REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2169 OF 2014

UNION OF INDIA AND OTHERS ...APPELLANT(S)

VERSUS

LT. GEN. (RETD.) S.K. SAHNI ...RESPONDENT(S)

WITH

TRANSFERRED CASE (CRIMINAL) NO. 1 OF 2017

J U D G M E N T

B.R. GAVAI, J.

1. Criminal Appeal No.2169 of 2014 is filed by Union of India and others challenging the orders passed by Armed Forces Tribunal, Chandigarh Regional Bench at Chandimandir (hereinafter referred to as the "AFT") dated 10th October 2013 in MA No. 1871 of 2012 and OA No. 262 of 2011 to the effect that it reduces the sentence of three years rigorous imprisonment and cashiering imposed on the respondent herein-Lt. Gen. (Retd.) S.K. Sahni to dismissal from the service as provided in

Section 71(e) of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the "AFT Act"), and 21st March 2014 in MA Nos. 3201 and 3202 of 2014 in OA No. 262 of 2011, whereby the learned AFT refused to grant leave to appeal.

2. Transferred Case (Criminal) No. 1 of 2017 is filed by the petitioner therein (respondent herein), originally before the High Court of Punjab and Haryana being Criminal Writ Petition No. 1895 of 2013, challenging the dismissal of MA No. 1871 of 2012 and OA No. 262 of 2011, which was filed challenging the order dated 18th February 2011, passed by the General Court Martial (hereinafter referred to as the "GCM"), vide which the respondent herein was held guilty of first, third, fourth, fifth, seventh and ninth charges and was sentenced as under:

(i) To be cashiered; and

(ii) Rigorous imprisonment for three years subject to confirmation.

3. As such, both, the appeal filed by the Union of India and others, and the transferred case, filed by the respondent herein

have been heard together. For the sake of convenience, the facts are taken from Criminal Appeal No. 2169 of 2014.

4. The respondent was commissioned in the Indian Army on 16th December 1967 and earned promotions and was promoted to the rank of Lieutenant General in May 2003. The respondent was thereafter appointed as Director General, Supplies and Transport (hereinafter referred to as "DGST") with effect from 1st February 2005. He was also awarded the "Ati Vishisht Seva Medal" in January 2005.

5. An anonymous complaint was received in the Directorate of Supplies and Transport (hereinafter referred to as the "Directorate") on 4th April 2005. On 8th April 2005, the complaint was forwarded and a request was made to the respondent to examine the complaint and forward his comments on the file on priority for perusal of the Directorate. It is contended by the respondent that he replied to the same on 12th September 2005.

6. A Court of Inquiry was ordered against the respondent under the directions of General Officer Commanding-in-Chief,

Western Command (hereinafter referred to as "GOC-in-C"), to investigate into the following seven allegations:

> "i. Procurement of Kabuli Chana through contract finalized during April 05 by Army Purchase Organization;
>
> ii. Tendering and procurement of Barley crushed and Gram kibbled during financial year 2005-2006 by Army Purchase Organization;
>
> iii. Testing and sampling of items of ration by CFL Delhi as per laid down specification arid its subsequent purchase/procurement from various firms/dealers as per approved sample and ASC specifications;
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> iv. Tendering and procurement of 979 Metric Tonnes of Masoor Whole which was supplied by GRAINFED; -
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> v. Violation, if any, of the laid down quality norms, ASC specifications and other desired parameters with regard to moisture content, number counts per 100 gm weight, system of imposing price reduction of commodities contracted.
>
> vi. Any undue favour granted to any contractor for procurement of meat by HQ Central Command during financial years 2003-2004 and 2004-2005
>
> vii. Any irregularity with regard to permitting a civil contractor to dump excavated soil within the compound of ASC Centre and College of any undue favour taken from any contractor by and Army pers at ASC Centre and College."

