COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

1.
OA 214/2012

Lt. Gen. P.K.Rath (Retd) .....Petitioner

Versus

Union of India & Ors. .....Respondents

For petitioner : Mr. S.S.Pandey, Advocate
For respondents : Mr. Ajai Bhalla, Advocate
CORAM:
HON'BLE MR. JUSTICE SUNIL HALI, MEMBER
HON'BLE AIR MARSHAL J.N.BURMA, MEMBER

JUDGMENT
05.09.2014

Notes of the Registry	Orders of the Tribunal
05.09.2014	Vide separate judgment the petition is allowed with costs of Rs.1,00,000/-. Learned counsel for the respondents orally prayed for granting leave to appeal. There is no question of law of public importance involved in this matter. This is not a fit case to grant leave to appeal before the Hon'ble Supreme Court as it does not involve any question of public importance. As such the prayer is declined.

(SUNIL HALI)
MEMBER (J)

(J.N. BURMA)
MEMBER (A)

New Delhi
05.09.2014
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1. The petitioner through its petition has prayed for the following:

(a) Quash the orders dated 21.01.2011 to the extent of finding of guilty (by GCM) in respect of charges (No.2, 4 and 5) as well as the sentence passed by the GCM including the order dated 09.11.2011 of confirmation and the order dated 17.11.2011 of promulgation.

(b) Granting of exemplary compensation to the petitioner for the loss of reputation and harassment suffered by the petitioner as a consequence of such illegal and malafide action on the part of the respondent No.2.

2. The petitioner's case is as follows:

(a) The petitioner was commissioned in the Regiment of Artillery in the Indian Army on 14.11.1971. During 1971 to 2008, the petitioner on the basis of his hard work, sincerity, dedication and professionalism got promoted to the rank of Lt. Gen. He has an envious record of service having held coveted command and staff appointments and has undergone prestigious professional courses. He was awarded Ati Vishisht Seva Medal by the President of India for distinguished service.

(b) On promotion to the rank of Lieutenant General, the petitioner was posted as Corps Commander on 01.09.2008 at HQ 33 Corps Sukhna. The petitioner was briefed by his staff on various matters including the fact that a barren piece of land measuring 71 acres which was located near HQ 33 Corps was proposed to be developed for the purpose of Tea Tourism Project as per the agreement entered between private parties and Govt. of West Bengal. His predecessor had registered his objection to the said project asking Govt. of West Bengal for stopping such projects on the ground that the same had some security implications for the Army. The petitioner based on such briefing continued to follow the line as decided by his predecessor.

(c) The petitioner was also apprised of the difficulties experienced in stopping of Tea Tourism Project and the request made to Govt. of West Bengal to handover the possession of such land to the Army which in any case was beyond the purview of the Army authorities as it had financial implications and it required the approval of the Defence Minister. The

petitioner was also apprised that the married accommodation available in the station were lying unoccupied in large numbers even though it was a family station, because of lack of good schools near the Corps HQ as well as lack of employment opportunities for the family members of the officers posted there. The petitioner also came to know of the fact that the land in Sukhna military station was surplus and therefore acquisition of any land in Sukhna was a very difficult proposition. As learnt much later, the then Chief of Staff (COS) Maj Gen Ramesh Halgali had met the private parties before and after joining of the petitioner. He had discussed the matter with them relating to the objections of the Army and to find alternative solutions. During this period, the petitioner had interacted with the officers who were posted in the area earlier including the then Military Secretary Lt Gen Avdesh Prakash who had come on a visit to the Corps on 18.10.2008 and made a mention that a good quality school in the vicinity of the Corps will be beneficial for the troops.

(d) On 29.12.2008, the petitioner received a proposal from one Geetanjali Education Trust which was put up to him in normal dak containing an outline proposal to open a good quality school for girls on the land in question in Chumta Tea Estate with a commitment that if any such school was established on the said land, the Army personnel will be given various facilities and the school authorities would abide by all restrictions which may be imposed on them for security reasons. Considering the practical difficulties involved in getting the lease cancelled altogether as well as for its

transfer to the Army for which the case had not even been initiated for obtaining of 'in principle' approval from the competent authority and the likely benefits that would accrue to the troops, the petitioner did not see any harm in directing his staff to examine such proposal from all possible angles to enable him to take a decision in the matter. The owner of the land Mr. Sharad Bajoria along with Mr. Dilip Agarwal, who had earlier made the proposal, met the petitioner in his office on 31.01.2009 in the presence of Brigadier Administration (Brig Adm). Their offer to open an educational institution which would give reservation, fee concession for the children of army personnel and job opportunities to the ex-servicemen and the families was found to be *prima facie* beneficial for the army personnel and ex-servicemen and the petitioner did not perceive any harm in having such a proposal examined by his staff to ascertain its viability. Hence, without giving any specific assurance, the petitioner apprised them that the proposal would be considered subject to addressing the security concerns of the Army. The issue was discussed in a conference attended by the concerned staff officers including the Chief of Staff and a unanimous advice was given to the petitioner by the staff that the establishment of a good quality educational institution would result in not only imparting quality education to the children and wards of army personnel but will also give employment opportunity for the families and dependents of army personnel. It was also felt that opening of such a school will help in occupation of large scale married accommodation lying vacant at Sukhna.

(e) The office of the petitioner received a communication dated 22.01.2009 from the Govt. of West Bengal on 03.02.2009 intimating that a meeting had been called by the then Additional Chief Secretary, Govt. of West Bengal on 06.02.2009 on the proposal for cancellation of the lease for tea tourism project, in which a request was made to HQ 33 Corps to send a representative. The petitioner discussed the matter with his Brig Adm following which a decision was taken to send a representative of HQ 33 Corps to attend the meeting. As regards the alternative proposal for a school, the petitioner directed the then Brig Adm to analyse all aspects after taking the views of all concerned in case any such proposal came up for discussion. Thereafter, the matter was processed on file by the staff in which all concerned had expressed their views. It was learnt later during the course of the Inquiry that the Station Commander had initially recommended further deliberation but he was told to reconsider his views by the then Brig Adm instead of putting up the same to the petitioner. Brig Adm had got the note changed on 05.02.2009 without the knowledge of the petitioner who was away on a visit to HQ 27 Mtn Div by falsely taking the name of the petitioner.

(f) As rep of 33 Corps, AQMG of HQ 33 Corps attended the meeting on 06.02.2009, wherein the Govt of West Bengal was apprised that the Army had strong objections for any tea tourism project on the said land. When the views of the Army was sought about a proposal of a school, it was conveyed that such a proposal for an educational institution could be considered by the

Army provided the security concerns of the Army were met and the private parties gave a commitment to that effect. Once the security concerns of the Army was addressed, the Army may give No Objection for the same. Thus, only a view was expressed at that time, which has been misinterpreted by the respondents as a no objection certificate to warrant charges against the petitioner. Minutes of the above meeting prepared by the representative was put up to the petitioner on 17.02.2009 in which it was categorically stated that the lease for Tea Tourism Project would be cancelled, which was the main concern of the Army. It was also mentioned, that the security concerns of the Army will be addressed by entering into an MOU and thereafter the MOU and NOC will be forwarded to the Govt. of West Bengal for incorporation in the lease agreement between the Govt. of West Bengal and the private parties.

(g) A communication dated 10.02.2009 was received at HQ 33 Corps on 12.02.2009 requesting for submission of an MOU “in order to process the case for cancellation of the previous lease and for finalizing a new lease for change of use of land. The matter was put up to the petitioner on 17.02.2009 who endorsed his views and directed that any such MOU should be prepared in consultation with DJAG who was his legal advisor.

(h) On 13.02.2009, Respondent No.2 visited HQ 33 Corps. The petitioner made a mention of the proposal received from the private parties while seeing him off at the helipad. At that time, respondent No.2 showed no reaction to the proposal. However, the matter was given undue prominence

by Respondent No.2 later, since he had a serious grudge against the then Military Secretary Lt Gen Awadesh Prakash who he held responsible for obtaining a commitment from him on the issue of his date of birth which stood in the way of his extension of tenure as the Chief of the Army Staff. The petitioner throughout was under a *bona fide* belief that his staff must have been keeping all concerned including HQ Eastern Command informed about all developments since he had passed general directions in September, 2009 itself that all developments related to land cases be informed to the HQ Eastern Command on staff channel. At all stages of the trial, the evidence clearly showed that the petitioner has not passed any instructions to any of his staff not to inform the steps undertaken in respect of New Chumta Tea Estate Land to Eastern Command.

(j) Between 17.03.2009 to 30.03.2009, the petitioner proceeded on temporary duty to Eastern Command and thereafter to Army HQ. Before leaving, the draft MOU vetted by the then DJAG was put to the petitioner. Much later, it came to the notice of the petitioner that DJAG had initially opined that before the conclusion of the MOU, concurrence of Command HQ/Army HQ may be sought if deemed appropriate. However, once again the then Brig Adm prevailed upon him to make a fresh note excluding such remark on the ground that the same will delay the project. This action itself showed that the staff officers including the then Brig Adm just to show their efficiency to impress the petitioner, adopted shortcuts. At no point of time, the petitioner was advised by any of his staff officers to inform the GOC in C

about such cases nor did they submit the reports through staff channel which was within the framework of their duties.

(k) While the petitioner was at Delhi, HQ Eastern Command decided to order a high level COI into the matter as to how the staff officers led by the COS got the MOU signed with four private parties on 20.03.2009 in order to process the case and take a final decision whether such formal no objections should be given in the matter as requested by the private parties. The petitioner did not receive any details regarding such signing of the MOU as the same was brought to his notice much later after it was signed and copies of the MOU handed over to the private parties without any reference to the petitioner. In the next 10 days, no attempt was made to inform Eastern Command nor any specific direction sought from the petitioner especially when the Brig Adm had specifically undertaken to inform Eastern Command before signing of MOU while requesting DJAG to change his note. A minute sheet dated 21.03.2009 was put up to the petitioner during the intervening night of 31.03.2009 and 01.04/2009 seeking his approval to the proposal of sending the MOU to Govt of West Bengal which the petitioner signed in good faith as he was convinced about the merit of the proposal based on the inputs received by him till then, especially in the absence of any reservation brought to his notice by any of his staff officers and therefore no attempt was made to seek any approval of the petitioner because all concerned were fully aware that such a concurrence and examination of the issue will be required while issuing No Objection Certificate (NOC) for establishment of the school,

which was the last step in the transaction. Immediately thereafter, the COS who was to proceed to HQ Southern Command on posting informed the petitioner that the staff at 33 Corps had not intimated the developments related to New Chumta Tea Estate to HQ Eastern Command with a request that the petitioner may speak to the GOC in C,Eastern Command. The petitioner expressed his anger and surprise since his staff had not done their duty. But at the same time he was surprised since he felt that the matter was not significant enough requiring personal discussion of the petitioner with the Army Commander. The land in question was not defence land and being the highest formation commander located in the relevant area; the petitioner was competent to deal with such issues without concurrence of superior authority. Nonetheless the petitioner called respondent No.2 on 03.04.2009 at the earliest opportunity when he became available at his HQ apprising him of the steps taken till that period. Respondent No.2 directed the petitioner not to proceed ahead in the matter. The petitioner tried to explain the merit of the case but since Respondent No.2 expressed his disapproval, the petitioner issued directions to his staff for not sending the MOU to Govt. of West Bengal. All relevant facts and reasons for processing the proposal for an educational institution on Chumta Tea Estate was brought to the notice of Eastern Command. On 06.04.2009, Eastern Command ordered cancellation of the MOU concluded between Stn HQ Sukhna and the private parties. The State Govt was apprised of the above on 18.04.2009.

