

**FORM NO – 21**  
**(See Rule 102 (1))**

**ARMED FORCES TRIBUNAL, KOLKATA BENCH**

**APPLICATION NO : O.A. 19 OF 2011**

**TUESDAY, THIS SEVENTEENTH DAY OF APRIL, 2012**

**CORAM :** Hon'ble Mr. Justice Sadhan Kumar Gupta, Member (Judicial)  
Hon'ble Lt. Gen. K.P.D. Samanta, Member (Administrative)

IC-40381P, Ex Col Avijit Misra, son of late  
Prakash Chandra Misra, aged about 49 years,  
Presently residing at P O Pandapara Kalibari,  
Dist Jalpaiguri – 735123

-VS -

1. Union of India, through Secretary Ministry  
Of Defence , South Block, New Delhi 110011.
2. Chief of t he Army Staff, Integrated HQ of Ministry  
Of Defence(Army) South Block, New Delhi 110011
3. The General Officer Commanding in Chief ,Eastern  
Command ,Fort William , Kolkata 700021/
4. The General Officer. Commanding, 5 Mountain  
Division , c/o 99 APO
5. Members of the General Court Martial in respect  
Of the Applicant through its Presiding Officer, Brig  
Arun Kumar Sahni, Erstwhile Commander 2 Mountain  
Artillery Brigade , c/o 99 APO

..... Respondents

For the applicant : Mrs. Maitrayee Trivedi Dasgupta, advocate  
Mr Amit Sharma, advocate  
Ms. Poushali Bhandari, advocate

For the respondents : Mr. Mintu Goswami, Advocate

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**ORDER**

**Per Lt. Gen. K.P.D, Samanta, MEMBER (Administrative)**

This application filed under Section 15 of the Armed Forces Tribunal Act, 2007 is essentially an appeal preferred by Ex Col. Avijit Misra against the punishment inflicted upon him in a General Court Martial Proceeding initiated against him for certain misconducts.

2. The applicant/appellant was commissioned into the Indian Army in the year June 1982 in the 16<sup>th</sup> Battalion of Rajput Regiment. After serving in various sectors and in difficult assignments with sincerity and diligence, the applicant was promoted to the Selection Grade rank of Colonel in the year 2002 and was posted to 26 Rajput Regiment. He was at the relevant point of time inducted into the Zimithang Sector, which was part of 5 Mountain Division, in Arunachal Pradesh in March 2003 as Commanding Officer. It is the further case of the applicant that after taking over the unit as its Commanding Officer, he noticed certain deficiencies in various operational and administrative fields, which, according to him, were the result of perpetual neglect on the part of the higher authorities. Such inadequacies were as follows :-

- A) Crumbling of defence structures since less than 5% of the structures were useable. The applicant sent letters on 7.7.02 and 13.7.03 to Brigade Hqrs but without any result.
- B) Poor serviceability of the mechanical transports which was adversely affecting operational efficiency of the unit. The applicant sent letters on 15.4.03 & 28.4.03 to the Brigade HQ.

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- C) Excessive commitment on guard duties on the orders of Brigade Hq., which depleted the manpower reserves of 26 Rajput and prevented the battalion from maintaining mandated operational reserves. For this, the strength from forward posts had to be curtailed to meet such commitments.
- D) Issue relating to supply of inferior quality of ration to troops in gross violation of SRS norms, ASC specifications and contractual percentages despite several representations by the applicant to Brigade HQ.; but no action was taken.
- E) Deduction of troop's ration of all units at source by the Supply Depot on the instruction of Brigade HQ as "Brigade Cutting" including rations of 26 Rajput.
- F) Continued demand on regimental and S&S funds of 26 Rajput by the Brigade HQ.

3. The applicant therefore took up the matter with higher authorities but to no avail. On the other hand, according to applicant, by doing so, he earned the ire and wrath of some very senior officers viz. Brig Commander Brig. P.S.Paul and other officials, who were much responsible for the happenings in the Unit. Therefore, these officials colluded jointly in order to fix the applicant for being a whistle blower and revealing the state of affairs in the unit which was to the detriment of the interest of security of the country, especially because the unit was located in China border where intrusion and/or incursion by enemy could happen any time.

4. In the meantime, one Subedar Major Vijay Pal Singh of the same unit ( 26 Rajput), who, according to the applicant, was a puppet in the hands of these senior officials, made a complaint on 2.11.04 against the applicant alleging rude behaviour and ill treatment towards him. Subsequently, when the applicant went on leave from 10<sup>th</sup> Nov. 2004 till 13<sup>th</sup> Dec. 2004, the said Sub Maj Vijay Pal Singh

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made another complaint on 14<sup>th</sup> Nov. 2004 followed by another one dt. 27<sup>th</sup> Nov 2004 alleging misappropriation of Service and Supply ( S & S) Fund at the behest of the applicant.

5. A preliminary enquiry was carried out on 12.12.04 by Col Sumant Pradhan, Dy. Commander 190 Mountain Brigade. Subsequently, on the latter's complaints, a Staff Court of Inquiry was ordered to be held vide order dt. 14.12.04 by the competent authority. Initially only the 1<sup>st</sup> and 3<sup>rd</sup> complaint letters were ordered to be inquired into but subsequently it was amended on 29.12.04 to include the main complaint letter dt. 14.11.04 for enquiry. The applicant was attached with HQs 5 Mountain Arty. Brigade till finalization of the court of inquiry. Report of the inquiry was submitted in April 2005 and thereafter summary of evidence was taken. Finally, General Court Martial (GCM) was ordered to be held against the applicant and convening order was issued on 24/11/05 to hold GCM proceedings in respect of 10 charges. The applicant was placed under arrest w.e.f. 4.12.05. In April 2006, the GCM report was submitted holding that the applicant was guilty in respect of 8 charges and not guilty in respect of 2 charges. Based on such report, the applicant was punished with cashiering from service and one year RI. The punishment was confirmed by the competent authority on 25.8.06. The applicant filed a post confirmation petition u/s 164(1) of Army Act to the Central Govt.; which was rejected by the Central Govt. on 16.1.08. Thereafter, the present OA has been filed in which the applicant has challenged the charge memo, the court of inquiry, the entire GCM proceeding as also the punishment imposed on him, as illegal, arbitrary and de hors the rules.

6. The applicant tried to impress that the higher authorities were prejudiced against him because he, on joining as Commanding Officer of 26 Rajput, had brought up so many anomalies and deficiencies with regard to operational and administrative aspects of the Battalion. With that as a background, the applicant has all through maintained that the entire process starting from engineering a complaint by the unit's Sub Maj. (Vijay Pal Singh) to the preliminary enquiry being held by the Dy. Commander of 190 Mountain Brigade Col. Sumanta Pradhan – the Staff Court of Inquiry conducted by an officer (Brig. Raghavan), who was till recently the Dy. Commander of his own Brigade, which was 190 Mountain Brigade. the Summary of Evidence and the GCM were all vitiated with list of prejudice and pre-conceived conclusions.