7. The Court of Inquiry only recommended for award of recordable censure against the respondent while recommending disciplinary action qua other officials under the Army Act, 1950 (hereinafter referred to as the "Army Act") and Army Rules, 1954 (hereinafter referred to as the "Army Rules"). However, as per the direction of Army Commander, the respondent's name was included in the list for disciplinary action. The Court of Inquiry was finalized on 24th June 2006, and thereafter, the GOC-in-C directed a disciplinary action against the respondent.

8. As contended by the respondent, the GOC-in-C, despite recommendation mentioned in the Inquiry Report for an administrative action, directed disciplinary action while admitting that there was no evidence of the acts of financial consideration qua the respondent. The respondent, on attaining the compulsory retirement age of 60 years, retired on 30th September 2006.

9. The respondent filed a writ petition before the High Court of Delhi being WP (C) No. 11839/2006 seeking for quashing and setting aside of the proceedings and recommendations of

the Court of Inquiry in terms of order dated 26th May 2005 and order dated 18th July 2006 directing attachment of the respondent. The High Court of Delhi allowed the said writ petition, vide order dated 11th January 2007, in the following terms:

> "For the reasons afore-recorded, we are of the considered view that the respondents have not complied with the provisions of Rule 180 of the Rules, as such, they cannot take any further proceedings against the respondents on the basis of the Court of Inquiry held in furtherance to the order of the competent authority dated 26.9.2005. However, the respondents are at liberty to give notice to the respondent and continue with the proceedings under Rule 180, and in the alternative, even to take recourse to the provisions of Rule 22, or exercise any other power available to them under the Act, insofar as they do not rely upon the proceedings on the aforesaid Court of Inquiry."

10. The appellants, instead of invoking Rule 180 of the Army Rules, wherein opportunity was to be provided to the respondent, resorted to Rule 22 of the Army Rules and issued a fresh notice and passed an order dated 31st August 2007 and ordered attachment under Section 123 of the Army Act.

11. The respondent challenged the above by filing a writ petition in the High Court of Delhi being WP(C) No. 6632/2007, which was then transferred to the learned AFT, Principal Bench at New Delhi. The said learned AFT, vide its order dated 3rd September 2009, set aside the subsequent act of the Army Authorities and held that resorting to Rule 22 of the Army Rules was totally unwarranted and illegal. The appellants were however directed to resort to Court of Inquiry after giving an opportunity to the respondent and to comply with the requirement under Rule 180 of the Army Rules.

12. The GOC-in-C, vide its order dated 22nd September 2009, directed reconvening/reassembling of the Court of Inquiry on the basis of the liberty granted by the learned AFT, New Delhi vide its order dated 3rd September 2009. The GOC-in-C vide its order dated 12th April 2010, on the basis of the Court of Inquiry, directed disciplinary action against the respondent.

13. On 30th July 2010, a convening order, directing assembly of the GCM under the Army Act, was issued. The GCM consisted of 7 Members, out of which, 6 Members were holding

ranks of Major General which was lower than the respondent's rank. The Presiding Officer, however, was of the rank of Lieutenant General, but was allegedly junior to the respondent. Even the Judge-Advocate General (hereinafter referred to as "JAG") was allegedly junior to the respondent and was only holding the rank of Colonel. On the same day, i.e., 30th July 2010, a charge-sheet comprising of nine charges was served upon the respondent.

14. The GCM, vide order dated 18th February 2011, found the respondent not guilty of the charges No. 2, 6 and 8 whereas found the respondent guilty of charges No. 1, 3, 4, 5, 7 and 9 and was sentenced as under:

(i) To be cashiered; and

(ii) Rigorous imprisonment for three years subject to confirmation.

The findings and sentence of the GCM were confirmed by the Chief of Army Staff vide its order dated 13th January 2012.

15. The respondent filed an appeal before the learned AFT against the order of the GCM dated 18th February 2011, which

was further confirmed by the order dated 13th January 2012 passed by the Chief of Army Staff. The learned AFT, vide the impugned order dated 10th October 2013, partly allowed the petition. The learned AFT held that the findings of the GCM as against the respondent were liable to be affirmed. However, the learned AFT held that the sentence of cashiering and substantive imprisonment of 3 years' rigorous imprisonment was harsh and thus, modified the sentence to dismissal from service.