(l) As directed by Eastern Command, a case was taken up for cancellation of lease and transfer of land to Army. The MOU dated 20.03.2009 was an expression of interest having no legal consequences. NOC was never issued nor communicated to either the private parties or the Govt. of West Bengal. It was cancelled on 27.05.2009. Thereafter, consistent efforts were made as per the earlier decision. HQ Eastern Command, being satisfied with the steps taken, took no further action for almost six months.

(m) Petitioner's posting orders as Deputy Chief of Army Staff (DCOAS) was issued after the approval of Appointment Committee of the Cabinet on 15.09.2009. A COI was ordered on 30.09.2009, after almost six months of the withdrawal of the MOU. The petitioner felt that the purpose of the COI was to stop his move as DCOAS. The COI was initiated for three days on 11.10.2009. On 13.10.2009, it was adjourned to 25.10.2009 to be reconvened at Kolkata. With an ulterior motive to stop the petitioner to take over his new appointment and get an attachment order issued, a false ground was created to advance the reassembly of the Court of Inquiry. The COI was shown to have been reconvened without calling any witness just to invoke Army Rule 180 against the petitioner, when the petitioner was called to HQ Eastern Command for the purpose of his farewell/dining out party on 14.10.2009. Throughout the night, frantic activity took place to issue summons to the petitioner to attend COI on 15.10.2009. After invoking Rule 180, the COI was again adjourned till 26.10.2009. The whole exercise was

done to stop the petitioner from taking over his new appointment as Deputy Chief of Army Staff. The COI reassembled on 26.10.2009 and was concluded on 27.11.2009 in which an attempt was made to fabricate the facts instead of finding the same as mandated by the convening order. A media hype was generated by feeding concocted stories based on conjectures. The cost was reported to be to the tune of Rs.300 crores in the media. No one questioned as to how and who benefited from the so called scam, or how any loss was caused due to whatever action had been taken till then. It was only the petitioner who was attached even before the Court of Inquiry effectively started in a highly discriminatory manner in invoking Army Rule 180 in respect of the petitioner, whereas Army Rule 180 was invoked against five more officers during the course of the COI and all of them continued to hold their posts and functioned in a normal manner without being attached out.

(n) The petitioner made a representation dated 09.11.2009 to the Chief of Army Staff against the discriminatory attachment order and sought permission to join on posting. While the petitioner was in the process of applying for leave to proceed legally against an unjust COI, he was handed-over another attachment order dated 06.10.2012 to initiate disciplinary action against the petitioner without any justified reasons. The petitioner had filed a petition before the Hon'ble Delhi High Court which was subsequently withdrawn. A fresh application filed before the Hon'ble Tribunal challenging

the COI was also withdrawn on 11.02.2010 with liberty to file a fresh application at the appropriate stage.

(o) The respondents in compliance with the directions passed by this Hon'ble Tribunal in the matter of Lt Gen Avdesh Prakash of reassembling the COI in March, 2010, when such enquiry was not yet finalised, ordered recording of Summary of Evidence in respect of the petitioner. Aggrieved by such action, the petitioner filed another application. However, this Hon'ble Tribunal did not deem it appropriate to interfere in the matter at that stage on the ground that the subject matter of the legality of the COI had already been adjudicated by this Hon'ble Court in the matter of Lt. Gen. Avdesh Prakash arising out of the same COI. In any case, hearing of charge should have been done by the GOC in C HQ Eastern Command as the petitioner was a Corps Commander. SOE was completed on 03.04.2010. After about four months, the petitioner was served a charge sheet dated 16.08.2010 signed by the then COS who had completed the formalities under Rule 24 in his capacity as CO of the petitioner when he was much junior to the petitioner though holding the same rank. He also intimated him the decision to convene a GCM at Shillong on 30.08.2010 when the COI as well as the SOE was recorded in Kolkata and the entire cause of action has arisen within the territorial limit of West Bengal. The charge sheet was prepared by the then COS who had acted in the capacity of Commanding Officer of the petitioner when he was junior to the petitioner in status and seniority and in terms of the existing provisions could not have acted as the Commanding Officer of

the petitioner thereby rendering all subsequent proceedings wholly illegal and without jurisdiction.

(p) The petitioner was served with a copy of SOE on 19.08.2010. The petitioner found that there was no evidence whatsoever, in the SOE to justify even framing of a single charge but in view of the specific remedy available to him to take such objections before the GCM, he did not take recourse to any proceedings. On 27.08.2010, the petitioner made a request to Respondent No.3 to postpone the date of commencement of the GCM as he was finding it extremely difficult to avail the services of a suitable Counsel to defend himself as no one was willing to travel to the far flung inaccessible areas in the North East. The respondents intimated the petitioner of the change in the date of assembly of GCM from 30.08.2010 to 14.09.2010 and directed the petitioner to report at Shillong on 13.09.2010.

(q) Unknown to the petitioner, the Judge Advocate who was detailed for the trial was replaced by a new Judge Advocate presumably because he had sent a reference about the legality of the said trial in exercise of his power under Rule 105(3) of the Army Rules to the convening authority because it was discovered by the JA so detailed that the hearing of charge under Rule 22 and compliance of Rules 23, 24 and 37 was done by the authorities who were not competent to do so as the Chief of Staff Eastern Command being junior to the petitioner in status and seniority could not have acted as his Commanding Officer. Subsequently, the concerned JA was also posted out. As a cover up for such an act of command influence affecting independence

of the trial, a false ground was created that the change of JA was a *bonafide* action due to administrative reasons.

(r) The petitioner accompanied by his wife reported to Shillong one day in advance i.e. on 12.09.2010, in view of the poor health condition of his wife, non-availability of anyone to look after her and due to the fact that the petitioner for nearly one year did not have a Govt. family accommodation provided to him. The petitioner received a letter on 13.09.2010 by which he was communicated the order dated 09.09.2010 passed by Respondent No.3 placing the petitioner under open arrest and he was directed to shift his wife to another accommodation away from him. A Lt Col. ranking officer was detailed as an escort contrary to legal provisions who also insisted in regulating and maintaining visitors' record duly signed, again without jurisdiction.

(s) The GCM commenced on 14.09.2010 comprising of 07 Lt Gen but none of such Lt Gens had commanded a corps which was obligatory in terms of Regulations for the Army, causing grave prejudice to the petitioner. At the commencement of the trial, the petitioner made a request for submitting the plea to jurisdiction under Army Rule 51. Keeping in view the extreme hardship faced by the petitioner, he made a representation dated 16.09.2010 to Respondent No.3 requesting him to reconsider his decision for placing the petitioner under arrest as there were no justified reasons for doing the same. The petitioner was conveyed the decision of Respondent No.3 dated 18.09.2010 on 21.09.2010 for maintaining status quo regarding

his arrest. The GCM after receiving reply from the prosecution and further reply from the petitioner summarily rejected the request of the petitioner to call witnesses in support of the plea to jurisdiction and overruled the plea of the petitioner with a direction to proceed with the trial on 28.09.2010. Thereafter, the GCM was adjourned till 08.10.2010 on the request of the petitioner but no effort was made to release the petitioner from arrest causing immense hardship and suffering to the petitioner and his family.

(t) Thereafter, having found that the respondents had no justification for having any charge, the evidence not disclosing any offence and charges not having been framed in accordance with the Army Act and Rules, the petitioner took objections to the charges in terms of the Army Rules and duly supported by the relevant decision of Hon'ble Supreme Court. However, without considering the relevant provisions of law, the petitioner's plea was disallowed by the GCM on 13.10.2010. On 19.10.2010 the petitioner filed an OA seeking relief confined to grant of bail and illegalities involved in framing of the charge. Hon'ble Tribunal did not deem it appropriate to interfere at that stage since the GCM was already in progress but with kind intervention of Hon'ble Tribunal, the petitioner was released from arrest by the Respondents themselves as per the undertaking given by them before the Hon'ble Tribunal.

(u) On conclusion of the trial, the GCM vide their order dated 21.01.2011 found the petitioner not guilty on account of four charges but guilty on three charges under Section 63 for allegedly issuing directions for conveying of No

Objection, for direction for entering into MOU and for not informing HQ Eastern Command about such facts of conveying of No Objection and entering of the MOU. Such finding of the GCM was absolutely wrong on the facts as well as on the basis of evidence laid before it. The GCM probably felt compelled to convict the petitioner because the entire case was initiated by the officer who was the Chief of the Army Staff at the relevant point of time and if the petitioner had been found not guilty on all charges, it would have caused serious embarrassment to Respondent No.2 who right from the beginning had been misrepresenting the facts for furtherance of his illegal design.

(v) On 22.01.2011, the GCM awarded the following punishments to the petitioner:

(aa) Loss of seniority of rank of 18 months;

(bb) To forfeit 15 years past service for the purpose of pension

(ac) To be severely reprimanded

(w) The punishment was highly disproportionate to the charges on which he was found guilty especially considering the fact that conviction of the petitioner on all three charges was based on a common fact that the petitioner did not inform HQ Eastern Command about such developments when the staff officers who were charged for similar omissions and even for much serious lapses such as changing of noting etc. were only awarded censure in the matter. Hence, it is quite evident that the GCM got unduly

pressurized by the status of the complainant who was none other than the Chief of the Army Staff, himself.

(x) The petitioner preferred a pre-confirmation petition, under Section 164(1) on 22.02.2011 requesting for justice. Since January 2011, the petitioner was kept attached in a pitiable condition at Calcutta. Vide order dated 17.06.2011, after nearly six months, a perverse order of revision was issued by Respondent No.3 again under the influence of Respondent No.2 ordering the GCM not only to reconsider its finding of not guilty in respect of the first charge but also to re-appreciate the same in the manner in which Respondent No.3 wanted such re-appreciation to be done as desired by Respondent No.2. Pursuant to such illegal direction, the GCM reassembled on 11.07.2011 .After reconsidering all aspects the GCM declined to revise its findings and consequent sentence on 15.07.2011. The Respondents finally confirmed the findings and consequent sentence on 09.11.2011. The pre-confirmation petition of the petitioner was rejected by Respondent No.2 on 01.11.2011. Such an order passed by Respondent No.2 was wholly illegal because he being the complainant and was actually a witness, whom the GCM could not dare to call in spite of repeated requests of the petitioner, confirmed such proceedings when he was personally interested in its outcome.

(y) Respondent No.3 promulgated the findings and sentence on 17.11.2011. The petitioner put up an application to permit him to join his unit in the appointment in which he had been held since April, 2010. The

petitioner was finally allowed to join at Delhi on 19.12.2011 when he was due to retire from service on 31.01.2012. But in a most malafide manner he was again attached to the VOCAS Sectt, when he was required to be given his rightful appointment to belong to a unit to ensure his smooth and graceful retirement from service, after victimization and harassment faced by him continuously for more than two years. The petitioner finally retired from service on 31.01.2011 after more than 40 years of dedicated and self-less service which was tarnished by Respondent No.2 at the fag end of his unblemished career embarrassing the organization more than the applicant himself.