7. The applicant has also contended that Army Rule 180 was not complied with during court of inquiry, although this allegation is refuted by the respondents in their counter affidavit. While discussing further on the court of inquiry proceeding itself, the applicant has submitted that he was given a copy of the completed court of inquiry report on 19.5.05 while the hearing of the tentative charge-sheet was done on 20.5.05, thus defeating the purpose of justice because he could not have gone through such a voluminous court of inquiry proceedings to refresh his memory so as to apply his mind to the contents of the tentative charge-sheet.

8. Major M. Nagarajan, Quarter Master of 26 Rajput at that time was also enquired upon for similar allegations along with the applicant in the aforesaid court of inquiry. However, he was kept away from the ambit of tentative charge

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sheet (annexure A25 of OA). From here onwards, the applicant became the sole accused in the entire proceedings till findings of GCM and Maj. Nagarajan, a vital prosecution witness turning approver. On this point alone, the applicant has drawn our attention to Guidelines to GCM as per Note (4) of Manual of Military Law, Vol. II (page 438) that was violated while treating Maj M. Nagarajan as a prosecution witness in subsequent proceedings of Summary of Evidence and GCM.

9. The applicant has also submitted that the hearing of charge was done on 20<sup>th</sup> May 2005 based on tentative charge sheet comprising initially of 13 charges ( 7 relating to misappropriation of ration and fund and 6 relating to misconduct at the COI) without invoking rule 22(1); but S of E was ordered to commence on 21.5.05 i.e. the next day. Therefore, hearing of charge on tentative charge-sheet was held on 27.5.05 where again Army Rule 22(1) had not been complied with during COI.

10. The applicant, while submitting his grievance regarding the conduct of summary of evidence, has stated that S of E commenced on 31.5.05. The applicant has further submitted that he was not allowed to cross examine but while being examined on 7.7.05 with regard to some of the charges, was coerced and compelled to give statement with regard to the second aspect of the charges (i.e. misconduct during COI) even before the prosecution could complete examination of their witnesses. To this effect, the applicant has drawn our attention to annexure 26 to OA (pages 434-435) in which he has stated that "...insisting that I make a statement at this stage even before all prosecution witnesses have deposed, I would have had an opportunity to cross-examine

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them and the deposition of defence witnesses, would be a travesty of justice and a blatant continuation of the charade that has been going on for last seven months.....” In short, the applicant refuted all the charges relating to insubordinate language that was purported to be used by him to the members and presiding officer of COI.

11. He has contended that principle of natural justice was violated at every stage of the court of inquiry and he was denied effective opportunity to defend himself inasmuch, he was denied copies of vital documents and was also not allowed to cross-examine some principal witnesses. His request for production of vital witnesses was denied. That apart, although another person Maj. M. Nagarajan, Quarter Master of the same unit (26 RAJPUT) was also similarly accused like him in the court of inquiry, but he was not proceeded with along with him; rather he was made a prosecution witness and only applicant was singled out for S of E and GCM and punishment, although the applicant was not at all responsible for the alleged misappropriation being the Commanding Officer of the unit. It is the said Major, who was the quarter master of the Unit, and was solely responsible for accounting, maintenance and drawl of stock and ration. Therefore, if there was any misappropriation of Govt. fund at all, the said quarter master should be held responsible. On the above setting of facts, the applicant has prayed for setting aside the punishment order and for his reinstatement with all consequential benefits.

12. Besides the plea of denial of natural justice, the applicant also tried to substantiate in his appeal petition that the authorities were biased and mind set

to fix him. He also pointed out many lapses in the conduct of the GCM proceedings. These are –

a) Denial of opportunity to call defence witness. The applicant had asked for 9 important defence witnesses initially including the Unit Quarter Master, Ration NCO, Accounts Clerk and Adjutant. However, only three witnesses were provided to him and thus important witnesses as above were denied to him, who were vital since they were the ones who were actually handing funds and ration, rather than the applicant, who was only the supervisory officer being the Commanding Officer of the unit. He further stated that right to call the three vital witness (Quarter Master, Adjutant and SofS Accounts Clerk) was denied in violation of rule 33(2). The witnesses, who were asked for, are submitted at Exhibit (Ex) 103. He further stated that Army rule 34(1) was violated when he was denied to call the witnesses i.e. Sub Pandey, whose statement in Ex 34 were against him. He was not allowed to call him at the first place by the court.

b) He was not allowed to cross-examine PW-1. This witness submitted 35 exhibits and described each one of them including all the contents thereof in the court. He, according to the applicant, was a vital witness and was not a simple courier to act under cover of Sec. 139 Indian Evidence Act, as contended by the prosecution. Therefore, being a witness on oath, he should have been subjected to his cross-examination. But that was denied to him. According to the applicant, it was in gross violation of Army Rule 135. the

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prosecution could not escape such violation under the cover of Sec. 139 of Indian Evidence Act, which in this case should not be applicable.

c) The GCM showed undue hurry. The details of the proceedings would give clear indication that the entire process had to be quickly completed with as if the conclusion had already been drawn up. To this extent, the applicant has stated that closing address of the defence was completed on 25.4.06 but the JAG's summing up was done on 27.4.06 with only one day to prepare which does not normally happen in such cases. Further, immediately after the JAG summed up, on the same day within minutes, the Court submitted its findings i.e. on 27.4.06 itself. It was all pre-decided without any application of mind.

d) The applicant has submitted that he was given a copy of the summary of evidence two days after the GCM started. To further substantiate he mentioned that the GCM started on 27.4.05 but the summary of evidence was given to him on 29.4.05.

e) The applicant submits that he never gave "plea of bar" as required under Army rule 53 for charges 6 to 10; yet surprisingly it was sent for confirmation by the authorities as if the applicant had given such statement. Record would speak for itself.

f) The applicant has brought to our notice that various documents that were used in the GCM were inconsistent, either had been doctored or details inserted. To prove his point, he brought to our notice that exhibits 59 and 60 of the GCM differed from exhibit 'CJ' of summary of evidence, although both are supposed to be same. Details of doctoring and insertion of additional pages is

quite evident. The applicant also brought another issue to our notice that no short hand writer or interpreter was provided to him.

g) It was brought to our notice that there were irregularities in exhibit 38 of GCM which is the feeding strength register. This was brought before the Court by PW-1 although the PW-1 was neither the custodian nor the author of that document. Thereafter, the court depended on PW-2 to prove the veracity of the entries. There were proof of over-writing and cutting in this vital exhibit which goes on to indicate that excess strength of troops was fed by the battalion. Here again PW-2 was asked to reconcile the errors because these documents differed from Exhibit 84. Accordingly, PW-2 rectified the mistakes in exhibit 84 in the court. All these aspects give rise to the apprehension of the applicant there was some kind of collusion between the prosecution and the court.

