBER

(S.S. KULSHRESTHA)
MEMBER