(z) In addition, while highlighting the grounds the petitioner has brought before us the following:

(**i**) The GCM was in relation to certain decisions taken by HQ 33 Corps, which the petitioner was commanding as Corp Commander pertaining to a piece of land measuring 71 acres, known as Chumta Tea Estate in the vicinity of HQ 33 Corps at Sukhna. Such land was a private land under the ownership and possession of the private parties on the basis of long term leasehold ownership in perpetuity. West Bengal Estates Act under which the land was given on lease, clearly stipulated that Govt of West Bengal had no right to reclaim such land as long as the same was being used for the purpose for which such land was given. Sometime in 2006, the Govt. of West Bengal had entered into a fresh lease agreement with the private parties for making use of such land for the purpose of Tea Tourism with

mutually agreed terms and conditions. Govt. of West Bengal had not even considered it necessary to obtain the view of the Army in this regard. Sukhna being merely a military station and not a cantonment, the restrictions which generally apply to cantonments was not applicable in this case. Even the Defence of Works Act, 1903 was not applicable since there was no ammunition dump or any installation on the basis of which the applicability of such act could have been extended. The predecessor of the petitioner had taken up the case with the Govt. of West Bengal expressing the reservation of Army regarding such Tea Tourism project on security grounds based on the presumption that such Tea Tourism project will give rise to unhindered access to the foreigners etc. which will have security implications. Communications were also sent for not only stopping such Tea Tourism project but also with a request to transfer such land to the Army with a commitment that the Army will pay the cost of such land. Such undertaking was given without obtaining in-principle approval of the *Raksha Mantri* which was mandatory for all land acquisition cases before any commitment could be made. Necessary precondition for any acquisition of land is that the concerned unit/formation must be deficient of land while as per admitted position, the land at Sukhna was surplus. When the petitioner took over as Corps Commander in September, 2008, based on the feedback received from his staff, he carried forward the steps taken by his predecessor for stopping of any Tea Tourism Project in the said land because the petitioner like his predecessor was of the view that any such Tea Tourism Project in

the vicinity of Sukhna Military Station will have security implications. However, considering the reservations of the Army, the private parties came up with a proposal to establish a good quality school for girls on the said land with a commitment to provide reservation of seats to wards of Army Personnel as well as fee concessions to them with the added advantage of employment opportunity to the family members of the service personnel and ex-sevicemen.

(ii) The petitioner who was fully competent to consider such a proposal keeping in view the practical difficulties involved in the matter of stopping such a project and the benefits to the Army Personnel that would accrue passed instructions to his staff to explore the feasibility of such project including security aspects. Thereafter, the petitioner concurred with the advice rendered by his staff officers for taking certain exploratory steps in the matter. However, when Respondent No.2 as Army Commander did not agree with such steps, steps taken till that time were retraced and status quo restored in spite of the personal conviction of the petitioner about the merit of the proposal. Thereafter, the matter had been closed. But after the petitioner was posted at DCOAS, the case was revived by ordering a COI which came to predetermined findings with the sole aim of implicating those who Respondent No.2 wanted to victimize due to his personal grievance and vengeance.

(iii) The following facts indicate that Respondent No.2 was acting in a vindictive and arbitrary manner creating a pretext to settle scores :-

(aa) Respondent No.2 and the then Military Secretary Lt. Gen Avdesh Prakash had exchanged certain letters related to the issue of change in the record of the year of birth of Respondent No.2 from 1950 to 1951 even after his giving a written commitment earlier. Respondent No.2 again reiterated his written commitment sometime in 2008-2009 by accepting 1950 as the year of his birth. The commitment was projected as having been made under duress and coercion.

(ab) Respondent No.2 was overlooked for being appointed as Vice Chief of Army Staff (VCOAS) during the time of his predecessor as the COAS and Lt Gen (Retd) PC Bhardwaj appointed as the VCOAS.

(ac) Both these events resulted in a vengeance in the mind of Respondent No.2 for which he held the then Military Secretary responsible and was looking for an opportunity to get even.

(ad) The issue of processing of the case of New Chumta Tea Estate was brought to the notice of Respondent No.2 by the petitioner with all specific details in the first week of April 2009 and on his instructions, all steps taken in this regard were revoked and *status quo* restored. Thereafter, for the next six months no cognizance of the case was taken. Between April, 2009 to September, 2009, Respondent No.2 learnt that the person who had submitted the proposal for a school which was processed by HQ 33 Corps was a family friend of the then Military Secretary. During the same period, the petitioner was approved to be appointed as DCOAS(IS&T). HQ Eastern Command apparently converted these developments to suit the convenience

of Respondent No.2 by selectively releasing false and baseless reports to the media projecting an altogether different case to be extent that the land in question was Defence land which was being transferred to private parties due to an ulterior motive and also that such action involved a scam involving crores of rupees without any basis whatsoever. The sustained media campaign was aimed at creating a vitiated atmosphere so that once HQ Eastern command creates a case for investigation, all authorities at Army HQ, MOD and judicial forums would get influenced by such vitiated misinformation campaign and decline to stop the illegal, arbitrary and *malafide* action of Respondent No.2 by examining all issues in an objective manner. Unfortunately, Respondent No.2 achieved complete success in his ulterior design and in the process brought irreparable dent in the image of the organization in the public mind for his self servicing cause when ironically he was slated to take-over as the COAS.

(ae) In the COI conducted by HQ Eastern Command, every attempt was made to fabricate a case against the petitioner who as a Corps Commander was responsible for taking a decision based on the inputs received from his staff officers who were morally and legally bound to advise him in a most objective manner. However, even though they had recommended the contemplated actions at the time of Court of Inquiry, to buy immunity and with the hope of reward for helping Respondent No.2 in his illegal design, such staff officers did not hesitate to implicate their own Corps commander, disowning their own actions to apportion blame to the petitioner. The then

Col Q (now Brigadier) Col NK Dabas who as Col Q (Land) was primarily responsible for initiating the minute sheet on which the case was processed had categorically recommended the steps taken by 33 Corps in view of the change of proposal from Tea Tourism to opening of a school. However, during the Inquiry and subsequently, he left no stone unturned to disown his own action and to implicate the petitioner by levelling false allegations. The said officer was given severe Displeasure (Recordable) which resulted in denial of promotion to him in the rank of Brigadier. However, immediately after the said officer deposed against the petitioner and later in the case of Lt. Gen. Avdesh Prakash, the censure was withdrawn and the officer was promoted to the rank of Brigadier. It is pertinent to state that Respondent No.2 himself chose to put the rank of the Brigadier on the shoulder of the said officer and also rewarded him by appointing him as Brigade Commander HQ 60 Inf Bde at Delhi. It is indeed surprising that an officer who had been blamed earlier, was given such reward pointing towards the fact that the Respondent No.2 was fully aware of the fact that there was no case against the officer but the same was made up only to settle his score with some senior officers out of vengeance without any regard for the credibility of the organisation. Similarly, the then COS HQ 33 Corps Maj Gen (Now Lt. Gen) R.Halgali in respect of whom, it was discovered during the GCM that he had very close interaction with the owners of the land including Mr Dilip Agarwal. Moreover, he had a most active role in all crucial decision making process of the land case. It was established from the

records that such officer had made false statements on various occasions. Severe Displeasure (Recordable) awarded to him was set aside by Respondent No.2 and he was rewarded with the appointment of DCOAS (IS&T).

(af) Malafide action of the respondents is quite apparent from the fact that as admitted by the prosecution before the GCMs; the convening authority had appointed Brig T Prasad, Deputy JAG HQ Central Command earlier as the Judge Advocate for the trial. The said JA before the commencement of the GCM in terms of the Army Rule 105, had given a detailed written advice addressed to the convening authority i.e. GOC in C Eastern Command in which had categorically brought out that the exercise of power by COS HQ Eastern Command who was otherwise junior in service and status from the petitioner though of the same rank, instead of exercise of such power by the GOC in C, was a grave jurisdictional error which will render all subsequent proceedings illegal and without jurisdiction. However, instead of considering the advice, the Respondents replaced the JA presumably knowing that he would have followed the correct rules and procedures which would have rendered the proceedings null and void. Action of the respondents replacing him as JA only shows the pre-determined mindset of the Respondents to find the petitioner guilty at any cost because Respondents No.2 would have lost his credibility in case the GCM would have found the petitioner not guilty on all charges.

(ag) The MOU in question, which was conditional, was given only to meet the legal requirements of the State Govt. to press the case. It is only after the fresh lease for the purpose of Educational Institution was allowed that formal contract could have been signed. However, when HQ Eastern Command was apprised of the matter, it was curtly denied. Thereafter, there had been no adverse communication from HQ Eastern Command as to why such allegedly wrong decision was taken. The GCM failed to take into account the fact that the question of issuance of No Objection did not arise because there was no evidence brought to this effect by the prosecution.

(ah) It is not the case of the respondents that the petitioner committed the alleged acts with any ulterior motive or personal gain. It has also not been alleged nor proved that any of the acts committed by petitioner were with any ulterior motive. The petitioner in any case would have finished his tenure and left but the facility created would have benefited officers and the troops stationed at Sukhna Military Station for all times to come. Such a noble intention of welfare of troops and improving their quality of life could not have by any stretch of imagination been considered as acts prejudicial to good order and military discipline even when the GCM observed that such steps were for the benefits of the station.

(aj) A charge under Section 63 pre-supposes the existence of any laid down norm or order deviation from which could be taken to be a breach of good order and military discipline. However, there is no evidence before the GCM to show that the alleged acts/omissions were attributed to the petitioner

in contravention to any laid down norm or code conduct. Good order and military discipline is not the subjective mindset of an individual person. The charge under Section 63 cannot be framed by merely making the alleged act an act prejudicial to good order and military discipline without specifying what order and military discipline norm has been breached. It is important that the act should not only be an act prejudicial to good order but the same should also adversely affect military discipline as good order and military discipline both are essential ingredients of the offence and one is not an alternative to the other. Therefore, the charge against the petitioner should have very specifically averred that as a Corps Commander what were the laid down military norms and instructions on good order which the petitioner in his personal capacity has required to follow violation of which would be the subject matter of change. However, no such evidence has come on record.

(ak) Before finding the petitioner guilty, the GCM ought to have considered that Sukhna military station was not an Army Cantonment and the army legally did not have any enforceable right on the land in question. It is the declared policy of the MOD to promote education. Schools are existing on the military land collocated with sensitive establishments. The Corp Commander being the Commander of the highest formation located in the station is competent to estimate the security threat potential based on his perception. Thus, having taken due consideration of all the security related aspects and appropriately regulating the same, his perception that a school as against a tea tourism project is not a security threat by any stretch of

imagination and therefore he could not have been faulted let alone attributing criminality to the same. The petitioner as a corps commander was fully competent to endorse a view on the subject taken by his predecessor or to make necessary changes based on new facts and changes in circumstances. Absence of any accusation to show that such acts alleged against the petitioner had any ulterior or exterior motive resulting in personal gain to him would attach no criminality to a charge.