16. The respondent filed a writ petition being Criminal Writ Petition No. 1895 of 2013 before the High Court of Punjab and Haryana at Chandigarh, challenging the aforesaid impugned order dated 10th October 2013 passed by the learned AFT. The High Court issued notice vide order dated 28th October 2013. In the meanwhile, the appellants also filed an appeal being Criminal Appeal No.2169 of 2014 before this Court, challenging the order passed by the learned AFT dated 10th October 2013. Thereafter, the respondent filed an application being CRL.M.P. No.24464 of 2014 in Criminal Appeal No.2169 of 2014 seeking

transfer of Criminal Writ Petition No. 1895 of 2013, pending before the High Court of Punjab and Haryana at Chandigarh to this Court.

17. This Court, vide its order dated 22nd August 2016, allowed the said application and directed transfer of the said petition to this Court, to be listed along with Criminal Appeal No.2169 of 2014.

18. We have heard Shri R. Balasubramanian, learned Senior Counsel appearing on behalf of the Union of India and Shri K.K. Tyagi, learned counsel appearing on behalf of the respondent.

19. Shri Tyagi, learned counsel appearing on behalf of the respondent, raised a preliminary point that since the Members of the GCM were below the rank of the respondent, the GCM was not properly constituted, and as such, violative of sub-rule (2) of Rule 40 of the Army Rules. He relies on the order of this Court in the case of ***Ex. Lt. Gen. Avadhesh Prakash v. Union of India and Another***[1]. He submitted that from perusal of the said order, it will be clear that about 80 Lieutenant Generals

1 **Criminal Appeal No. 140 of 2019 dated 24.01.2019**

were available in the Indian Army at the relevant time, and as such, the Court-Martial which had Members below the rank of Lieutenant General, could not have tried the respondent. He therefore submitted that the GCM, which is constituted in contravention of sub-rule (2) of Rule 40 of the Army Rules, could not have tried the respondent. He further submitted that on the same ground, in view of Rule 102 of the Army Rules, since the JAG, who was of the rank of Colonel, which is below the rank of Lieutenant General, stood disqualified while acting as a JAG. He relies on the judgment of this Court in the case of ***Union of India and Another v. Charanjit S. Gill and Others***[2] in this regard.

20. Shri Balasubramanian, learned Senior Counsel appearing on behalf of the appellants, on the contrary, submitted that though sub-rule (2) of Rule 40 of the Army Rules requires that the Members of a Court-Martial for the trial of an officer shall not be of a rank below than that of the officer, it also provides that a departure from the said rule is permissible, when in the

2 **(2000) 5 SCC 742**

opinion of the convening officer, having regard to the exigencies of the public service, the officers of such rank are not available. He therefore submits that merely because the GCM consisted of the officers below the rank of Lieutenant General itself, would not *ipso facto* vitiate the proceedings. He submitted that the only requirement is that such an opinion is required to be recorded in the convening order. He submitted that insofar as the order of this Court in the case of ***Ex. Lt. Gen. Avadhesh Prakash*** (supra) is concerned, in the said case, the order was passed by this Court on the concession that such officers were available. He further submitted that in the said case, no such opinion as required under sub-rule (2) of Rule 40 of the Army Rules was recorded.

21. For appreciating the rival submissions with regard to the preliminary objections, it will be relevant to refer to sub-rule (2) of Rule 40 of the Army Rules:

> "**40. Composition of General Court-martial.-**
>
> (1). .....
>
> (2). The members of a court-martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening

> officer, officers of such rank are not (having due regard to the exigencies of the public service) available. Such opinion shall be recorded in the convening order."

