ARMED FORCES TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

T.A. 594 OF 2009

WRIT PETITION (CIVIL) NO. 5349 OF 1997

IN THE MATTER OF:

NB SUB DAYANAND .....Applicant

Through : Mr.Ashmit Bhardwaj, counsel for the applicant

Versus

The Union of India and others .....Respondents

Through : Mr. Anil Gautam, counsel for the respondents

CORAM:

HON'BLE MR JUSTICE S. S. KULSHRESTHA, MEMBER,

HON'BLE LT GEN Z. U. SHAH, MEMBER

JUDGMENT

Date: 10.5.2011

1. The petition (W.P (C) No. 5349 of 1997) under Article 226 of the Constitution of India was brought before the Delhi High Court. The same was transferred to this Tribunal on 11 Sep 2009 and was treated as an appeal under Section 15 of the Armed Forces Tribunal Act 2007. The appellant has prayed for setting aside of the Order of conviction, sentence of one year RI and dismissal from service by Summary General Court Martial (SGCM) held between 4 - 17 Oct 1995. The appellant has also prayed for grant of pensionary benefits.

2. The appellant was tried by SGCM on 4 Oct 1995 convened by the order of Maj General Mohan Anand Gurbaxani GOC 28 Inf Div and charged under Army Act Section 63 for "An omission prejudicial to good order and military discipline

in that he,

At field, on 28 October 1994, while on active service, during 'OP SAHAS', being the Junior Commissioned Officer-in-Charge of 'Reserve Party', failed to maintain contact with own troops engaged in action against the militants at Point 1979 (Square-0643), in which the following personnel belonging to the same unit were killed :-

(a) IC-50921W Capt Sanjay Chauhan

(b) IC-52600X 2/Lt Anil Yadav
(c) No 288224 3H Rfn Dalbir Singh
(d) No 2882896K Rfn Krishan Kumar
(e) No 2885234M Rfn Sri Girish Singh

3. The background of the case is that the appellant was detailed to participate in an operation against militants planned by Captain Sanjay Chauhan. There were two parties the Ghatak Party was led by Captain Sanjay Chauhan and comprised of 14 other ranks and was to carry out operations in village Lachhampur. The Reserve party was led by the appellant and was to be located nearby so as to render assistance to the Ghatak Party. The appellant states that he was instructed to keep his radio set on "listening watch" and await further instructions from Captain Chauhan. He was further instructed not to fire on any other person unless he was fully identified to be a militant. The appellant positioned his party at the appointed place on Dogar Pur ridge at 0500h on 28 Oct 1994 but states that no order was received by him till 1430 hrs on 28 Oct 1994 when Captain Chauhan contacted him and told that the Ghatak party would be reaching his location shortly and there was nothing to report.

4. The appellant further states that at 1515h on 28 Oct 1994 he heard bursts of gun fire for 20 to 25 minutes and therefore went alongwith his party towards village Lachhampur and deployed at a place overlooking the village till 1645 hrs. The appellant states that he

did not see anything untoward and returned back to his original position at Dogar Pur ridge at 1800h. Subsequently, the appellant tried to contact the Ghatak party but was unsuccessful. He claims that he kept giving half hourly reports to his Company Cdr at Base Camp.

5. Subsequently in the encounter between the Ghatak party and some militants, 5 members of the Ghatak party were killed and the remaining party got scattered and reached Base Camp.

6. The appellant states that he was served with two charge sheets. The first one on 2 Oct 1995 which charged him under Army Act Section 63 for "an act prejudicial to good order in military discipline". The 2nd charge sheet was served to him on 4 Oct 1995, the day the court sat, and charged him under Army Act Section 63 "for an omission prejudicial to good order in military discipline".

7. The appellant claims that this prejudiced the preparation of defence.

8. The appellant has also brought out several other points in his favour :-

(a) During the SGCM out of 9 prosecution witnesses not a single person had pointed out any act of commission/omission on the part of the appellant.

(b) The operation was conducted by the Ghatak party in civil dress. The appellant claims that this is not permissible under Military Law under Para 652 of Regulations of the Army (Annx P2 page 19)

(c) His guilt was not proved beyond reasonable doubt

(d) Two punishments were awarded for the same offence and the punishment was harsh and disproportionate to the offence. Maximum punishment under Army Act section 63 prescribed is 7 years RI. The sentence of his dismissal is therefore harsher than the maximum punishment prescribed. The SGCM also did not punish him with stoppage of his pension and it amounted to double jeopardy.

(e) His SGCM was conducted to circumvent the legal process and there was no reason why he was not tried by General Court Martial (GCM)

(f) The JAG officer detailed during his trial failed to conduct himself in an impartial manner and acted hand in glove with the prosecution.

9. The respondents in the counter affidavit have stated that subsequent to the operation in Lachham Pur village, wherein two officers and three other ranks were killed, a summary of evidence was held on 29 Dec 1994. Subsequent to this the convening authority GOC 28 Inf Div ordered trial of the appellant by SGCM under the authority of Army Act section 112 B. The same was assembled on 29th Sep 1995 and the appellant was tried under Army Act section 63 for "An omission prejudicial to good order and military discipline".