13. During oral submission, while amplifying on the issue pointed out by the applicant in the appeal, the Id. Advocate for the applicant Ms. M.Trivedi Dasgupta drew our attention to the fact that the Commanding Officer was not responsible for holding of cash or documents. As per procedure that is followed in the units, the custodian of the cash is the Sub Major with supervision by the 2<sup>nd</sup> in Command. Similarly, the accounts and other documents relating to feeding strength, ration demand and receipts thereof etc. are maintained by the Accounts Clerk, Rationing NCO and the Quarter Master of the unit, who in this case was Maj Nagarajan. The Id. Counsel further emphasized that here again the applicant, as the commanding Officer of the unit, did have a supervisory responsibility only and nothing else. He could not have committed all those acts

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of commission or omission, as alleged in the charge sheet, by himself. In fact, according to the Id. Counsel, such acts were perhaps being committed by the lower down the authorities. Therefore, none of the charges with regard to misappropriation of fund or ration (charges 1 to 5) are at all relevant, as far as the applicant is concerned. Nowhere in the prosecution evidence it is borne out with regard to disposal of so called misappropriated fund and ration. She insisted that such acts were never done by the applicant, or even if contrived to be done, then the prosecution would have had enough evidence but there was none whatsoever in respect of the applicant. Therefore, in the eye of law, the applicant was nowhere connected with the offence under various Army Acts, as alleged in the charge Nos. 1 to 5. The contents of charge Nos. 6 to 10 have been totally denied by the applicant.

14. The application has been contested by the respondents by filing a reply affidavit. The respondents have denied all the material allegations made by the applicant in the appeal. It is, however, admitted that the applicant was the Commanding Officer of 26 Rajput w.e.f. 24.8.02. The unit was deployed in Zimithang Sector in Border Management Posture under 190 Mountain Brigade with Battalion Hq located at Lumpo in Arunachal Pradesh. The unit was deployed in high altitude terrain in field which was hard and difficult area along Indo China border. It is also stated that the unit was not subjected to audit as is prevalent in peace stations.

15. A complaint was sent by Sub Maj Vijay Pal Singh of 26 Rajput on 14.11.2004 addressed to the Commander 190 Mountain Brigade with copy to

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GOC 5 Mountain Division, 4 Corps and GOC-in-C alleging misappropriation of Supplies and Services Funds by the applicant. He also sent two more complaints dt. 2.11.04 addressed to Chief of Army Staff alleging ill treatment to him by the applicant as also misappropriation of SS Funds. Preliminary investigations were made by Col. Sumant Pradhan, Dy. Commandant, 190 Mnt. Brig. on 12.12.04, which revealed that there was prima facie evidence for ordering Staff Court of Inquiry. The Staff Court of Inquiry revealed certain anomalies in accounting procedure of 26 Rajput i.e. indenting extra govt. ration for troops by showing inflated troop strength and misusing and/or misappropriating the ration so drawn. The unit was also maintaining a 'slush fund' which was created by misappropriating public funds i.e. SS Fund, Military Intelligence Fund, Papad, Pickle and Copra allowance and Condiment allowance. The Court of Inquiry further revealed that the applicant was responsible for the above violation and lapses and accordingly disciplinary proceeding was initiated against the applicant and another officer viz. Major M. Nagarajan by the GOC 5 Mountain Division. Summary of evidence was recorded on 21.5.05 and completed on 24.9.05. Thereafter charge sheet was issued on 2.11.05.

16. The charges are as follows :-

First Charge Army Act, Sec. 52(f)	Such an offence as is mentioned in clause (f) of Sec. 52 of the Army Act with intent to defraud,
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In that he

At field, between 01 April 2003 and 31 October 2004, being the commanding Officer of 26 Rajput, with intent to defraud, caused drawl of approx 36349 (Thirty six thousand three hundred forty nine only) units of excess Government ration, from Field

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supply Depot Bomdir, by falsely showing inflated troops' strength, thereby causing a loss to the Government to the tune of approx Rs. 10,22,394 (Rupees Ten lakh twenty two thousand three hundred ninety four only.)

Second Charge  
Army Act Sec. 52(f)

Such an offence as is mentioned in clause (f) of Sec. 52 of the Army Act with intent to defraud,

In that he,  
at the place and during the period aforementioned, being the Commanding Officer of 26 Rajput, with intent to defraud, caused drawl of excess "Papad, Pickle, Copra and condiment" Allowance to the tune of approx. Rs. 60,657/- (Rupees Sixty thousand six hundred fifty seven only) purportedly for the troops, from the Govt. exchequer, by falsely showing inflated troops' strength thereby causing a loss to the Government of the said amount.

Third charge  
Army Act 52(b)

Dishonestly misappropriating property belonging to Government,

In that he,  
At field, between 01 April 2003 and 31 October 2004, being the Commanding Officer of 26 Rajput, dishonestly misappropriated Rs. 8,51,548/( Rupees eight lakh fifty one thousand five hundred forty eight only), the property of the Government drawn from the "Supplies and Services Fund" on account of payment to the porters employed by the battalion.

Fourth charge  
Army Act Sec. 53(b)

Exacting without authority money from a person

In that he,  
At field during January 2004 being the Commanding Officer of 26 Rajput, exacted, without authority Rs. 4168/- (rupees four thousand one hundred sixty eight only) from No. 2992153 Nk Jagadish Singh of 26 Rajput.

Fifth Charge  
Army Act Sec. 53(b)

Exacting without authority money from a person,

In that he,

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At field during June 2004 being the Commanding Officer of 26 Rajput, exacted, without authority Rs. 2722/- (Rupees two thousand seven hundred twenty two only) from No. 2998308 Sep Ravindra Singh of 26 Rajput.

Sixth Charge  
Army Act Sec. 40©

Using insubordinate language to his superior officer

In that he,

At field, on or about 03 January 2005, while attending the proceedings of a court of Inquiry presided over by Brigadier vikram Raghavan, Commander 40 Mountain Brigade, said to the Court in an intemperate tone "This is a mockery. You all are acting like a bunch of civilians. I don't want to be a part of this Court. I am leaving"; or words to that effect.

Seventh Charge  
Army Act Sec. 40©

Using insubordinate language to his superior officer

In that he,

At field, on or about 16 January 2005, while attending the proceedings of a court of Inquiry presided over by Brigadier vikram Raghavan, Commander 40 Mountain Brigade, said to the Court in a raised voice, "You have absolutely no idea how a court of law should function. You are behaving like civilians"; or words to that effect.

Eighth Charge  
Army Act Sec. 40©

Using insubordinate language to his superior officer

In that he,

At field, on or about 17 March 2005, while attending the proceedings of a court of Inquiry presided over by Brigadier Vikram Raghavan, Commander 40 Mountain Brigade, said to the Court in an intemperate tone "You people are turning this court into a fish market"; or words to that effect.

Ninth Charge  
Army Act Sec. 40©

Using insubordinate language to his superior officer

In that he,

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At field, on or about 19 March 2005, while attending the proceedings of a court of Inquiry presided over by Brigadier Vikram Raghavan, Commander 40 Mountain Brigade, when the court announced adjournment of its proceedings, said to the Court in an intemperate tone “ I refuse to leave the court. I will take legal action against you all to teach you a lesson; or words to that effect.