(al) Under the scheme of the Army Act and Rules, disciplinary action is warranted only if based on the facts of a given case, prima facie it is found that the act or omission is alleged against a person subject to Army Act is an offence within the meaning of any of the Section from 34 to 69 of the Army Act. If the act in question lacks any criminality and the same is done during the course of performance of an official duty it cannot amount to an offence just because there are two views possible in the said matter especially where there is no allegation of any personal gain against the petitioner. It is strange that the GCM came to the conclusion that entering into an MOU was to secure the security interest of the Army and at the same time took such action to be an act prejudicial to good order and military discipline.

(am) The GCM failed to consider the essential facts as brought out in the evidence and failed to consider that most of the witnesses were accomplice witnesses who had every motive to implicate the petitioner. Respondent No.2 has granted full relief to the Col NK Dabas who has been made a Brigadier as a reward for falsely implicating the petitioner. Major Gen (Now

Lt Gen) R.Halgali was given full redressal and rewarded by being made the Deputy Chief of the Army Staff. It could not be a mere coincidence that the officers including legal officers involved in processing the fall out of Sukhna case were awarded with Vishisht Sewa Medal and other important appointments/postings.

(an) The Respondents made no efforts to detail the members in the trial who had performed the duties of Corps Commander. None of the members of the GCM had any experience of commanding a Corps as required vide Para 460 of the Regulation for the Army. The petitioner was thus gravely prejudiced as the Members of the GCM failed to appreciate that as a Corps Commander the petitioner had no personal obligation to go into the procedure before taking a decision which was required to be ensured by the staff officers as the petitioner had 74 staff officers to assist him in following the procedure, violation of which was wrongly attributed to the petitioner.

(ao) Finding of guilty by the GCM against the petitioner is suffering from serious legal infirmity because the petitioner was not given adequate opportunity to defend himself by calling witnesses including Respondent No.2 to establish the facts asserted by the petitioner as to what transpired between him and Respondent No.2 which if proved would have clearly exonerated the petitioner. Even otherwise, once the GCM found the petitioner guilty of not informing HQ Eastern Command about conveying of the so-called NOC and entering into MOU and using this charge to find him

guilty for the other two charges is an example of multiplicity and duplicity of such charges rendering the finding absolutely illegal.

(ap) Due to the personal involvement of Respondent No.2, who being the GOC in C Eastern Command was the initiator of the case and overseeing the COI, the COAS designate halfway during the processing of the case and was also the COAS during the SOE and trial stage, exercised tremendous command influence on the case. He had the same staff officers who had dealt with the case in HQ Eastern Command moved to IHQ of MOD (Army) and positioned in appropriate to monitor to IHQ of MOD (Army) and positioned in appropriate appointments to monitor and steer the case. Thus, he acted as the initiator, investigator, prosecutor, judge and confirming authority all rolled into one against all canons of natural justice. In addition, the media blitz and trial with selective supply of misinformation was orchestrated to mislead the nation giving the impression that a massive scam had taken place when in fact no effective transaction had been carried out in the matter.

(aq) The punishment given to the petitioner is highly disproportionate to the charge and merited inference at the time of confirmation but the same was not done as a measure of punishment for not implicating Lt. Gen. Avdesh Prakash who was the real target of Respondent No.2.

3. The case of the respondents is as follows:

(a) The land in question is the Chumta Tea Estate was given on lease to private parties by the Govt. of West Bengal for Tea Tourism. Having noticed

construction activities in the said land, Army authorities formally took up the case for the cancellation of lease and transfer of land to Army. Between Feb, 2008 and December, 2008, it had been the consistent stand of HQ 33 Corps that the land in question shall be acquired by the Army. A demi-official letter was written by the then General Officer Commander 33 Corps Lt Gen Deepak Raj SM on 29.02.2008 to the Chief Secretary, Govt. of West Bengal with a copy to the Chief of Staff HQ Eastern Command on the above subject. On 07.03.2008 Col NK Dabas (PW1) along with DC Shri BL Meena presented the case before the Chief Secretary and requested him to issue orders for handing over the Chumta Tea Estate to the Army. The Chief Secretary directed the Divisional Commissioner to start the process of cancellation of lease with the lessees and hand-over the land to the Army. The Chief Secretary told PW1 that since the letter was in the form of a demi-official letter, he should write an official letter which was accordingly written. Between March and September 2008 a number of meetings were held with the DC, Jalpaiguri and DM, Darjeeling District in connection with the Chumta Tea Estate. Spot enquiries conducted by the revenue department officials highlighted the security concerns of the Army.

(b) At the time of taking over us GOC 33 Corps, the petitioner was duly briefed about the case of Chumta Tea Estate by the staff Col NK Dabas (PW1) who had met the Chief Secretary, Govt. of West Bengal on 22.09.2008 had subsequently put up the details of the meeting to the petitioner. Thereafter, vide letter dated 04.10.2008 addressed to the Chief

Secretary, the petitioner had requested personal indulgence of the Chief Secretary to issue suitable directions for cancellation of the lease of Chumta Tea Estate land. After terror attacks in Mumbai, vide letter dated 01.12.2008 addressed to the District Magistrate, Darjeeling, it was once again recommended that the lease granted to private companies for the purpose of tea tourism be cancelled and the land handed over to the Army as agreed to by the Chief Secretary to Govt. of West Bengal. PW1 had included the land case of Chumta Tea Estate in the report on important land cases forwarded to the HQ Eastern Command wherein the stance of the Army on account of security concerns was inter alia intimated to HQ Eastern Command. It is thus evident that the earlier stand of HQ Corps between February, 2008 was for cancellation of lease due to security concerns and transfer of land to Army.

(c) PW1 was on leave from 13.12.2008 to 15.01.2009. Brig PC Sen (PW 6) had just joined HQ 33 Corp. Maj Gen R Halgali (PW 7) COS HQ 33 Corps was also on leave. It was during this period that the change of stance had taken place at the level of the petitioner after he received a communication from Geetanjali Educational Trust and his meeting with Mr Dilip Agarwal CW 2 who in his oral testimony had admitted that he had met the accused and given a proposal to HQ 33 Corps to permit establishment of educational institute at New Chumta Tea Estate. Registration deed of Geetanjali Education Trust reveals that the same was registered at Gautam Budh Nagar (UP) with a corpus of only Rs.1500/- in the year 2001. There was

nothing on record to show that the said trust was running any educational institution of repute after its inception.

(d) On 29.12.2008 Brig PC Sen (PW-6) received a letter from the PA of the petitioner marked priority written by Geetanjali Education Institute inter alia requesting issuance of 'No objection certificate'. The petitioner had put a remark on "Please exam; a new angle project we may consider" and marked it to Brig Adm. The petitioner briefed him about the proposal and told him that it was a noble project and it would improve the educational facilities for the children in the station. The petitioner further told PW6 that modalities for issuance of a NOC would be required to be worked out and directed PW 6 to hold a meeting Mr Dilip Agarwal (CW-2). The meeting was held on 01.01.2009. Minutes of the meeting prepared by PW-3 were put up to PW-6 on a noting sheet dated 02.01.2009. The said minutes were perused by the petitioner on 06.01.2009. In the meanwhile, PW1 joined back from leave and having gone through the notings conveyed his reservations on the project. When PW6 conveyed reservations of PW1 to the petitioner, he did not show any reaction. PW6 therefore, directed PW1 to process preparation of conditional 'No Objection' and MOU taking care of the security concerns. It would thus be seen that the petitioner had taken the decision all by himself and the staff was left with no option but to work out the modalities to implement his decision with regard to establishment of an education institute on the said land.

(e) On 31.01.2009 Mr Sharad Bajoria (PW-8) and Mr Dilip Agarwal (PW-2) visited the petitioner in his office. After the meeting, four separate letters dated 01.02.2009 addressed to GOC HQ 33 Corp were received on 03.02.2009 by the four lessee companies. In the letters the owners of the private companies had thanked the petitioner for giving them a patient hearing seeking approval of the petitioner for establishment of school for girls in the vicinity of Army installations. They had further requested the petitioner to send an authorised representative to the meeting to be held at Kolkata on 06.02.2009. This shows that the decision to send representative for the meeting was taken at the behest of private companies.

(f) The remark of the petitioner "affidavit not notarized or in front of magistrate or regd. rectify" on exhibits 40, shows the deliberate manner in which exhibits 40 to 43 were perused by him. In the first week of February, 2009, the petitioner received a letter dated 22.01.2009 calling for a meeting on 06.02.2009 for cancellation of lease to the lessees for Tea Tourism Project due to serious objections raised by the Army. There was no mandatory requirement to send a representative from HQ 33 Corps yet a representative was sent to convey the change of stance. PW 3 was detailed to attend the meeting wherein he gave conditional No Objection on behalf of the Army. PW3 could not have conveyed no objection on behalf of the Army without the approval of the petitioner especially when there had been stiff resistance from the Army for establishment of Tea Tourism on the said land. The petitioner was well aware of the stance of the Army regarding

acquisition of land of Chumta Tea Estate. In the letter dated 10.02.2009 the Govt. of West Bengal had referred to the letter of the petitioner dated 04.11.2005 and the State Govt. had stated that the matter was examined as per the recommendations of the petitioner and 'no objection' conveyed by PW3. Hence, the MOU was called for so that the conditions proposed by the Army could be entered in the lease deeds with the private companies.

(g) It is evident from the record of the GCM proceedings that in furtherance of his decision to permit establishment of educational institution on the land in question, the petitioner had directed PW-6 to enter into MOU with the four private companies as desired by the Govt. of West Bengal. Pursuant to the said directions of the petitioner, the Station Commander, Sukhna had executed the MOU and later as per the directions of Army commander, the said MOU was cancelled *ex-parte*.

(h) In the DO letter dated 21.08.2008, the then GOC in C had highlighted the deficiency of about 21,000 acres of land in Command Theatre. The petitioner had referred to the letter and included Chumta Tea Estate for acquisition. However, the change of earlier stance as well as entering into an MOU with the four private companies was not at all brought to the notice of HQ Eastern Command. The petitioner was well aware of the earlier stance of the Army. His contention that it was not necessary to seek concurrence of HQ Eastern Command before carrying out exploration of the feasibility of an educational project on such land as the same was within the competence of the local military authority is misplaced and misleading. The

petitioner had attempted to justify his act by contending that the change of land use was for a noble cause and it was the duty of the staff to keep the higher HQ informed. Considering that the petitioner was the GOC of a Corps, he cannot be absolved of his responsibility to act in the best interest of the organisation and not take a unilateral view to change the previous stance without approval/ information of the higher HQ on a matter which involved question of national security. The petitioner has been aware of the above stated events, was required to inform HQ Eastern Command about the said events and ought to have ensured the same between February and December, 2008.

(j) Lt Gen R Halgali (PW 7) has brought about in his deposition that the petitioner spoke to GOC in C Eastern Command on the subject in the first week of April, 2009 only after he had advised him. PW7 had asserted that having come to know that the GOC in C was not kept informed about the new development with regard to New Chumta Tea Estate, he walked up to the office of the petitioner and demanded that the matter be reported to GOC in C. There is nothing on record to show that the HQ Eastern Command was informed about the developments with regard to Chumta Tea Estate between January, 2009 to March, 2009.