10. The appellant was detailed as party commander for an operation against militants located at village Lachham Pur. The party was to be located 500 meters behind the Ghatak party and come to their aid in case of any contingency. The Ghatak party led by captain Sanjay Chauhan came under militant fire at 1315h on 29 oct 1994. In the subsequent operation two officers and three other ranks of the Ghatak party were killed by hostile fire. The appellant did not maintain contact with the Ghatak party and did not come to their aid. The appellant, as Reserve Party Cdr was expected to assist Captain Sanjay Chauhan's Ghatak party when they came under fire. No special orders were required to carry out this action and the appellant showed cowardice by not going forward to the scene of the fire. The appellant should have moved forward instead of moving to the intervening position where he and his party remained on night on 28-29

Oct. Subsequently, when the Ghatak party broke up and withdrew to the Base Camp they could not find the Party at their appointed location. Some members of the Ghatak party contacted them(Reserve Party) between 1700 to 1900h in area HuganiKut which was far away from the designated location.

11. The respondents state that in active operations it is the duty of the Cdr to utilise all means at his disposal. The Ghatak party operated in civil dress because of operational necessity so as not to compromise surprise. Para 652 of Regulations of the Army, about dress code, is not applicable during counter insurgency areas as operations in civil dress are an operational necessity.

12. The SGCM was convened by the Competent Authority, that is GOC 28 Inf Div under Army Act Section 112 (b) as he was the Officer commanding the forces in field on active service. The appellant was tried by SGCM between 4 -17 Oct 95 and comprised of 6 officers who were not part of the appellant's unit and the senior most officer amongst the members detailed became the Presiding Officer. The appellant was also provided with a legally qualified defence counsel, Col S S Gajraj.

13. The appellant was initially served with a charge sheet on 2 Oct 1995 and charged under Army Act Section 63 for "an Act

prejudicial to good order in military discipline." This was typographical error and the same was corrected on 4 Oct 1995 before the commencement of the SGCM and the charge under Army Act section 63 was amended to read "An omission prejudicial to good order in military discipline." The respondents maintained that the factual part of the charge sheet remained the same and thus no prejudice was caused to the appellant.

14. The respondents maintained that punishment was not a case of double jeopardy. The appellant was awarded only one punishment, i.e. imprisonment of for one year and to be dismissed from service. The sentence of dismissal is less than the sentence of 7 years imprisonment which is the maximum punishment which can be awarded under Army Act Section 63 depriving the appellant of pensionery benefits as a result of his dismissal as pension regulations authorised automatic forfeiture of pension in case of dismissal.

15. We have heard the arguments and perused the SGCM proceedings. The GOC 28 Inf Div was competent authority to order SGCM of the appellant under Army Act Section 112 B as he was the officer commanding the forces in the field on active service.

16. No prejudice was caused to the appellant by amending the original charge sheet served on the appellant on 2 Oct 1995 wherein

the word “act” was substituted by the word “omission” as there was no change in the factual part of the charge sheet. The appellant was the Party Cdr and was to remain on listening watch. He was to be located at Dogar Pur Ridge and was to move in aid of the Ghatak party as & when required. The appellant heard the sound of firing and moved forward towards village Lachhampur. He, however, made no attempt to establish physical contact with the Ghatak Party which needed his help whilst engaging the militants. Subsequently, when the Reserve Party withdrew from the vicinity of Lachhampur village, they did not go back to Dogar Pur ridge but to an adjoining height. This was clearly brought out by L/Hav Dharam Pal Singh (PW4). The appellant was a Nb Sub with 27 years service and should have realised that his responsibility as Reserve Party Cdr was to come to the aid of the Ghatak Party if required. In this duty the appellant failed and negligently proceeded away from the place where the Ghatak party was engaged in operations against the militants.

17. It is an admitted fact that the appellant being Officer in Charge of the Reserve Party, while on active service during “Op Sahas”, was supposed to maintain contact with the Ghatak party. He was responsible for the efficient performance of the Ghatak party and to assess and co-operate with the performance of the task entrusted to him. The reserve force kept for the specific performance cannot afford

to be lethargic and wait for orders to move. The appellant being a senior and experienced officer should have reacted visualising the situation. His failure to react is a strong reason to prove omission on his part. A Junior Commissioned Officer was expected to be prudent and move immediately to aid the Ghatak party. The rule as to the right of defence has been stated by **Russel on Crime** (11th Edn. Vol. I, page 491) thus:

> " ..... a man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases he is not obliged to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended, and if in a conflict between them he happens to kill his attacker, such killing is justifiable."

Instead of waiting for instructions, it was expected of the reserve force, of which the appellant was in charge, to have reacted on the situation.

18. It may be mentioned that in the absence of direct ocular evidence, conviction can also be based on circumstantial evidence. In this case, undoubtedly, there is no direct evidence of the crime as to how and in what circumstances the appellant refrained from rendering assistance when the Ghatak party was engaging the militants. The

prosecution case hinges on circumstantial evidence and such circumstantial evidence can form the basis of conviction, as was held by the apex Court in **Hanumant Govind Nargundkar** v. **State of M.P** (AIR 1952 SC 343). The principle enunciated by the Apex Court in the above case reads thus:

> "10. ..... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

The above proposition of law was reiterated in **Naseem Ahmed** v. **Delhi Administration** (1974(3) SCC 668).

19. In this case, as would appear from the evidence, the appellant was told by Capt Sanjay Chauhan to close up his party and that he would join him at his location in an hour's time. When Capt Sanjay Chauhan did not turn up and the appellant heard firing the second time, he was under obligation to verify from where the firing

sound and the pro-militant slogans were coming. There is ample evidence on record to show that the appellant failed to act to the situation, which itself is a strong circumstance to prove omission on his part. Further, it is a fact that there was an encounter between Ghatak party and the militants and this information was not passed on to Haphruda location till 1800 hours. This would also attribute to his act of omission.

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

Z. U. SHAH
(MEMBER)

S. S. KULSHRESTHA
(MEMBER)