Tenth Charge  
Army Act Sec. 40©

Using insubordinate language to his superior officer

In that he,

At field, on or about 25 March 2005, while attending the proceedings of a court of Inquiry presided over by Brigadier Vikram Raghavan, Commander 40 Mountain Brigade, a member of the said court, waving his fist menacingly and said to him in a raised voice “Mr Smart Alec, I am going to sort you out, you just wait”; or words to that effect.

17. After conclusion of the GCM proceeding, the finding was recorded on 27<sup>th</sup> April 2006 to the effect that the accused was not guilty in respect of fourth and fifth charges but guilty of third, sixth, seventh, eighth, ninth and tenth charges.

18. There was also some special finding in respect of first charge to the following effect :-

“.... Is guilty of first charge with the variation that figures and words 36349 (Thirty six thousand three hundred and forty nine) and Rs. 10,22394.00 (rupees ten lakh twenty two thousand three hundred and ninety four) shall read as 36066 (thirty six thousand and sixty six) and Rs. 10,14,201.88 (Rupees ten lakh fourteen thousand two hundred one and paise eight eighty.)

Similarly, in respect of 2<sup>nd</sup> charge also, there was some special finding to the effect that –

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“is guilty of second charge with the variation that figures and words Rs,.60667.00 (Rupees sixty thousand six hundred and sixty seven) shall read as 60154.00 (Rupees sixty thousand one hundred and fifty four only)

19. Based on the above finding of the GCM proceeding, the applicant was awarded punishment on 27<sup>th</sup> April, 2006 to the effect :-

- i) Cashiered from service
- ii) Rigorous Imprisonment for one year

20. The punishment was promulgated on 29<sup>th</sup> August 2006 and the applicant was sent to Central Jail, Tezpur. The applicant filed post confirmation petition on 28<sup>th</sup> August 2006 which was rejected by the Central Govt. on 16<sup>th</sup> January 2008.

21. The respondents have contended that the GCM was conducted in accordance with the rules and procedures. Every opportunity was given to the applicant to defend himself in the said GCM and there was no violation of the principle of natural justice and as such, this Tribunal should not interfere with the finding and the punishment meted out to the applicant. Therefore, the appeal should be dismissed being devoid of any merit.

22. The applicant has filed a rejoinder in which the contentions raised in the OA have been reiterated.

23. We have heard the ld. advocates for both the sides at length. After conclusion of the hearing, both the sides have submitted written notes of arguments. That apart both sides have cited a number of judicial decisions in support of their respective pleas. We have considered the same. Ld. advocate for the respondents has also produced the original voluminous records of the GCM proceedings. We have also gone through the same.

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24. While making oral submissions, the Id. advocate for the applicant has, at the outset, after narrating the background facts, submitted that the applicant was an upright and honest officer having earned commendation for his gallantry service in the Army. When he was posted as Commanding Officer of 26 RAJPUT under 190 Mountain Brigade deployed at a very remote and hard area situated at high altitude bordering China, he wanted to be sure of the defence preparedness. Having noticed some deficiencies in defence structures, he wanted remedial measures to be taken and for that purpose, he wrote to various authorities for resources to enable proper upgradation. Similarly, on administrative side, he insisted for providing adequate manpower and better quality of ration for his troops. Possibly, by doing so, he had earned the wrath of some very senior officers. As a result, as submitted by the Id. Counsel for the applicant, such people hatched a deep rooted conspiracy against the applicant to oust him from that position by way of punishing him for having obstructed their personal interest and gain. Accordingly, a complaint letter was sent through Sub Maj Vijay Pal Singh. This JCO, according to the applicant, had a history of making false allegations and instigating fellow soldiers, for which he was earlier given counseling. But it appears the interested officials picked him up as a tool to teach a lesson to the applicant and caused the complaint to be made against the applicant making wild and false allegations regarding misappropriation of Govt. fund by overdrawing ration showing inflated number of troops etc.

25. Sub Maj Singh was made PW 19 whereas the hostile officers like Brig. P.S. Paul and Col. Sumant Pradhan, as DW 3 and 2 respectively at the GCM. It

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is contended that the complaint dt. 14.11.04 written by Sub Maj Singh was orchestrated by the above two persons. Ld. adv. has pointed out by referring to the evidence of PW 19 that the manner of submission of the complaint was doubtful as different versions have been given as to how the complaint was sent. It is further pointed out that in the guise of making complaint, the said Sub Maj actually wanted an interview with Brig. Paul, which made it quite clear that conspiracy was being hatched against the applicant because the said Sub Maj was earlier already granted interview with the said Brig. In the GCM proceeding, the applicant wanted Brig I C Adm. 4 Corps as a defence witness to unearth the truth about the complaint dt. 14.11.04, but his request was not granted by the GCM and thus denying him reasonable opportunity to defend.

26. It was also submitted by Ms. Trivedi Dasgupta, the Id. Counsel for the applicant, that although preliminary investigation was conducted on 13.12.04 but the report had already been initiated a day earlier on 12.12.04, which clearly show biased and closed mind. The preliminary inquiry was conducted by Col. Sumant Pradhan, who was the deputy of Brig. PS Paul behind the back of the applicant since he was on leave. This fact can be established by looking to the evidence of PW 5 i.e. Lt. Col. IMS Parmar. The applicant pointed out this defect in the preliminary inquiry to the GCM but to no avail.

27. It is further contended that the applicant was illegally attached with HQ 311 Mtn. Brigade and was also confined arbitrarily and illegally. He was denied all these documents relating to attachment and arrest during GCM even though asked for.

28. The court of inquiry was conducted by Brig. V. Raghavan and according to the applicant, he had vested interest in suppressing the malpractice going on in 190 Mtn. Brigade as he was earlier posted in that brigade as the Deputy Commander.

29. The Id. advocate for the applicant has repeatedly argued that there was total violation of principle of natural justice in the GCM proceedings inasmuch as vital documents were denied to the applicant inspite of repeated requests. Similarly, the applicant was denied opportunity of vital witnesses to be examined. He wanted 9 witnesses to be produced whereas he was granted only 4. The applicant wanted Brig. PS Paul, as witness which was denied. He also wanted one Quarter Master Om Prakash as a witness but the same was denied.

30. Ld. advocate has also alleged that various documents and proceedings of court of inquiry were doctored, tampered and forged to the prejudice of the applicant. Some vital documents were also removed from the court of inquiry records with mala fide intention to harass the applicant and some fabricated documents were inserted to frame the applicant. She has also contended that certain invented utterances were inserted in the records of the court of inquiry proceedings in order to implicate the applicant for alleged offence of insubordination.