(k) The petitioner had contended that it was under the bonafide belief that till the stage of the MOU, the case was only at the exploratory stage and that it was for the staff to keep the higher formation informed whether they did not do for reasons best known to them. Even on the noting sheets this aspect

had not been highlighted by the staff. The above contention of the petitioner is misplaced. The petitioner was aware of sending of no objection to Addl. Chief Secretary, Govt. of West Bengal and entering into MOU with four private companies as the same was done on his directions only. Considering the rank and status of the petitioner, it was oversimplifying to say that the petitioner was not aware that HQ Eastern Command was required to be informed about sending of 'No Objection' and entering into MOU. It was not a routine matter. As GOC, it was the duty of the petitioner to inform HQ Eastern Command about the change of stance regarding usage of land in question in the light of the DO letter written by GOC in C Eastern Command. The omission was on the part of the petitioner to inform HQ Eastern Command was found to be improper and prejudicial to both good order and military discipline. The petitioner cannot absolve himself of his responsibility.

(l) Reflecting on the merits, the respondents stressed that arguments in the defense of the petitioner are an afterthought only. The contention of the petitioner that he was competent to deal with the issue without concurrence of any superior authority is denied. On 14.07.2009, HQ Eastern Command wrote to Board of Governors, Mayo College, Ajmer, intimating them about the cancellation of the MOU and requesting them not to grant any franchise to any agency including 'Geetanjali Education Trust' for establishment of educational institute on the concerned land at Sukhna.

(m) The contention of the petitioner that the COI was ordered by the Respondent No.2 to implicate all those who did not take his side in his sustained campaign of modification of his date of birth, is also misplaced and denied. The proceedings were conducted as per the laid down procedure and there was no aim to stop the petitioner from taking over his new appointment as Deputy COAS. The contention of the petitioner regarding fabrication of the facts at the COI is not correct. Petitioners allegation of generation of media hype by feeding concocted stories based on conjecture are denied. The answering respondents have no control over private media.

(n) The attachment of the petitioner was justified since disciplinary action was directed against him on conclusion of the Court of Inquiry. The contention of the petitioner that hearing of charge should have been done by the GOC in C Eastern Command and not by the COS is without any legal basis. COS HQ Eastern Command having been delegated the power of Commanding officer by the GOC in C Eastern Command in respect of officers of the rank of Col and above was competent to carry out hearing of charge in respect of the petitioner. The then COS, HQ Eastern Command was competent to exercise the power of Commanding Officer over the applicant and his being junior in service to the petitioner could not have affected his competency as such. There was no illegality in holding of the GCM at Shillong, notwithstanding the fact that the COI as well of S of E was recorded at Kolkata. In terms of the Army Act section 124, a GCM can be assembled anywhere within the jurisdiction of the convening authority.

(o) The contention of the petitioner that there was no evidence whatsoever available in the S of E, to even justify framing of one charge is without any legal basis. His contention that the punishment awarded to him was disproportionate to the charges on which he was found guilty is denied. The punishment awarded was commensurate to the nature and gravity of the offence for which the petitioner was found guilty.

(p) The contention of the petitioner that he was victimised by respondent No.2 Gen. (retd) VK Singh is not supported on record. His contention that the GCM acted under command influence is not corroborated by records.

4. The petitioner ins his rejoinder has highlighted the following :

(a) The land in question i.e. the Chumta Tea Estate was actually under ownership of private parties by way of lease in perpetuity. The Govt. had no authority to take back the land as long as the same was used for the purpose of tea cultivation. The barren land surrounded by the tea gardens was relinquished by the owner for the purpose of tea tourism project near Corps HQ which was perceived to be a security concern and the petitioner has never changed such decision of his predecessor so far as the tea tourism project is concerned. Predecessor of the applicant had approached the Govt. of West Bengal for cancellation of the lease for the tea tourism project and for handing over the land to the army. The petitioner realized that the request of the Corp HQ for handing over the land was merely to prevent possibility of using the said land by the owners which may have security

concern but the procedure which was required to be followed before making the request for acquiring the land i.e. in principle approval of the Defence Minister etc. was not even initiated by the concerned staff. It is relevant that the whole case was initiated by HQ 33 Corps with the Govt. of West Bengal. HQ Eastern Command had been informed only when the case had been initiated. The respondents have not disclosed that the cancellation of lease and prevention of recurrence of such projects was pertaining to tea tourism project which had possible security implication. There was no tactical or strategic reason for cancellation of the project.

(b) Respondents have attempted to project the issue through the motivated disposition of PW1 who had made all attempts to falsely implicate the petitioner and was suitably rewarded by Respondent No.2 who not only got the censure awarded to him set aside but rewarded him with promotion to the rank of Brigadier ignoring the fact that he had processed the said case as Col Q. Even otherwise the respondents have glossed over the following facts while evaluating the deposition of PW-1.

(i) All the actions were pertaining to the proposal of Tea Tourism project.

(ii) Action on ground between February 2008 to September 2008 did not show any alacrity to readily cancel the lease to hand-over the land as claimed on the part of the lower functionaries of Govt. of West Bengal. Hardly any progress had been made till the petitioner took charge of 33 Corps.

(iii) The petitioner was never briefed as deposed by PW 1 as he was shown one odd slide about Chumta Tea Estate as this was not an important case having any operational connotations/implications. There were many important land acquisition cases being processed in the Corps Zone which were required for operational purposes like Ammunition Point (AP) Menshithang, AP Gurubathan, AP Panteng, Composite Aviation Base Shaugaon etc. However, once this case was pursued by Respondent No.2 to settle his own score with the then Military Secretary, the case became all important at the expense of other cases.

(iv) The petitioner was given to understand by his own staff, who turned their back after Respondent No.2 made an issue out of the case by disowning their own acts to avoid penal consequences or expecting relief against action taken against them. Firstly, the land could not have been acquired as Sukhna Military Station had surplus land. Secondly, there was a requirement for a good quality school in and around Sukhna Military Station. Thirdly, a lot of Govt. accommodation was lying vacant even though Sukhna was a family station due to lack of good schools and lack of employment opportunity to the families. Lastly, Sukhna not being a Cantonment, the Army did not have a legal right to restrain such activities of the private parties in their own land through any legal means since Defence of Works Act, 1903 had no clause which could have been invoked by the Army to restrain any such construction. Even otherwise, the land in question was located more than 1-2 kms. from Corps HQ. With this background, when the proposal was

received by the petitioner, he had endorsed his remarks without fixing any time frame with the expectation that the staff will carry out all the necessary exercise to examine such proposal from all angles and will place on record all necessary facts for or against such proposal, if any, to enable the petitioner to decide whether such exploratory steps are required to be taken forward or not.

(v) Contention of the respondents that CPW2 had met the petitioner on 29.12.2008 is incorrect. In his statement CW2 has clearly admitted that he had met the petitioner only once on 31.01.2009. As a matter of fact there was no change of stance involved in the matter. A stance is a position taken for a given set of conditions which if changed under similar conditions will amount to a change of stance. If the conditions are changed and the circumstances are changed consequently, the position adopted can change. This would not amount to be a change of stance. The same was explained to HQ Eastern Command vide HQ 33 Corps letter dated 06.04.2009. However, the same was not accepted later on in October, 2009 since the aim of the Inquiry was to fix and wreck vengeance on certain targeted persons.

(vi) It was not for the Corps Commander to assess the financial viability of the Trust. If the firm did not have the capability, it would not be able to construct the school but only a school for which permission is granted can at best come up in the land. Thus, the interest of the army was not compromised in any manner.

(vii) PW-6, a career officer from the EME, adopted shortcuts to progress the proposal to impress his Corps Commander about his exceptional abilities. Towards that end, he adopted most unethical means by falsely telling other staff officer i.e. Station Commander to change his notings. Respondents are seeking conviction based on his statements who has deposed falsely about expressing his reservations to the petitioner. PW6 had never brought out any issue verbally or in writing to the petitioner expressing his reservation. On the contrary, he told the Station Commander to change the notings stating that it was the orders of the petitioner and later deposed falsely that the petitioner had told him to do so which the GCM disbelieved and the petitioner was exonerated from the said charge. The petitioner has been found guilty for certain procedural issues which was essentially a staff work. Unfortunately, none of the officers detailed for the GCM had served as a Corps Commander and thus were not in a position to appreciate the issues involved. Nothing prevented PW 1 and PW6 to put the noting with rationale for consideration. The fact remains that everyone in the staff had agreed that the education project was a good idea and would have been beneficial for the station. However after the inquiry was ordered and HQ Eastern Command viewed the matter differently, they sang a different tune. No marking of 'PRIORITY' was put anywhere on the proposal by the petitioner. A remark "Please examine – a new angle project we may consider' by no stretch of imagination can be interpreted to be a final decision. There is no evidence to show that the decision to send a

representative for the meeting called by the West Bengal Govt. was taken at the behest of the private companies.

(viii) The reply to the DO letter to GOC in C in September, 2009 was written during the settling down period of the petitioner. The land in question had little operational connotation. The staff had initiated subsequent report on 03.12.2008. Any change should also have been done on the staff channels. All actions with respect to Chumta Tea Estate land prior to December, 2008 were pertaining to Tea Tourism projects which were perceived to be detrimental to security of the installations based on which the lease was sought to be cancelled. But a school had no such security connotations. It was PW1 who was in the knowledge of the background of the case and was responsible to intimate about the project to HQ Eastern Command. Not having done his duty, he tried to wriggle out of the situation by blaming the Corp Commander. Had he carried out his duty, the occasion for the Corps Commander to personally inform the Army Commander would not have arisen.

(ix) The matter was reported to the Army Commander in April, 2009 in detail both verbally as well as in writing. At that time the rationale for carrying out the exploratory actions were intimated and was accepted by HQ EC. Then, in the month of October, 2009 all of a sudden an inquiry was ordered into the same matter, obviously with an ulterior motive. There was no loss of property, nor loss of any Govt. store which could necessitate a Court of Inquiry but yet it was ordered and vigorously pursued. It was highly

publicised in the media with coloured statements quoting imaginary figures alleging a massive scam having taken place which was completely untrue as proved later. The manner in which a Corps Commander had been taken to task, for a duty which is the primary responsibility of the staff does not augur well for the Army. PW1 and PW7 were indicted in the Court of Inquiry for Adm lapse but they have been exonerated and rehabilitated; in fact promoted by the same Amy Cdr who became COAS later. If their lapses were not found to merit Adm Action, how come the Crops Cdr had been so seriously punished. The petitioner believes that it was because the Corps Commander did not toe the line desired by the Army Commander, to assist him for taking out his vengeance against the then Military Secretary which was done by others who were suitably rewarded by him.