22. In view of the specific contention with regard to the violation of sub-rule (2) of Rule 40 read with Rule 102 of the Army Rules, we have summoned the original file. On perusal of the original file, we find that the convening officer has recorded reasons as to why the officers of the rank of respondent were not available. We find that the reasons given, for doing the same, would fall within the exigencies of the public service. The scope of judicial review of such a decision is very limited. Unless it is found that the decision taken by the authority suffers from arbitrariness, irrationality or unreasonableness, it would not be permissible for us to sit in an appeal over the decision of the convening officer. The limited inquiry that would be permissible is, as to whether the reasons recorded are having regard to the exigencies of the public service or not. On perusal of the original file, we find that the reasons given are directly concerned with the exigencies of the public service. We therefore do not find any merit in the said submission.

23. Insofar as the order of this Court in the case of ***Ex. Lt. Gen. Avadhesh Prakash*** (supra) is concerned, in the said case, the contention made on behalf of the petitioner therein was that the respondents therein could have tried to make Lieutenant General available. In any case, from the said order, it is not clear as to whether the subjective satisfaction as required under sub-rule (2) of Rule 40 of the Army Rules was, in fact, recorded or not. Another reason that weighed with this Court for interfering with the order of the learned AFT was that the learned AFT had recorded that since the appellant therein had already retired from the service, there was no illegality in constitution of GCM. This Court found that such a finding was not permissible on the bare reading of Rule 40 of the Army Rules.

24. Insofar as the merits of the present matter are concerned, Shri Balasubramanian submits that after the learned AFT had concurred with the findings of the GCM that the charges against the respondent stood proved, there was no occasion for the learned AFT to have interfered with the penalty imposed on

the respondent. Insofar as the appeal of the appellants herein is concerned, the learned Senior Counsel for the appellants submitted that since there are concurrent findings of fact with regard to the charges being proved, no interference would be warranted in the appeal of the appellants. He therefore submitted that the appeal of the appellants deserves to be allowed and the Transferred Case (Criminal) No. 1 of 2017 filed by the petitioner (respondent in Criminal Appeal No. 2169 of 2014) be dismissed.

25. Shri Tyagi, learned counsel appearing for the respondent, on the contrary, would submit that the findings as recorded by the GCM as well as the learned AFT are recorded on the basis of conjectures and surmises. He submitted that in the GCM, the standard that is required to be followed is of a criminal trial. It is therefore submitted that unless the charges against an officer are proved beyond reasonable doubt, he cannot be held guilty in GCM. It is submitted that like a criminal trial, the benefit of doubt must go to the officer and not to the prosecution. He, however, submitted that in the present case,

the GCM as well as the learned AFT have given the benefit of doubt to the prosecution.

26. He submits that as a matter of fact, not a single charge stands proved beyond reasonable doubt against the respondent. However, the respondent has been convicted by the GCM without any evidence. He therefore submitted that the Transferred Case (Criminal) No. 1 of 2017 filed by the petitioner (respondent in Criminal Appeal No. 2169 of 2014) deserves to be allowed and the appeal filed by the appellants be dismissed.

27. With the assistance of the learned counsel for the appellants and the respondent, we have perused the order passed by the GCM as well as the learned AFT and the materials placed on record.

28. At the outset, we may state that there are inherent limitations on the jurisdiction of this Court and it will not be permissible to reappreciate the evidence as recorded by the GCM unless this Court finds that the material factors have been either ignored or the evidence that has come on record,

has been appreciated in a totally erroneous manner. With these limitations in mind, we will consider the materials placed on record.

29. Though nine charges have been framed against the respondent, he has been found guilty insofar as charges No. 1, 3, 4, 5, 7 and 9 are concerned. He has been found not guilty insofar as charges No. 2, 6 and 8 are concerned. The learned AFT has also concurred with the finding of fact holding the respondent guilty of the aforesaid charges. The learned AFT has observed that the evidence led with regard to all these charges is mostly common and as such, has decided all the said points together.

30. The learned AFT has come to a finding of fact that though the contracts were finalized by the Army Purchase Organization (hereinafter referred to as the "APO"), insofar as the provisioning of dry supplies for the troops is concerned, it found that both the APO as well as the Directorate, are concurrently and co-jointly responsible for the monitoring, examination and the progress of the contracts.