31. Assailing the charge sheet and various charges leveled against the applicant, Id. advocate has first contended that Maj Nagarajan M, Quarter Master of 26 Rajput was a co-accused at the court of inquiry but it appears that the said Nagarajan was later made a prosecution witness during S of E and GCM, after

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turning him as an approver, which is not permissible in terms of, Note 4, MML Vol. II wherein it is clearly laid down in such cases, step must be taken to ensure that the case against him is disposed of summarily or tried by court martial, before the trial of persons concerned against whom he is to give evidence and that he is only tendered as a witness when he has already been acquitted or convicted. The authorities without first trying said Nagarajan converted him as PW in flagrant violation of the rule. It clearly shows that the only purpose of the proceeding was to punish the applicant by any means. It is contended that there was blatant violation of Army Rule 22(1) inasmuch as the applicant was not allowed cross examine some vital witnesses. Similarly, there was violation of rule 23 of Army Rules and the applicant was coerced to give his statement in a state of utter confusion and helplessness. It is alleged that cross examination of ten vital witnesses including that of Sub Maj Vijay Pal Singh was foreclosed and the applicant was denied proper opportunity to cross examine those witnesses. There was also non-recording of some part of depositions of some witnesses to the detriment of the applicant.

32. It is alleged that the applicant was denied opportunity to cross examine PW I who produced several documents being the custodian of record. The applicant wanted to verify the authenticity of those documents by cross examining which was denied to him. Ld. adv. cited the exhibit Nos. 59 to 61 to this effect.

33. It is next argued that the GCM held against the applicant was nothing but an extension of prosecution and in that regard, the ld. adv. has drawn our

attention of the deposition of Maj. B.S Dhami, PW2. Even though there was several discrepancies in the documents produced showing monthly feeding strength, opportunity was given to correct them which was improper. Similar acquisition has been made against the Judge Advocate, who advised illegally in favour of the prosecution and not as an independent functionary as he should be. It is also alleged that there was inaccurate recording of the proceedings at various stages. It is alleged that the testimony of Maj Vinay Sharma, officiating quarter master was not taken though it was vital as he was conversant with the indenting of excess ration.

34. The Id. adv. for the applicant has challenged the assessment of evidence by the Court. It is stated that in respect of first charge, 13 witnesses were examined and barring PW 19 (complainant), made false statement because all these witnesses earlier stated before the court of inquiry that there was no irregularities pertaining to rations and funds. But before the GCM they reversed their stand and the Court took into consideration such false statements of these witnesses.

35. It is further argued that the court presumed that the applicant was the officiating commanding officer during the charged period though the fact is that there were four other officers, who had also officiated as commanding officer during the relevant time. They are Lt. Col. Manu Gurng (PW 14), Lt. Col. IMS Parmar (PW5), Maj Rohit Jaggi and Lt. Col. Sharawat. If there was excess drawls of ration or misappropriation of money, these persons cannot also be let off. So far as special finding in respect of this charge is concerned, the court did not take

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into consideration the anomalies in the strength calculation as per Ex. 123 and 92. Conflicting and contradictory figures were cited by PW 2, PW 8 and PW 15 in their testimony with regard to extra ration indented which clearly proves that the prosecution case was concocted and manufactured and was not at all true. Still the Court relied on those contradictory figures. Similarly, in respect of other two charges regarding porter payment and ration money etc. the Id. adv. has pointed out several anomalies in the depositions of the witnesses and has vehemently contended that all these allegations are false and fabricated and the court relied on evidence of witnesses who were not reliable by giving contradictory statements.

36. So far as charges 6 to 10 i.e. insubordination are concerned, the Id. adv. has contended that the eye witnesses i.e. persons who recorded the proceedings during court of inquiry failed to remember any of the so called utterance made by the applicant. She also relied on Note 10 of Sec. 40 of the Army Act to contend that expressions offensive to a superior that are used in the course of judicial inquiry by a party to that inquiry are privileged and cannot be made the subject matter of criminal charge.

37. The sum and substance of the arguments of the Id. advocate for the applicant is that the applicant has been falsely implicated and was denied all reasonable opportunity to defend himself in the GCM and on the basis of false and unreliable evidence of witnesses and also relying on doctored documents, the prosecution has held the applicant guilty and punished. Since the GCM was vitiated by denying the principle of natural justice, the finding arrived at is also

perverse and therefore, the entire proceeding including the punishment awarded should be set aside and the applicant should be honourably acquitted.

38. Per contra, the Id. advocate for the respondents has denied all the allegations made by the applicant. It is contended by Mr. Mintu Goswami, the Id. advocate for the respondents that the applicant has not challenged the final confirmation order dt. 16.1.2008, which merged with the order dt. 27.4.06, the prayer of the applicant made in this appeal was thus defective. He has stated that on receipt of a complaint from Sub Maj Vijay Pal Singh, a preliminary enquiry was conducted and thereafter court of inquiry was also held in which the applicant was found to be prima facie guilty of certain misconduct and therefore charge sheet was issued and the applicant was tried in a GCM. The GCM was held strictly in accordance with rules after giving all opportunities to the applicant. In the GCM the applicant raised objection against the JAG and one Member as per Sec. 130 of Army Act, The objection relating to the Member was disallowed after due consideration. However, subsequently Judge Advocate was changed for free and fair trial. It was stated that all necessary documents were supplied to the applicant and only exhibits of summary of evidence which were voluminous in nature were given for examination. All the objections raised by the applicant were considered and replied to. In the GCM proceeding 23 PWs and 5 DWs were examined and cross examined strictly as per rule 58 of Army Rules. After conclusion of the proceeding, the applicant was found guilty of all the charges except two charges and thereafter punishment was awarded by the competent authority which was also confirmed by Central Govt. as per rules.

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39. Ld. advocate for the respondents submitted that the findings of the GCM in respect of each charge recorded at pages 1007 to 1021 of the GCM proceeding are based on evidence and documents exhibited before the court. The reasons for holding such findings have also been given. He has denied the conspiracy theory as advanced by the applicant. He has also contended that the objection of the applicant to transfer the place of trial of GCM to another place under sec. 124 of the Army Act had been given due consideration and appropriate order passed. Regarding violation of rules 22,23 and 180, as alleged by the applicant, the ld. advocate has denied such allegations. So far as violation of rules 33 and 34 of Army Rules are concerned, it is contended by the ld. adv. that all relevant documents relied upon by the prosecution were supplied to the applicant. So far as denial of cross examination to PW I i.e. Lt. Col. R.J.S. Sohi is concerned, it is submitted by the ld. adv. that he was the official custodian of the documents connected with this case and he was called to produce those documents and therefore, the applicant could not be allowed to cross examine the PW-1. In terms of Sec. 139 of Evidence Act, the said PW-I only produced the documents and said nothing on the merit of the case, therefore, his cross examination, as claimed by the applicant, was rightly disallowed. It is submitted by the ld. adv. that the applicant was solely responsible for the misconduct and misdemeanor and therefore he was proceeded against and no one else was held responsible and therefore question of action being taken against others did not arise. At this point, Mr. Goswami also submitted that Maj. M. Nagarajan (PW 15) was latter (after the GCM sentence was promulgated to the applicant, the

accused) dealt with summarily and administrative action was taken. It was lastly submitted that when the applicant participated in the proceeding and he was given all opportunities, he should not now question that principle of natural justice was denied and he was denied opportunities to defend. Ld. adv. has requested the appeal should be disallowed by this Tribunal.