(c) The respondents failed to call Respondent No.2 as a witness who was asked to prove issue related to *malafide*, yet they contend that there was no evidence of *malafide* action on the part of Respondent No.2. So far as advice rendered by Brig Prasad is concerned, he had raised such observation after having been appointed as Judge Advocate which was addressed to the convening authority when the GCM though convened was not assembled. In terms of Rule 105, such advice rendered to convening authority was required to be entered in the proceedings. But the same was not done because apparently he had clearly brought out that there was jurisdictional error and all subsequent proceedings were liable to be set aside due to the same. The Respondents instead of acting on the advice

decided to charge him on the ground that he was under posting which was a made up ground because two officers including the Presiding Officer received their posting order and the same was implemented. In any case, if the respondents were of the view that such observation of Brig T Prasad the previous Judge Advocate was not material, then reluctant to show the same and their denial to produce the same to the petitioner ever under RTI Act shows that the respondents are reluctant to disclose the views which do not support their case.

5. We have perused the proceedings of the GCM and heard the counsels from both sides at length. Our observations are given in the following paragraphs:-

6. Lt General P.K.Rath was court-martialled from 14.09.2010 to 11.2011 at Shillong and for the following seven charges.

"CHARGESHEET

The accused, IC-25448L Lieutenant General Prasant Kumar Rath, AVSM, Integrated Headquarters of Ministry of Defence (Army), an officer holding permanent commission in the regular Army, now attached to Headquarters Eastern Command, is charged with :-

First Charge Army Act Section 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that he,

At Field, on 03 Feb 09, while being General Officer Commanding 33 Corps, with intent to defraud, ordered Brigadier (now Major General) PC Sen, VSM, then Brigadier Administration of the same Headquarters to convey through a representative a conditional 'No Objection' on behalf of Army, for setting up an educational Institution with residential facility in New Chumta Tea Estate, Sukhna, District Darjeeling, West Bengal, in the meeting called by Additional Chief Secretary and Commissioner General, Land Reforms, Government of West Bengal at Kolkata on 06.02.2009, for cancellation of lease of said land situated in New Chumta Tea Estate to four private companies mentioned in Annexure to this charge sheet.

Second charge Army Act Section 63(alternative to First charge)

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,

at Field, on 03 Feb 09, while being General Officer Commanding, 33 Corps, improperly, ordered Brigadier (now Major General) PC Sen, VSM, then Brigadier Administration of the same

Headquarters to convey through a representative a conditional ‘No Objection’ on behalf of Army, for setting up an educational institution with residential facility in New Chumta Tea Estate, Sukna, District Darjeeling, West Bengal, in the meeting called by Additional Chief Secretary and Commissioner General, Land Reforms, Government of West Bengal at Kolkata on 06.02.2009, for cancellation of lease of said land situated in New Chumta Tea Estate to four private companies mentioned in Annexure to this chargesheet.

Third Charge Army Act Section 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that he,

At Field between 17 February 09 and 20 March 09, while being General Officer Commanding, 33 Corps, with intent to defraud, directed entering into ‘Memorandum of Understanding’ with the four private companies as mentioned in Annexure to this chargesheet, with regard to the impugned land as described in the first charge above, for construction of schools and colleges with boarding facility for students and staff (Teaching and Non-Teaching), well knowing that a case has already been taken up with the Government of West Bengal for transfer of the said land to Army due to security concerns.

Fourth Charge Army Act Section 63 (Alternative to Third Charge)

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,

at Field between 17 February 09 and 20 March 09, while being General Officer Commanding, 33 Corps, improperly, directed entering into 'Memorandum of Understanding' with the four private companies as mentioned in Annexure to this charge-sheet, with regard to the impugned land as described in the first charge above, for construction of schools and colleges with boarding facility for students and staff (Teaching and Non-Teaching) well knowing that a case has already been taken up with the Government of West Bengal for transfer of the said land to Army due to security concerns.

Fifth Charge Army Act Section 63

AN OMISSION PREJUDICIAL TO GGOOD ORDER AND MILITARY DISCIPLINE

In that he,

At Field, between 29 December 2008 and 20 March 2009, while being General Officer Commanding, 33 Corps, improperly omitted to inform Headquarters Eastern Command about the following events:-

(a)Tendering of no-objection to the Additional Chief Secretary and Commissioner, Land Reforms, Government of West Bengal,

for the use of impugned land and described in first charge above, if an Educational Institution is constructed on the said land.

(b) Entering into 'Memorandum of Understanding' with the four private companies mentioned in Annexure to this chargesheet, whereby use of impugned land was permitted for the purpose averred in third charge above.

Sixth Charge Army Act Section 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

In that he,

At Field, on 05 February 2009, while being General Officer Commanding, 33 Corps, with intent to defraud, directed Brigadier (now Major General) PC Sen, VSM, then Brigadier Administration of the same Headquarters to ask Brigadier Sunil Chadha, then Station Commander, Sukna, to change his Note 4 to minute sheet No.230100/ Chumta TE/Q3 dated 05 February 2009 wherein he had recommended that giving 'No Objection Certificate' to civilians be pended till such time a design for Corps Headquarter Complex is finalized, in pursuance whereof the ibid Note was change to that of recommending giving of a conditional 'No Objection Certificate'.

Seventh Charge Army Act Section 63 (Alternative to Sixth Charge)

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,

at Field, on 05 February 2009, while being General Officer Commanding, 33 Corps, improperly and without authority, directed Brigadier (now Major General) PC Sen, VSM, then Brigadier Administration of the same Headquarters to ask Brigadier Sunil Chadha, then Station Commander, Sukna, to change his Note 4 to minute sheet No.230100/ Chumta TE/Q3 dated 05 February 2009 wherein he had recommended that giving 'No Objection Certificate' to civilians be pended till such time a design for Corps Headquarter Complex is finalized. In pursuance whereof the ibid Note was changed to that of recommended giving of a conditional 'No Objection Certificate'.

Place : Kolkata-21
Dated : 31 July 2010

sd/-
(Munish Sibal)
Lieutenant

General Commanding Officer
HQ Eastern Command
*To be tried by a General Court Martial

Sd/-

(Bikram Singh)

Lieutenant General
General Officer Commanding-in-Chief
Eastern Command

Place : Kolkata – 21
Dated : 02 August 2010
Annexure to the Charge Sheet
Details of the private companies

M/s Sheetla Vyapar Pvt Ltd.
McLeod House, 2nd floor, 3 Netaji Subash Road, Kolkata-700001
M/s Akshara Vanijya Pvt Ltd.
McLeod House, 2nd floor, 3 Netaji Subash Road, Kolkata-700001
M/s Mata Vaishnodevi Mercantile Pvt. Ltd.
McLeod House, 2nd floor, 3 Netaji Subash Road, Kolkata-700001

M/s. J.F. Low & Company Ltd.
McLeod House, 2nd floor, 3 Netaji Subash Road, Kolkata-700001

7. The GCM found the petitioner “Not Guilty” of first, third, sixth and seventh charges but ‘Guilty of second, fourth and fifth charges. The GOC in C Eastern Command had vide his order dated 17.06.2011 ordered for the GCM to reassemble to reconsider on its findings on the first charge by way of revision under Army Act, Section 160. The GCM adhered to their finding of ‘Not guilty’ on the first charge. After analysing the proceedings and having heard arguments from both sides, we endorse the findings of the GCM in respect of first, third, sixth and seventh charges as there is no evidence whatsoever to charge the petitioner with an ‘intent to defraud’. Therefore, we will restrict our consideration and comments to the charges second, fourth and fifth which have been made out under Army Act, Section 63 i.e. Acts/omission prejudicial to good order and military discipline.

8. The petitioner has been found guilty on account of charge Nos.2,4, & 5. In order to appreciate the controversy involved , it is necessary to deal with these charges separately. It is pertinent to mention here that the charges for which the petitioner was not found guilty ie charge Nos.1,4,6 & 7 pertains to the fact that petitioner had fraudulent design while committing this act. The court martial ruled out that the petitioner had any fraudulent design while committing the said act of omission and commission . It is the element of the criminality involved in those charges which were totally rejected by the GCM.

9. Now coming to the first charge for which the petitioner has been found guilty. What has been alleged in this charge is that the petitioner had directed his Brigadier Administration to convey the no objection for establishment of educational institution on the land in question. The said no objection was to be conveyed to the Addl. Chief Secretary, who had convened the meeting for seeking cancellation of the lease land in New Chumta Tea Estate. <u>The import of the charge is that while the meeting was called for cancellation of the lease of the said land for which tourism project was to be installed, there was no occasion to convey no objection certificate for establishment of the educational institution</u>.

10. This was highly improper. The prosecution case is that there is a tea estate called New Chumta Tea Estate also called just Chumta Tea Estate in

Sukna District Darjeeling, West Bengal located adjacent to Sukna Military Station. Out of 2711 acres of the Estate, 71.55 acres were not fit for tea plantation. The same was leased out to four private companies, namely, M/s Sheetla Vyapar Pvt Ltd. M/s Akshara Vanijya Pvt Ltd., M/s Mata Vaishnodevi Mercantile Pvt., and M/s. J.F. Low & Company Ltd. As this land was not fit for tea plantation, the aforementioned companies requested the State Govt. to consider a change in the use of the said 71.55 acres of the land from being used for the sole purpose of tea plantation to other commercial purposes and use. The State of West Bengal had accepted the proposal of the aforesaid companies and thereby a long term lease was executed in the year 2006 between the State Government and the lessee companies for a period of 99 years, for the purpose of developing a Tourism Complex including facilities like Adventure Tourism, Guest villages, Retreating housing along with internal roads and other infrastructure on the said land. On 02.02.2008, Hq 33 Corps noticed some construction activity and clearance of the area by labourers in the said Chumta Tea Estate. On enquiry it was found that the aforesaid companies were developing the said land for a Tourism Project. The land was more or less in the centre of Sukhna Military Station. Upon finding that the matter required urgent attention, the issue was taken up with State Government at all levels from the District Magistrate to the Chief Secretary by the staff and GOC himself.

11. The objections of the Army concerning to the security threat was acknowledged by the officials of West Bengal Government. The perception

as envisaged by the army related to the strategic importance of the area which was only linked to the North Eastern States. Many other aspects were contemplated by the army which includes the fact that it was home to the Naxalism in early 60's as well as it is proximity to China. The nature of the activity to be undertaken on the said tourist complex by itself created apprehension in the army that it would be a security threat to the army. As a first reaction to such proposal, it was desired that the land in question be handed over to the army for which process was initiated by the predecessor of the petitioner. It is a positive case set up by the respondents that the proposal to acquire the land was taken by the predecessor of the petitioner. It was in the light of this, a meeting was called by the West Bengal Government for seeking cancellation of the lease of the said land on which tourist complex was to be established. Therefore, the objection of the army was in respect of the nature of the activity in the shape of tourist complex which was to be established on the land, which necessitated prompt action on the part of the army for acquiring the said land. The case set up by the respondent is that in the backdrop of seeking to acquire the land, was it proper for the petitioner to have given no objection certificate for establishing an educational institution. Therefore, the no objection given by the petitioner or conveying Army's willingness for establishing such an institution was contrary to the stand taken by his predecessor in the interest of the petitioner.

12. A meeting was called by the Addl. Chief Secretary in which it was desired that representative of the 33 HQ may also participate. The meeting was called for cancellation of the lease infavour of private parties for establishing tourist complex on it. It is in this meeting that the conditional no objection certificate was to be given by the representative of 33 HQ on the instructions of the petitioner. The stand was changed by the petitioner from seeking acquisition of the land to permitting the private parties to establish an educational institution. This was done without informing the HQ Eastern Command. It provided a breather to the private companies, whose lease was required to be cancelled in that meeting. In that meeting the land would have ordinarily reverted back to the original lessee.