31. The respondent, at the relevant time, was holding the post of DGST. Though nine charges have been framed against the respondent, they are inter-connected and are related to three transactions as under:

(i) That the respondent had agreed to the proposal of M/s Gujarat Co-operative Grain Growers Federation Limited (hereinafter referred to as "M/s GRAINFED") for addition of two more tendering stations at Gadarwara, District Narsingpur, Madhya Pradesh and Narsingpur in Madhya Pradesh in addition to 14 tendering stations already mentioned in the contract. The charge was that this was done with an intent to defraud the State;

(ii) That though the respondent had enquired in the complaint dated 4th April 2005 alleging fake tendering and presence of Kesari Peas and Akra, which were unfit for human consumption, he had omitted to ensure investigation of the alleged presence of Kesari Peas and Akra in Dal Masur Whole. Therefore, the respondent was instrumental in feeding the food to the Army

Personnel, which was not as per the standards. As a continuation of the same transaction, with an intent to defraud, he had agreed to the proposal of M/s GRAINFED for upgradation of Dal Masur Whole supplied by the firm knowing that the said item had been found and declared unfit for human consumption; and

(iii) That the respondent had approved deviation with relaxation to M/s PUNSUP Limited and M/s MMTC Limited of permitting 350-400 grains per 100 grams of Kabli Chana as against 300-350 grains per 100 grams, and that this was done with an intent to defraud.

32. Insofar as the first charge is concerned, the findings of the learned AFT would reveal that the request of M/s GRAINFED for two additional tendering stations at Gadarwara and Narsingpur was made on 3rd March 2005 to the Chief Director of Purchase (hereinafter referred to as the "CDP"), APO. The APO forwarded the said request for comments/views of the Directorate vide communication dated 9th March 2005. The

perusal of the orders of the learned AFT as well as the GCM would reveal that, after accepting the recommendation of PW-6-Major General (Retd.) S.C. Mohan, the respondent did not agree to the request of M/s GRAINFED. However, the proposal was put up before him for reconsideration pursuant to the note prepared by PW-13-Col. (Retd.) N.K. Yadav, Director Provisioning, stating that the entire quantity against the acceptance of tender has already been tendered at Gadarwara within the delivery period. The respondent therefore agreed to the request of M/s GRAINFED for two additional tendering stations and the decision of the respondent was intimated to the APO.

33. With regard to the aforesaid charge, it will also be relevant to refer to the order passed by the learned AFT, in the case of ***Brig P.S. Gill v. Union of India and Others***[3]. In the said case, the petitioner therein (Brig. P.S. Gill), at the relevant time, was working as CDP, APO. The relevant portion of the said findings are as under:

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3 **OA No. 147 of 2010 dated 24th May 2011**

"2. From a bare reading of the aforesaid charges it appears that the petitioner in the capacity of his being Chief Director of Purchase, Army Purchase Organisation, Ministry of Defence contrary to APO/MOD Consolidated Order No.3 of 1987, with intent to **defraud/improperly approved addition of two more tendering stations namely Gadarwara and Narsingpur in Madhya Pradesh**. For the purpose of drawing the charges, reliance appears to have been placed by the respondents on the exhibits, the details of which may be charted out as under:

Exhibit	**Page**	**Para**
L	239	-
LXIX	294	-
XXVII	193	2
VI	141-143	1 and 2
II	83-85	-
V	139-140	-
LXXV	303-305	-
XXVIII to XXXIII/I	194-204/80	-

From the perusal of the exhibits noted above, there is nothing to show that the addition of two tendering stations was not within the powers of the petitioner. Nothing could be pointed out to show the relevancy of these documents for making out prima facie case against the petitioner. Further the statement of the witness namely, PW1 Brig PPS Bal of CDP Army Purchase Organisation, AHQ New Delhi was scrutinised. He was categorical in his statement that he was aware of the Consolidated Order No.3 of 1987 (Ext.2) permits the inclusion of additional tendering station. Ext.1 is related to the letter dated 06.10.2008 written to M/s M.P. Trade &