40. We have given our anxious consideration to the rival contentions and have carefully gone through the evidence on record as also various decisions cited at the Bar. It is pertinent to mention here that the applicant had earlier filed MA 11 of 2011 praying for condonation of delay in filing the original application, which was opposed by the respondents. However, on consideration of the facts and circumstances of the matter, this Tribunal by order dt. 5.4.11 allowed the application in favour of the applicant and the delay in filing the original application was condoned and the same was heard on merit.

41. There is no dispute on the issue that the applicant was the commanding officer of 26 Rajput, during the period from 1st April 2003 to 31<sup>st</sup> October 2004, the period relevant to the charge, when the unit was deployed in Lumpo sub-sector, though there were other officers subordinate to him (PW-5, PW-14 and two others), who officiated as Commanding Officer for different durations during the charged period. It is also the admitted position that a complaint was sent by Sub Maj Vijay Pal Sing of 26 Rajput of which the applicant was the Commanding Officer, to his higher authorities. On receipt of such charge a preliminary enquiry was conducted and thereafter a court of inquiry was held. The contention of the applicant is that since he wrote several letters for upgradation of defence

structures in his units and pointed out various deficiencies and curtailment of troop strength, he was being targeted by very senior officers as he struck into the vested interests created by those officers for their own personal benefits and the complaint by Sub Maj Vijay Pal was as a result of a deep rooted conspiracy being hatched against him. However, the court of inquiry, after conclusion of inquiry, held that certain amount of money was misappropriated, that a slush fund was created by extra indenting of ration for inflated number of troops and also excess indent was made towards PPC & C i.e. Papad, Pickle, Copra and Condiment allowance and for all these the applicant was responsible. Accordingly action was recommended to be initiated against him.

42. At the same time, the court of inquiry also held Maj Nagarajan M, the quarter master of the unit responsible for all the above misconduct. The observation of the court of inquiry in respect of Maj Nagarajan, as available from annexure to reply affidavit of the respondents, may be extracted below :-

43. (SC-00071F) Major Nagarajan M. 26 Rajput : Conniving with Col. Avijit Misra in:-

- (a) Indenting extra government ration of troops by showing inflated troops strength and misusing/misappropriating the rations drawn thereby.
- (b) Operating an illegal/illegitimate fund (Slush Fund) in the unit called the Duplicate Treasury Chest (RTC).

- (c) Misappropriating Rupees 5,64,848.00 of Supplies and Services (S&S) fund meant for payments to the porters employed by 26 Rajput between February 04 to October 04.
- (d) Illegally drawing Papad, Pickle, Copra allowance and condiment allowance amounting to Rs. 30,387.00 between the period February 04 and October 04 on account of extra/inflated troops strength and thereby misappropriating the said public fund.

I direct that disciplinary proceedings against SC-00071F Major Nagarajan M be initiated after conclusion of disciplinary proceedings in respect of Col Avijit Misra , unless otherwise directed by this Headquarters to be initiated earlier, if the circumstances so warrant.”

44. Thus, it is apparent that Maj Nagarajan was also held responsible for connivance with the applicant for the same set of offence. However, it is very peculiar that the court of inquiry recommended that disciplinary proceeding against Maj Nagarajan be initiated only after conclusion of the disciplinary proceeding against the applicant. If both are held responsible and allegation of connivance is established, then they both should have been proceeded against concurrently in a common proceeding. In fact, the applicant has alleged that initially both were made co-accused. But subsequently, said Nagarajan was made prosecution witness against the applicant, thus letting him off. However, Id. adv. for the respondents submitted that Nagarajan was also proceeded against and punished, but after the proceedings against the applicant were over and GCM sentence promulgated.

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45. This aspect has been seriously objected to by the Id. adv. for the applicant. She contended this is in violation of Note 4 of MML, Vol. II (page 439) which has been quoted at page 30 of the written notes. The same is as follows :-

“4. If in any case two more persons are suspected of complicity in an offence and it is found necessary to call one of these for the prosecution against the other or others charged in connection with the offence, one of the two courses must be taken – either –

- (a) Proceedings against him must be abandoned and any charge therein already preferred against him dismissed; or
- (b) Steps must be taken to ensure that the case against him is disposed of summarily or tried by court martial, before the trial of persons concerned against whom he is to give evidence, and that he is, only tendered as a witness when he has already been acquitted or convicted”

The above provisions mentioned as guidance to officers conducting GCM and S of E, draw their strength in letter and spirit from Sec. 306 of Cr PC and Sec. 157 of Indian Evidence Act. Violations of these provisions amount to deliberate denial of natural justice to the accused.

46. Ld. adv. for the applicant submits that Natarjan was also a co-accused but he was made a vital witness to depose against the applicant without first acquitting him or punishing him of the same charge. This has vitally prejudiced the applicant.

47. We agree with this contention of the Id. adv. When Maj. Nagarajan was also indicted in the court of inquiry for the same offence, it is quite natural that both should be tried together in common proceedings. In fact, that was sought to be done initially despite the recommendation of the court of inquiry as quoted above, but subsequently the said Nagarajan was made a prosecution witness.

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His subsequent prosecution and punishment cannot cure the defect. In our opinion, by following such procedure, the entire proceeding against the applicant was vitiated. This is particularly so, because the applicant being Commanding Officer of the unit was not directly responsible for procurement of ration or keeping books of accounts or stock books. It was the quarter master of the unit i.e. Major Nagarajan was responsible for this. Therefore, without trying him for the offence, the respondents thought it fit to make him a witness and showed leniency towards him. It is unfortunate and blatantly unjust to merely deal with him summarily with administrative action only after the GCM was completed for the applicant. Doubts arise whether it was a reward to Nagarajan for deposing as a PW against his CO, the accused. Be that as it may, we are of the clear opinion that the proceeding was surely vitiated by such course of action, as followed by the GCM.

48. Now we come to the various charges levelled against the applicant in the impugned charge sheet. Of the 10 charges for which the applicant was brought before the GCM, he was found not guilty in respect of charge Nos. 4 and 5 whereas found guilty in respect of 1<sup>st</sup> and 2<sup>nd</sup> charges (with modification of amount and figures), 3<sup>rd</sup> charge and also 6<sup>th</sup> to 10<sup>th</sup> charges. These charges can be classified in three groups, viz. :

**Gr-A : Charge Nos.1 and 2** :- These charges are under Army Act Sec. 52(f) relating to causing drawl of excess ration and claiming excess money from the Govt. than what was authorised with intent to defraud.

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**Gr.-B : Charge No. 3 :-** This is under Sec. 52(b) of Army Act implying dishonest misappropriation of property belonging to the Govt. In this charge, the applicant has been accused of dishonestly misappropriating Rs. 8,51,548/- during the period from 01.4.03 to 31.10.04.