13. It is further alleged that the change in the stand by the petitioner was, as a result of his prior discussion with private parties for establishing the said institution on the land in question. Therefore, the petitioner is stated to have taken the decision to grant No Objection Certificate by over looking the decision of the army to seek the acquisition of the said land so as to address the security concerns in this behalf. The petitioner is accused of having committed offence under section 63 of the Army Act. He is stated to have committed an act which though not specific offence under the Army Act is prejudicial to good order and military discipline. By not informing H.Q, Eastern Command, his conduct was prejudicial to the good order and military discipline.

14. The facts in this case are not in dispute in as much as the land in question where a private tourist complex was to be installed raised certain security concern which resulted prompt action on the part of the Army. The objection was in respect of installing a tourist complex for which the predecessor of the petitioner had already informed the West Bengal Government including the army's intention to acquire this land. This line was pursued by the petitioner also. Therefore, both the petitioner and his predecessor as well HQ 33 Corps opposed the installation of the tourist complex. There were some valid reasons in opposing this move. It also appears that a new proposal was given by the private companies to establish an educational institution. It is stated to have happened only after meeting the petitioner. The consequence of this was to depute the representative of 33 Corps to attend the meeting convened by the Addl. Chief Secretary for cancellation of the lease to private parties. The agenda was pursued by the petitioner of course with active support of his subordinates,PW1, PW3 & PW6. It ultimately culminated in arriving at a Memorandum of Understanding. The whole process was conducted in isolation of HQ Eastern Command. Once the information was made available to the HQ Eastern Command, the petitioner was asked to withdraw the Memorandum of Understanding which was promptly done by the petitioner.

15. The question that now calls for our consideration is as to whether this action of the petitioner has caused prejudice to good order and military discipline in the Army. A bare reading of the provisions of section 63 implies that an act which is prejudicial to the good order and military discipline will be covered in this section. What is being contended by the prosecution is that a decision was taken to acquire this land. This process got diluted on account of issuance of conditional No Objection Certificate by the petitioner . It prompts a discussion as to whether there was any legal process invoked by the army to acquire this land or was it merely an intention to do the same. Acquiring of land entails a legal process which requires to be initiated by the authorities in this behalf. Admittedly, the land did not belong to the Army. There is nothing on record to suggest that any process was initiated to take it on lease. There are written instructions and laid down policy for processing and finalisation of land acquisition by the army. This is contained in Ministry of Defence order No. 11011/1/92/D (Lands) Government of India, Ministry of Defence, New Delhi dated the 04.02.1992. The measures to be adopted at each important stage of processing and finalisation by the user organisation/ service HQrs. / DGDE / Ministry of Defence, including Finance Division are brought out hereunder:-

> "ASSESSMENT OF NECESSITY
>
> 2.1 (i) As far as possible, additional land acquisition should be met out of the existing available / surplus Defence land holding at various stations including

that in the custody of sister services / Departments at the required location, even through suitable relocation of the proposed units/projects. In case the locational factors are inflexible, and the land costs are high the land requirement should be assessed on the most stringent basis, notwithstanding the fact that larger holding may be justified with reference to the prescribed scales.

(ii) Proposals for acquisition for land should be moved only after the necessity for the total project has received Government approval."

16. The order clearly reflects that before any process of acquisition of land is to be undertaken approval of the government has to be obtained. In the guide lines laid down by the Government of India for assessing the necessity and scope of land acquisition in respect of an existing station, " what is the deficiency" is an important question to be answered by the agency seeking transfer of land. What implies from the aforementioned order is that firstly the deficiency has to be indicated before starting the process for seeking acquisition of the land and thereafter approval has to be obtained from Government of India. In the present case, none of these questions have been addressed by the prosecution. Before taking the decision for acquiring the land there has been no approval of the Union of India nor any deficiency has been indicated by the Army . Evidence has

been brought before us that the land holdings at Sukhna were surplus to the requirements of the Army and more than 100 acres of land was under encroachment on which unauthorised colonies have been built. There was no case for the Army to seek acquisition of the land as per laid down policy of the Government. The decision taken by the predecessor of the petitioner to seek the acquisition of the aforementioned land was not done in pursuance to the aforementioned government order. The matter had been pursued by HQ 33 Corps at its own level without the prior approval of the government. This was an exercise which was not in consonance with the law.

17. The next question which calls for consideration is that the decision taken by the HQ 33 Corps for handing over the land to Army is also not in consonance with the provisions of law. It is pertinent to mention that vide communication dated 01.12.2008 by Col. N. Dabas (PW-1) had strongly recommended for cancelling the lease of land for the purpose of tea tourism granted to New Chumta Tea Estate and handover the land to Army as approved by the Chief Secretary. It was also mentioned that Army is ready to pay the costs of the land. Analysing the import of this communication, it would reflect total ignorance of law. For any acquisition, the first step is intention of the department to acquire land for the Army which is to be addressed to the State Government who would initiate the process of acquiring the land. The request for seeking the acquisition of land

has to be preceded by an approval by the Central Government. It is only after the request is accepted by the State Government, that Notification under sections 4 & 6 of Land Acquisition Act are issued. Emergency powers of section 17 can be taken recourse to only after the first two steps are complied with and 80 % of the compensation is deposited

18. In the present case, neither was there any approval of the Central Government nor was any Notification under sections 4&6 issued. Therefore, resorting to taking over the possession of the land was uncalled for. In essence what emerges from the above discussion is that there was no process in existence for acquisition of the land. The communication addressed by the predecessor of the petitioner for acquiring of the land had no legal sanctity. Therefore, to say that the petitioner has not followed the legal process is factually incorrect. The petitioner, therefore, cannot be held guilty for non pursuing the process of acquisition initiated by the predecessor which per se was contrary to law. We can safely say that there was no acquisition process going in accordance with the law and also as per the government policy. Therefore, it can be safely stated that there was no indiscipline committed by the petitioner in this behalf. He had not breached any legal norm.

19. The next question that calls for consideration is that whether the petitioner had malafide intention to allow the lease of the private parties to

remain in existence . It is pertinent to mention here that what has been objected to by the Army was the installation of the tourist complex only for compelling security reasons. Whether those reasons would exists in case an educational institution was allowed to come upon the land. Sukhna estate exists in the vicinity of tea plantation and some residential area occupied by the people. As a matter of fact it is the case of the respondents that the encroachments have been made by the people on the land which is owned by the Army. Therefore, the view that every activity of civilian nature adjacent to the Sukhna station is a security threat can not be accepted. It may also be noticed that till 01.02.2008, the Army perceived no security threat whatsoever on account of the Chumta Tea Estate not being in possession of the Army. It is only after it was decided to establish a tourist complex, the threat was perceived. Therefore, it entails for discussion whether the installation of educational institution on the said land would be a security threat to the Army or not. This issue has not been a subject matter of debate before the GCM or with authorities. However, it would be important to mention that while entering into Memorandum of Understanding following conditions were imposed:

a) The above land will be used for educational purposes only;
b) The Army is authorized to check any person, vehicle and campus for security reason;
c) One Army officer will be in the governing body of the institution;
d) One Army officer will be in the security committee of the Institution;
e) Any new development in the campus will be informed to the Army;
f) At least 1% of teaching and non-teaching staff will be from Ex-Army and ladies from the Cantonment.

This by itself confirms that the Memorandum of Understanding which was required to be signed should satisfy the conditions laid herein above so as to safeguard the security concern of the Amy. It was only after satisfying the condition to the satisfaction of the army, the process for granting No Objection Certificate could have been considered. It is admitted that no final No Objection Certificate has been granted which would be a ground for permitting the private companies to establish the educational institutions. This process was undertaken by the petitioner with the sole object of allowing educational institution to come up to meet the requirements of the wards of the Army persons. This fact has been acknowledged by the GCM also. Therefore, it would not be appropriate to state that the petitioner was following the course wherein it can be said that the same was done at the cost of security concern of the Army or for any oblique motive.

20. As already stated herein above, by not allowing a tourist complex to come up was on account of genuine concerns expressed by the Army . A place of tourism is accessible to all and sundry which may include all kinds of people including foreigners . An educational institution by in itself restricts the entry only to a class of persons. Therefore, security concern is lesser . For that also necessary precautions were incorporated in the Memorandum of Understanding.

21. Lastly what has been contended is that while the petitioner was pursuing this matter, HQ Eastern Command was kept out of the loop. The question now calls for consideration is whether the GOC, 33 Crops was competent to take the decision or not in this behalf ? The answer is “yes”. Nothing has been brought before us to show that such a decision could not have been taken by the petitioner . It was a decision taken at the tactical level which he was empowered to do . It may be noted that no final decision in the matter was taken. It was only a process to examine the desirability of establishing an educational institution. One can say that he had allowed the proposal for establishing an educational institution to be examined after addressing the security concern of the Army. The respondents have no where stated that he was not competent to take the decision. Two questions emerge from this. (1) whether he was required to inform the HQ, Eastern Command before final decision to grant No Objection Certificate was issued.(2) whether there was any legal and administrative necessity to have informed the H.Q on his own or it was the duty of his subordinate officers. Nothing has been produced before us to show that there was any existing rule or instructions which required GOC, 33 Crops to inform the HQ Eastern Command personally. It is a purely an administrative decision taken at that time. Even if we assume that he was required to inform the HQ in this behalf, was it his personal duty or that of his subordinate officers. It will be fruitful to highlight para 16.1 of the Government of India letter dated 04.02.1992 which is reproduced below:

"MONITORING AND REVIEW"

"16.1 Each service HQrs / Department / concerned organisation shall undertake review of the progress of their land acquisition cases which involve acquisition of more than fifty acres of land or an estimated acquisition cost of more than Rs.1 crore. For this purpose the concerned service HQrs / Department / organisation shall obtain from DGDE information in the format at Annexure III. The outcome of the review shall be furnished to the Ministry [(to the undersigned, by name (i.e. Joint Secretary to the Govt. of India)] within 45 days of the end of the relevant quarter. Report for quarter ending 31.03.1992 and for the full year 1991-92 shall be furnished to the Ministry by 15.05.1992.

17.1 Besides the aforesaid quarterly review, the DGDE shall undertake monthly review of all pending cases and advise the Ministry of cases in which time bound decision are required. Based on the monthly reports of DGDE and the quarterly reports to be furnished by the Service HQrs/ Department/ Organization, the Ministry will decide whether proceedings in regard to any pending case deserve to be dropped, for given reasons. If so, the Ministry will promptly inform the concerned State Government that further action may not be taken in the case.

22. Therefore, to state that the petitioner was culpable for not informing is a misnomer. The duty was on the Chief of Staff and his subordinates to have kept the command informed in this behalf. We say so because no final decision in the matter was taken. All that was done was to examine the possibility of opening an educational institution after addressing the security concerns of the Army. One could say that final decision to grant No Objection Certificate could not be taken to the exclusion of HQ Eastern Command.