Investment Facilitation Corporation Ltd. for "procurement of 1000 MT Gram Crushed (Kibbled) against A/T even no. dated 05.12.2007 from M/s. MPTRIFAC-Addition of Tendering Station-Delhi. This one example was quoted by the witness. This itself indicates that the addition of tendering stations is within the discretion of the competent authority to the effect that "stores can be tendered at Delhi as a special case in the subject A/T, subject to the condition that any additional expenditure incurred by the purchaser/savings accruing to the supplier, on account of this addition of tendering Station, shall be reimbursed by the Supplier to the Government" which is also exactly the requirement mandated in defence Consolidated Order No.3 of 1987. Further with regard to the making of the additional tendering stations by the accused-petitioner as per the reply of PW1, the contract was amended as required by Government of India orders and the amended contract was also communicated by Exh. VI. There was no objection to such acceptance of tendering stations from Audit authorities or by PCDA. Apart from it, witness also makes it clear in his answer to Question No.4 that the tenderer has option to select stations where he can tender stores as per the contract. The APO does not dictate the tendering stations. However, they must lend themselves to ease of inspection and movement of stores to consignee depots. Lastly this witness also clarified that by making the addition of two tendering stations no monetary benefits could be acquired by petitioner nor there was any extra expenditure borne out by the respondents owning to acceptance of two new stations by the accused-petitioner. Further by adding these two new stations, no violation of any rule or order was made by the accused petitioner."

34. It could thus be seen that the very same AFT has come to a finding that the CDP, APO was within the powers to include additional tendering stations. It has further been found that there was no objection to acceptance of such tendering stations from Audit Authorities or by CDP, APO. It is further to be observed that the learned AFT has clearly noted that the Consolidated Order No. 3 of 1987 permitted inclusion of additional tendering station subject to the condition that the additional expenditure incurred by the purchaser/savings accrued to the supplier, on account of this addition of tendering station, shall be reimbursed by the Supplier to the Government. There was a specific finding that on account of addition of two tendering stations, neither any monetary benefits could be accrued to the petitioner therein (Brig P.S. Gill), nor there was any extra expenditure borne out by the Army owing to acceptance of two new stations by the petitioner therein (Brig P.S. Gill). In any case, it is clear from the said order that the authority to accept such additional tendering stations was with the CDP, APO. In view of this specific finding of the learned AFT recorded in the order dated 24th May 2011, we find that the

finding, to the contrary, recorded by another Bench of the learned AFT vide the impugned order dated 10th October 2013 in the case of the present respondent, would not be sustainable.

35. In any case, it is not even the case of the appellants herein that any loss was caused to the Army on account of such decision or any additional benefit was accrued to M/s GRAINFED by such deviation. This is apart from the fact that the Consolidated Order No. 3 of 1987 itself required any additional expenditure incurred by the purchaser/savings made by the supplier to be reimbursed by the Supplier to the Government. As such, the findings of the learned AFT that there was an intention on the part of the respondent to defraud, in our view, would not be sustainable.

36. Insofar as the second charge is concerned, it is with regard to the respondent not taking action on the basis of the anonymous complaint dated 4th April 2005. The related charge is that though the Dal Masur Whole was found to also contain

Kesari Peas and Akra, the respondent cleared the samples and the supply of said Dal Masur Whole was cleared. It is the case of the appellants that on account of this, the Dal Masur Whole, which was not as per the standards, was fed to the Army Personnel. It is their further case that the respondent also did not take immediate steps for preventing the consumption of the same. It is to be noted that after the receipt of the said anonymous complaint, the samples were sent for analysis and the presence of traces of Kesari Peas was revealed during analysis of samples on 13th May 2005. The respondent thereafter issued instructions to freeze the stocks. It is further to be noted that the DGST, vide order dated 12th April 2005, had directed a Departmental Court of Inquiry to inquire into whether there were any irregularities in tendering/inspection procedure of Dal Masur Whole offered by M/s GAINFED. It will be apposite to refer to the said order dated 12th April 2005:

> "1. A departmental Court of Inquiry composed as under will assemble at the place, date and time to be fixed by the Presiding Officer to investigate whether there were any irregularities in tendering/inspection procedure of Masur Whole offered by M/S Gujarat Coop Grain Growers' Federation Ltd. for inspection by CFL ASC, Delhi

against AT No.J-13028/1/4-03/45-RP/2005-PUR III dated 28 Feb 2005:-

Presiding Officer – Brig V Marwaha
DDST, HQ Delhi Area

Technical Members – Col SC Chakravarty
Dir ST (FI)

2. The court will specifically examine the following issues:-

(a) Whether the complete qty of 979.600 MT was tendered by 15 Mar 2005. If so why was the BIO instructed to inspect only 440.800 MT.

(b) Was it ascertained by the BIO that the complete qty i.e. 979.600 MT has been tendered and a report made to that effect.

(c) Why did the BIO not carry out sampling of the consignment, and why were the samples of bags rejected, not brought for the perusal of CO/Lab analysis.

(d) The decision of CO, CFL ASC Delhi to repack and retender the stocks as and when ready when the AT Note is against Risk Purchase; resulting in automatic extn of DP.

(e) The acceptance of a cert from the contractor that the balance of the consignment ie, 538.400 MT is packed in the same quality bags as the 440.800 MT; and thereby ordering its rebagging.

3. The Court will examine all associated issues, and pin point responsibility for lapses if any.

4. The proceedings duly completed will be submitted personally to ADGST (SM) by 19 Apr 2005."

37. It could thus be seen that the Court of Inquiry was directed to examine all associated issues and pin point responsibility for lapses, if any. It is thus clear that the finding that the respondent had failed to take cognizance of the complaint and direct an inquiry with that regard, is contrary to the material placed on record.

38. It is further to be noted that the GCM has itself, in its order dated 18th February 2011, come to a conclusion that 560.727.380 Metric Tons of Dal Masur Whole was declared gone bad within warranty period for which recoveries were made from M/s GRAINFED.

39. That leaves us with the third charge with regard to the relaxation being granted to M/s PUNSUP Limited and M/s MMTC Limited in acceptance of tender dated 26th June 2005, vide which 350-400 grains per 100 grams of Kabli Chana was permitted on price reduction of 0.5% instead of 300-350 grains per 100 grams. It is to be noted that, leave apart the

respondent or anyone else gaining from the said relaxation, there is a specific finding that on account of the decision of reducing 0.5% contract amount for such a relaxation, there has been a benefit to the public exchequer. It will be relevant to refer to the finding of the learned AFT in the case of ***Brig P.S. Gill*** (supra):

> "There is no dispute on the point that DGST was the competent authority for making relaxation in the specification. There is also ample evidence that the DGST being competent authority permitted to despatch 400 grains per 100 gms. in the place of 300-350 grains per 100 gms. DGST also appears to have made reduction of 0.5% from the contract amount, in that the Government money to the tune of Rs.7,57,480.16 was saved in the matter of supplier M/s. Punjab State Civil Supplies Corporation Ltd pertaining to Charge Nos. 3 and 4. Similarly, within his powers, he granted relaxation to M/s. MMTC to the tune of Rs.4,48,050.00."

40. It could thus be seen that the learned AFT has specifically come to a finding that on account of such decision, public money to the tune of Rs.7,57,480.16 was saved in the case of supplier M/s Punjab State Civil Supplies Corporation Ltd. Similarly, an amount of Rs.4,48,050/- was saved in the case of relaxation granted to M/s MMTC Limited.

41. It is not the case of the appellants that the Kabli Chana so supplied was of inferior quality or not as per the standards. The only allegation is that the relaxation which was granted was with regard to number of grains that every 100 grams should contain. On the contrary, on account of reduction in price, there has been a substantial saving to the public exchequer, leave aside any pecuniary gain to the supplier. As a matter of fact, even the GCM in paragraph (26) held that the respondent was entitled to benefit of doubt with regard to his intent but has found that the said act was prejudicial to good order and military discipline.