**Gr.-C : Charges 6 to 10 :** They are under Army Act Sec. 40©. In these, the applicant has been charged for using insubordinate language to his superior officers on different dates while attending the court of inquiry that had assembled to examine the allegations made against the applicant. In fact, he is alleged to have used insubordinate language to the Presiding Officer and Members of the court of Inquiry.

49. We shall discuss in the following paragraphs the manner in which each of these charges was heard by the GCM for which the accused/applicant was ultimately punished.

A) **Charge Nos. 1 & 2 :** There is no doubt that the applicant in this case was the Commanding Officer of 26 RAJPUT for the period from 01.4.03 to 31.10.04 during which he has been alleged to have caused drawal of excess ration and claimed excess Papad, Pickle and Condiment (PPC) allowance than what was authorized. Yet we cannot ignore that there were other subordinate officers, who were officiating as commanding officer for different durations during the charged period. Therefore, all wrong doings, if at all, during these entire period, cannot be singularly attributed to the applicant. Notwithstanding that, we have gone through the evidence adduced by the relevant PWs, especially, that of PW 15, Maj. M. Nagarajan, who was the quarter master of the unit. The duties

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and responsibilities of each individual in a unit, in this case 26 RAJPUT, are well defined through a standard operating procedure. It is quite evident from the evidence on record that PW 15 admitted that he had inflated the strength of personnel in order to draw excess ration and similarly claimed excess PPC allowances. He, however, in his deposition had submitted that all these were done by him on verbal instruction from the Commanding Officer, who in this case, is the accused/applicant. PWs 2, 4 and 14 also in their verbal depositions had mentioned that they were ordered by the Commanding Officer to resort to such inflation of figures so as to enable excess drawl of ration and aforesaid allowance. The accused i.e. the applicant has flatly denied having given any such orders/instruction. In fact, he has relied on the documents which are audited regularly by an internal quarterly audit board and subsequently sent to the higher authorities i.e. 190 Mountain Brigade HQ. Therefore, he had submitted before the GCM that he had neither any intention to cause such defraud nor was he ever instrumental to any such practice of defrauding by manipulating documents. Under such circumstances, we find that except for the oral evidence by the PW 15 and others, who themselves were responsible for maintaining the related documents and draw/claim ration/allowance, there was no other document/evidence to support that the Commanding Officer (the accused) himself had ever any intention to cause such over-drawls. Therefore, in our considered opinion, the charges could not be said to be substantially proved by the prosecution in view of lack of documentary evidence. It is the cardinal principle of law that an accused is presumed to be innocent until contrary is

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proved, onus of proving everything essential to establish the charge against the accused lies on the prosecution. We also feel that in case of doubt, it is judicious to acquit than to condemn for its better to let off several guilty persons than one innocent person to suffer. In the instant case, the charges have not been established beyond doubt. The trial court (GCM) seems to have heavily relied on oral deposition of PW-15, amongst others, who himself was a co-accused at court of inquiry stage. He could not be considered as a reliable witness.

B) **3<sup>rd</sup> Charge** : Through this charge under Army Act, Sec. 52(b), the prosecution has attempted to prove that the accused had dishonestly misappropriated an amount of Rs. 8,51,548/-, being the Govt. money, drawn from S & S fund between the period from 1.4.03 and 31.10.04. The prosecution in order to prove this charge has relied on the statements made by PWs 2, 4, 14 and 15 and documents submitted by them. All these PWs, especially PW 15 i.e. Maj. Nagarajan, who was the quarter Master of the Unit, stated that funds were drawn for the purpose of paying to the porters on different occasions totalling the ibid amount. However, as per the statements made by these witnesses, no money was ever paid to the porters. On verbal instruction of the commanding officer (the accused) such money was to be deposited with the Sub Maj Vijay Pal Singh (PW 19) (complainant) while the porters should be paid in kind i.e. by giving them rations. Such money was accumulated as per statements made by PW 15 and would be later utilized for different purposes in the battalion. PW 6 and PW 17 further submitted that rations were indeed given to the porters from the unit ration store and they did not see any porters being paid money. The

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prosecution has relied on the statements of PW 6 and PW 7, which were corroborated by PW 15 to establish that S&S Fund was drawn but was not actually paid but kept with Sub Maj Vijay Pal Singh (PW 19) or the officer officiating on his behalf during the charged period. We, however, notice that there is no evidence to even indicate that the accused had amassed such fund for his personal gain. In fact, as stated by many of the PWs including those mentioned above, this fund that was allegedly drawn in surplus, was spent for battalion. Notwithstanding the oral statements that have been made as above, the accused has flatly denied that any such fund was ever accumulated. He has submitted that the proper accounts were maintained being public fund and they were audited every quarter by a quarterly audit board and counter signed by the Brigade Commander. Therefore, to allege that the porters were not paid is surprising to him and he categorically denied such allegation. He stated that details of payment were part of the accounts, which were forwarded to the higher authorities regularly. Considering the circumstances and the evidence on record, that have been relied upon by the GCM, we find that there is no documentary evidence to prove any such misappropriation. Moreover, regular internal quarterly audit board by the brigade HQ and periodical inspection by the Brigade Commander have never pointed towards such irregular practice except the complaint that was received from PW 19, who himself was the custodian of such alleged fund. Under such circumstances, it is difficult to establish that the accused has indeed misappropriated such amount for his personal gain or for that matter for any other reason. Therefore, we are of the view that this charge

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also has not been sufficiently proved to term the accused as guilty or to sentence him for that purpose.

C) **Charge Nos. 6 to 10** : All the above charges relate to utterances of insubordinate language against superior officers punishable under Army Act Sec. 40©. Such misconduct was committed while the court of inquiry was in progress and allegedly uttered against the presiding officer and members of the said court of inquiry. The prosecution has relied on the testimonies of PW5, PW 11, PW 21, PW 17 and DW 2 to prove that the accused indeed made such utterances, as have been quoted in the contents of the charge sheet to his superior officer viz. Brig. Vikram Raghvan i. e. DW 2. In fact, a letter written by the presiding officer (DW 2) to the convening authority has been produced as exhibit 76, which indicates that such insubordinate language (contents differ) was used by the accused. The GCM, besides relying on the testimonies of the above witnesses, had also relied on the evidence of PW 15, who was originally named as a co-accused and who was present all through during the proceeding of court of inquiry since Army Rule 180 was applied to both of them. We have examined the evidence adduced by PW 15. We find that he did not verbatim agree with every utterances that were alleged to have been made by the accused but has clearly stated that the accused was agitated during the examination and used to say to the court members "you are behaving like civilians". The defence on their part has relied on the provision of Note 10 to Army Act Sec. 40 to which we will come a little later. Moreover, the accused has submitted that he was given a reprove by the commander of 5 Artillery Brigade (the commanding officer of the accused

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while he was attached) for his alleged misbehaviour during the court of inquiry proceeding (vide exhibit 76). Therefore, if at all, argued by the Id. counsel for the applicant/accused, he was to be punished for using the alleged insubordinate language against the superior officer, then in that case, he could not have been punished twice. He considered such reprove by commander 5 Artillery Brigade to be an adequate punishment. In any case, the accused denied the contents of the above charges. The GCM in its finding has found that the reprove issued by the Brig. D.N.Yadav, Commander, 5 Mountain Artillery Brigade on 30.3.05 and 19.4.05 was merely advisory in nature and should not be considered as reprove.