23. It may also be pertinent to note that the officers, PW-1,PW-3 and PW-6 were all well aware of this process. Not only they were aware but they actively participated in the deliberations . Even though they have been charged for their lapse they have been given lighter sentence. As a matter of fact some of them have been promoted by the Chief of Army Staff, which was done after their statements were recorded by the GCM, after setting aside their sentences.

24. The location of the Army base is far away from the National Frontier. Security of Army base can not be ensured by acquisition of private or government land by the Army. This can not be a valid reason for acquisition of land as per the government orders unless there are specific orders to that effect. Moreover, it has to be understood that the land belongs to the government. Therefore, they can not be told as to how they have to use their land by the Army. The only question that can be raised by the Army is with respect to the security concerns and not how to use the land. The Memorandum of Understanding clearly addresses those concerns. Therefore, it can not be said that the petitioner was guilty or culpable for having allowed this process to be initiated.

25. It may be noted that once the objections were raised by the Army for establishing a tourist complex on the land, a proposal was initiated by the District Magistrate, Darjeeling vide his communication dated 01.10.2008 addressed to the West Bengal Government for establishment of the

educational institution. The decision to establish the educational institution was primarily taken by the District Magistrate which he was competent to do so as the land belongs to the West Bengal Government. It was this proposal which was allowed to be processed by the petitioner. The petitioner can at best be accused of allowing a proposal to be examined which was moved by the District Magistrate but only after the security concern were addressed. In the opinion of the petitioner security concern were clearly addressed. There was no impropriety in allowing the proposal to fructify. The only reservation that could be shown by the Army was to address its security concern and not to prevent the Government from undertaking any activity on the said land which it owns.

26. What implies from the above mentioned discussion is that it was the prerogative of the West Bengal Government to allow an educational institution to come up. The Army cannot have any say in the matter except that its security concern should not be jeopardised. Therefore, the petitioner, who has been charged for having committed an act of omission & commission which is an act prejudicial to good order and military discipline cannot be sustained. In the book “Military Law” Third Edition by Edward M Byrna, the military justice system as obtaining the United States has been compared with Civilian criminal justice system in the following words:

> “Civilian criminal law seems to restrict and regulate behaviour so that people can live together in peace and tranquillity.

> Military justice has a similar and yet more positive purpose. Military justice must, of necessity, promote good order and high morale and discipline. In this context, discipline means a state of mind in the individual serviceman, so that he will instantly obey a lawful order, no matter how unpleasant or dangerous the task may be. This state of mind could be described as 'self-discipline'. In the military, the role of law in relation to discipline is to provide a framework for the encouragement of such self-discipline. In this way, law supports the military mission, which it must do if the nation's freedom is to be protected and preserved. (Of course, positive leadership through rewards and personal example is the best reinforcement of self-discipline). Military justice like civilian law, requires that the rights of the serviceman be protected and seems to assure everyone justice under the law"

27. We would also like to highlight the observations made by DC Holland, who had observed with regard to Section 69 of the British Army (corresponding to section 63 of the Army Act 1950.

> "It is regrettable that the court-martial committee did not draw attention to the offence created by Section 40 of the British (Army Act), that is conduct prejudicial to good order and military discipline. There is a strong case for the repeal of

this notionally vague section. Surely, if the conduct is truly prejudicial to good order and military discipline, it should be possible to prove one of the many specific offences existing under the military law." We would also like to reproduce an extract from the Study and Practice of Military Law 7th Revised Edition 2010 by Col GK Sharma and Col MS Jaiswal.

"The (above) criticism is not entirely unfounded. The Section lacks precision as well as sharpness of definition, as to what amounts to an act or omission prejudicial to good order and military discipline. Therefore, in certain cases, the possibility of erroneous application of this Section cannot be ruled out". The above observations have proved prophetic in the case before us.

28. The import of the charge No.4 is that the Memorandum of Understanding signed with four private companies for installation of educational institution was undertaken by the petitioner when the case was already taken up with West Bengal Government for transfer of the said land due to security concern.

29. As discussed above, there was no legal proposal pending with the West Bengal Government for transfer / acquisition of the land. What was

pending before the West Bengal Government was a desire shown by the predecessor of the petitioner to acquire the land for the Army. This decision was taken without prior approval of the Government, which in law cannot be sustained. Therefore, to say that entering into a Memorandum of Understanding with four companies had the consequence of diluting the concern of the Army, which had sought the acquisition of the land can not be accepted . The said communication at the best can be construed to be an anxiety shown by the Army for allowing a tourist complex to come up nearby which had security implications. Therefore, to say that the petitioner had committed an act of indiscipline would be farfetched . There was no legal proposal for acquiring this land pending before the Government of India at that time.

30. The import of the 5th charge is tendering of no objection for installation of educational institutions and entering of Memorandum of Understanding with four private companies. As already discussed above, tendering of no objection for installation of educational institution was conditional. The decision to grant conditional no objection certificate was only a process to examine the proposal put forth by four companies and also by the District Magistrate. As a matter of fact no final decision in this behalf has been taken by the petitioner. Signing of Memorandum of Understanding with the four private companies was done only after the security concern of the Army was addressed. This is the only objection that the Army could have

taken up. Admittedly the land did not belong to the Army but is owned by the State Government. Every construction activity or any other activity undertaken on a private land or State land is the domain of the owner of the said land with an exception that it should not jeopardise the security concern of Army. Therefore, to say that Army has pre-emptive right to curtail any activity adjacent to its land is misplaced.

31. Now coming to the question whether the petitioner has committed offence u/s 63 of the Army Act. Section 63 of the Army Act reads as under:

> "63- Violation of good order and discipline- Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, on conviction by court martial , be liable to suffer imprisonment for a term which may extend to seven years of such less punishment as is in this Act mentioned".

32. Section can be compartmentalised in two categories .

a) Any person subject to this Act who is guilty of any act or omission which, though not specified in the Act,

b) which is prejudicial to good order and military discipline. It contemplates that any act or omission which, though not specified in the Act but is prejudicial to the good order and military discipline.

Since there was no valid proposal for acquiring this land before the State Government, it can not be said that petitioner had violated any legal norms in

giving conditional no objection certificate. The word discipline in Military Law has been defined in the Black's Law Dictionary as "A state of mind inducing instant obedience to a lawful order, no matter how unpleasant or dangerous such compliance might be". It essentially speaks of conduct of a person in relation to a lawful order. Any person charged of indiscipline must have been found guilty for an, illegal conduct which per se must be in violation of a lawful order. There must exist mandatory regulations stating the minimum level of conduct that a person must sustain to avoid being subjected to disciplinary action. A good order contemplates a standard by which a person is considered fit to his tenure and consists of avoiding of criminal behaviour. It contains good ordinary conduct. To examine these two expressions in the present context what is being alleged against the petitioner is (a) that he directed issuance of a conditional No objection Certificate for establishing an educational institution on the land which was sought to be acquired by the Army. (b)This process was initiated without the prior consent of the HQ Eastern Command.

33. Admittedly, the malfide intention of the petitioner in initiating this process has already been rejected by the GCM He has been found guilty of improper action. Applying the definition of section 63, the petitioner has not breached any rule or law in initiating this process nor any such violation has been brought to the notice of the court. Therefore, to suggest that he has breached any law or rule which would entail disciplinary proceedings against him is uncalled for . There is no finding that he has committed any

misconduct. Therefore, to suggest that the petitioner for what has been alleged against him is guilty of any indiscipline is not legally correct.

34. Second question arises whether he has committed an act which has breached the good order of the Army. A good order is co-related to the behaviour of a person. Whether initiating an action or sending a proposal of establishing an educational institution tantamounts to breach of good order is the issue which arises in the present case. A good order has something to do with the personal behaviour of an officer while serving in the Army. An act by which disorder is created in the Army. For instance burning items of a fellow soldier may amount to breach of good behaviour. A good behaviour is co-related to the personal acts of an officer working in the Army. Admittedly, in the present case no such act is attributed to the petitioner which can be said to be an act which brings down the image of the Armed Forces in the eyes of public.

35. Admittedly, petitioner in this case has not committed any such act by which the image of the Army or discipline in the Army has been lowered down. Merely because he allowed the process to be examined for establishing an educational institution by itself does not violate discipline nor good order. No rule has been breached by the petitioner in this behalf nor has such an act lowered the image of the Army or its discipline.

36. “3(a) “An omission” to be punishable under this Section must amount to neglect which is willful and culpable. If wilful and deliberate it is clearly blameworthy. If it is not willful, it may or may not be blameworthy, and the Court must consider the whole circumstance of the case, and in particular the responsibility of the accused. A high degree of care can rightly be demanded of a person who is in-charge of a motor vehicle or public money or property, or who is handling firearms or explosives, where a slight degree of negligence may involve loss or danger to life; in such circumstances a small degree of negligence may be blameworthy. On the other hand, neglect which results from mere forgetfulness, error of judgment or inadvertence, in relation to a matter which does not rightly demand a very high degree of care, would not be judged blameworthy so as to justify conviction and punishment. The essential thing for the Court to consider is whether in the whole circumstances of the case as they existed, at the time of the offence, the degree of neglect proved is such as, having regard to their military knowledge of the amount of care which ought to have been exercised, rendering the neglect substantially blameworthy and deserving of punishment.” Further, language of Section 63 is “prejudicial to good order and military discipline”. The word ought used in this Section shows that both the conditions must be satisfied.

37. As already stated herein supra, the petitioner was pursuing the proposal for establishing the educational institution that too after taking into consideration the security concern of the Army. It may be stated clearly that

objection was raised by the Army only against the establishment of the tourist complex. It can not be said that such an opposition was raised for establishment of educational institution also. It was specifically indicated that establishment of tourist complex will result in exposing the area to public at large and all and sundry can come and visit the place. This could include foreign elements inimical to the country. The same can not be said to apply to an educational institution where entry is restricted to only those involved in the institution. Therefore, judging the proposal on the same template would be unjustified.

38. In view of the above, the appeal is **allowed**. The petitioner is acquitted of all charges. He is entitled to restoration of all benefits with 12% interest.

39. An individual's reputation and honour is a fundamental right. Speaking of honour and reputation, we quote Hon'ble Justices Anil R.Dave and Dipak Misra in SCC (2014) 5 SCC 417,

> "When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the downtrodden and the privileged. The aroma of reputation is an excellence which cannot be allowed to be sullied with the passage of time. The memory of nobility no one would like to lose; none would conceive of it being atrophied. It is dear to life and on some occasions it is dearer than life.

And that is why it has become an inseparable facet of Article 21 of the Constitution."

In this respect we would like to reproduce Text 34 Chapter 2 of 'The Bhagvadgita' :

("P*eople will always speak of your infamy, and for a respectable person, dishonor is worse than death")*.

40. The petitioner has suffered undue harassment and loss of reputation by the act of the respondents which if not compensated would be a travesty of justice. Therefore, as a notional compensation for the harassment and loss of honour and name caused to the petitioner, a cost of Rs.1,00,000/- is to be paid by respondents to the petitioner within 12 weeks from the issue of these orders.

(SUNIL HALI)
MEMBER (J)

(J.N.BURMA)
MEMBER (A)

New Delhi
05.09.2014
brh