42. In any case, it is to be noted that clause 6 (a)(iv) in the tender inquiry of the APO, which has been in vogue for decades, permitted the same to be done. It will be relevant to refer the same, which reads thus:

> "6 (a)(iv). When an appeal is preferred by the supplier against the decision of the inspecting officer the final finding of the appellate authority viz. QMG's Branch, ST-7/8 will automatically supersede the original report of the Inspecting Officer irrespective of the fact whether the said inspecting officer recommended the consignment to be accepted subject to quality allowance price

> reduction etc. In the event of any supplies being found not conforming to the prescribed specification but being considered of acceptable quality the Chief Director of Purchase may, at his sole discretion, accept the supplies subject to such reduction in price as he considers reasonable, in the light of the defects found in the supplies or the quality of the supplies accepted. In case, the reduction in price is up to 5%, the consignment will be accepted without any reference to the contractor for acceptance of the price reduction and the contractor will not raise any objection thereto. However, if any consignment is acceptable on price reduction over 5% the consent of the contractor will be obtained before acceptance of supplies."

43. It could thus be seen that the finding in that regard, in our view, is also not sustainable. It will also be apposite to refer to the following observations of the learned AFT in the impugned order:

> "38. However, we are of the opinion that though these charges stand proved which show that he had failed to perform the duties of the post of which he was assigned the duties and had done such acts prejudicial to good order and military discipline and he cannot escape the responsibilities in this regard. It is true that his acts were prejudicial to army discipline and he had committed such acts with intent to defraud but it cannot be said that he actually committed fraud or did any such act which resulted in actual loss or wrongful gain to any person though his acts lead to an inference that attempts were made to cause a wrongful gain and, therefore, he cannot escape his liabilities."

44. It could thus clearly be seen that the learned AFT has come to a conclusion that it cannot be said that the respondent has actually committed fraud or did any such act, which resulted in actual loss or wrongful gain to any person. However, in the same breath, the learned AFT observes that the acts lead to an inference that attempts were made to cause a wrongful gain, and therefore, the respondent cannot escape his liabilities. Observing this, the learned AFT comes to a finding that the offence under Section 52(f) of the Army Act, 1950, which reads thus, was made out against the respondent:

> "**52. Offences in respect of property.-**
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> .....
>
> (f). does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person."

45. We are afraid as to whether such a finding would be sustainable in law. The learned AFT has specifically come to a finding that the respondent has not committed any fraud or did not commit any act which resulted in actual loss or wrongful gain to any person. We are unable to appreciate as to on what basis the learned AFT comes to a conclusion that the acts lead

to an inference that the attempts were made to cause a wrongful gain. The finding as recorded by the learned AFT is totally contrary to the material placed on record.

46. We, therefore, find that the orders passed by the learned AFT as well as the GCM are not sustainable in law. The appeal of the appellants deserves to be dismissed and the Transferred Case (Criminal) No. 1 of 2017 filed by the petitioner (respondent in Criminal Appeal No. 2169 of 2014) be allowed.

47. In the result, we pass the following order:

A. <u>Criminal Appeal No. 2169 of 2014:</u>

(i) Criminal Appeal No. 2169 of 2014 filed by the appellants is dismissed.

B. <u>Transferred Case (Criminal) No. 1 of 2017:</u>

(i) Transferred Case (Criminal) No. 1 of 2017 filed by the petitioner (respondent in Criminal Appeal No. 2169 of 2014) is allowed;

(ii) The order dated 18th February 2011 passed by the GCM holding the petitioner guilty and imposing penalty on

him and the impugned order dated 10th October 2013, passed by the learned AFT are quashed and set aside;

(iii) The petitioner is acquitted of all the charges levelled against him; and

(iv) The petitioner would be entitled to all pensionary and consequential benefits in accordance with law. The arrears of such benefits shall be computed and paid to the petitioner within a period of three months from the date of this judgment.

.....J.
[L. NAGESWARA RAO]

.....J.
[B.R. GAVAI]

NEW DELHI;
MARCH 23, 2022.