50. We have examined the finding of the GCM with regard to these charges and we find that the utterances as quoted in the charge sheet were not substantially proved since no recording – manual or electronic - was produced to support these charges by the prosecution. Mere statements of the PWs as made during GCM proceeding, appear to us to be not sufficient, since they were all acting together to pin the accused for such utterance which he denied. There were inconsistency with regard to contents of the alleged utterances, as deposed by the witnesses. Notwithstanding above, we also observe that the stress and strain under which the accused was being examined by the court of inquiry, could have given rise to some heated arguments or raised voice, that may have been unpalatable to the court. The presiding officer of the court took notice of such alleged misbehaviour and reported the matter to the convening officer. Accordingly, he was indeed given reprove by Brig. Yadav, Commanding Officer, 5 Mountain Artillery Brigade. The matter should have been resolved at that point

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in a matured administrative manner. It did not require to use the might of a GCM to find ways to punish the accused on such issue. To our mind, the prosecution should not have used the forum of GCM for settling such trivial issue where there was no criminal intent at any stage.

51. Apart from our above observation and finding, we also take note of the argument made by the Id. adv. for the applicant in her written notes at page 202 where it is categorically stated that the GCM without considering legal position has come to patently erroneous finding. She has placed reliance on **Note 10 of Sec. 40 of the Army Act, 1950**, which states as follows :-

**“ Expressions, however, offensive to a superior, that are used (a) in the course of judicial inquiry, (b) by a party to that inquiry and (c) upon a matter pertinent to and bona fide for the purposes of that inquiry, as, for instance, the credibility of a witness, are privileged, and cannot be made the subject of a criminal charge.”**

52. It is obvious that even if the accused used certain unpalatable language to his superior during court of inquiry proceeding, in that event also, he could not be proceeded on criminal charge as the accused is protected by law being privileged. Therefore, on either count, we are of the opinion that these charges could not be proved beyond doubt. We are of the considered opinion that the prosecution had no ground to proceed with such charges.

53. In view of what has been discussed above, the conclusions that can be reached may be summed up, as under :-

- a) On many occasions, principle of natural justice was indeed violated and reasonable opportunity to defend was denied to the accused/applicant during the GCM proceeding, which

has seriously prejudiced the applicant and thereby vitiated the entire proceeding.

- b) The charges for which the applicant has been found guilty and punished, to our mind, were never proved beyond doubt.
- c) Besides minor violation of statutory provisions in conduct of the GCM proceeding, the major violations are :-
  - i) Denial of opportunity to cross examine by the accused to PW1.
  - ii) The respondents admitted that the exhibits of summary of evidence were not given to the accused since they were voluminous. Instead they were given to him in the court for examination only. This clearly violates the principle of natural justice. Non supply of vital documents on the plea of those being voluminous, cannot be accepted, as this violates the very principle of natural justice.
  - iii) Not enabling the accused the opportunity to examine the defence witnesses, as called for, especially the quarter master, adjutant and the accounts clerk of the battalion. To our mind, they were vital witnesses for the defence to disprove the charges.

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- iv) It was grossly improper for the trial court (GCM) and the officer recording the S of E to allow PW-15 (Maj M. Nagarajan) to depose for the prosecution, being a co-accused at the C of I stage. It was not only gross violation of the principle of natural justice but worse, when we find that he was later (after the GCM) let off with administrative action summarily. It appears that the entire system must have colluded to coerce him to depose favourably for the prosecution for him to be rewarded later.
- v) The undue hurry that was shown by the GCM on many occasions, especially the fact that the summing up by the JAG was made on 27.4.06 and immediately thereafter the finding by the court was pronounced on the same day. It is also noticed that the closing address by the defence was made on 25.4.06 and immediately thereafter even within one day, the JAG gave his summing up address. It appears that the JAG could not have considered all aspects of the closing address, as made by the defence, in preparation of his summing up. Similarly, the Court also could have deliberated a little more and pronounce its finding in stead of giving it immediately

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after the JAG summing up. All these, if viewed in its totality would go to indicate that the court was in a hurry and in that process also missed most vital points on fact and law while drawing up its conclusion.

54. Lastly, we come to the post confirmation order dt. 16.1.08, a copy of which, has been produced before us during the course of hearing and we have taken it on record for complete adjudication of the matter. It appears that the applicant filed a petition under Sec. 164(2) of the Army Act before the Central Govt. on 28.8.06 against the finding and sentence imposed on him by the GCM. The Central Govt. in the Ministry of Defence vide its order No. C/06280/EC/318/AG/DV2/5185/D(AG) dt. 16.1.08 rejected the said petition. We find that in the aforesaid rejection order, the Central Govt. was satisfied with the finding of the GCM as also the adequacy of the punishment imposed. However, we find that the Ministry of Defence has mechanically considered the petition and did not substantiate enough reasons in the order as to why the findings of the GCM should be considered as appropriate and the sentence was justified. To our mind, there was total non-application of mind on the part of the Central Govt. while dealing with the petition U/s 164(2). Therefore, we are of the opinion that the above order cannot stand the scrutiny of law and accordingly, the same is liable to be quashed.

55. Before concluding, we would like to mention that Id. advocates for both parties have cited a number of decisions in support of various contentions raised

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by them. We have gone through all of them and we find that some are relevant and some are not at all relevant to the facts and circumstances of the case in hand. Be that as it may, since we have come to a definite conclusion on the basis of materials on record, we need not dwell on those case laws in detail.

56. In view of the foregoing discussions, we hold that the charges levelled against the applicant/accused were not proved beyond doubt and that during the GCM proceedings the accused was denied reasonable opportunity to defend himself and there was gross violation of the principles of natural justice, which has vitiated the entire GCM proceeding and the findings thereof. Consequently, the punishment inflicted on the accused/applicant also cannot stand and is liable to be quashed and set aside.

57. In the result, the appeal is allowed on contest but without cost. The applicant/accused be honourably acquitted of the charges levelled against him. The GCM Proceedings including its findings are hereby set aside. The punishment inflicted on the applicant/accused be also set aside. The applicant be reinstated in service in the post and rank from where he was cashiered by the impugned punishment order. The applicant be deemed to be continuing in service as if no GCM proceeding was initiated against him. He will be entitled to get all consequential service and monetary benefits. This order be implemented within 90 days from the date of communication of this order.

58. Let the original records, as produced by the respondents, be returned to them on proper receipt.

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59. Before parting with this case, we would like to record our appreciation for the valuable assistance provided by the Id. advocates for both the parties in deciding the matter.

60. Let plain copy of the order be handed over to both the parties.

  
(LT. GEN K.P.D.SAMANTA)  
MEMBER(ADMINISTRATIVE)

  
(JUSTICE S.K.GUPTA)  
MEMBER (JUDICIAL)