

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WP (C) No. 142 of 2001

% Date of Decision: 29.05.2008

MAJOR SURESH RANA ... .. PETITIONER

*Through :* Mr. Viraj R. Datar, Advocate.

- V E R S U S -

UNION OF INDIA & ORS. ... .. RESPONDENTS

*Through :* Mr. Sanjay Katyal, Advocate  
with Major S.S. Pandey.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE MOOL CHAND GARG

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|----|------------------------------------------------------------------------------|-----|
| 1. | Whether the Reporters of local papers<br>may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not?                                           | Yes |
| 3. | Whether the judgment should be<br>reported in the Digest?                    | Yes |

SANJAY KISHAN KAUL, J. (ORAL)

1. The petitioner was commissioned as a Second Lieutenant in the Army Ordnance Corps on 22.12.1979 and was sent on deputation to DGAR, Shillong on 01.01.1992. The petitioner during the said deputation period was posted as Joint Assistant Director (Provisions) with HQ, DGAR and was

entrusted with the duty of provisioning of general stores and clothing for the troops of Assam Rifles. In performance of his duties, requirements used to be received from the Maintenance Groups of the Assam Rifles for about 70 major items, which were dealt with by the petitioner.

2. It is the case of the petitioner that he was the junior-most officer in the Directorate and was serving directly under the officers of the rank of Colonel, Brigadier and Major General. The Directorate is headed by a Director General of the rank of Lieutenant General and all financial powers are vested with the Director General or his nominee being the Deputy Director General. Thus, all purchases were required to be sanctioned by the Director General or his nominee and at the relevant stage of time, it was the Deputy Director General, who was entrusted with the said task.
3. The controversy has arisen on account of one such transaction pertaining to purchase of Hessian cloth, which is used as packing material by the troops for movement and packing purpose. On receipt of the requirement for this item by the Directorate from the Maintenance Group, indent was placed for purchase of the same from the DGS&D as it was not available in the Army. The indent did not receive any response resulting in a decision being taken for local purchase from the open market and tenders were invited after following standard procedure, which was placed before

the Board of Officers. The petitioner was not a member of the Board of Officers nor did he take part in the deliberations. The recommendations of the Board of Officers were placed before the Deputy Director 'Q' and the Deputy Director General, who approved the same and the item was procured. It appears that a Court of Inquiry was instituted in respect of the procurement of the said Hessian cloth, which was not a critical item. It was further alleged that the petitioner had obtained the sanction of higher authorities without projecting the stock position as well as not projecting the minimum escapable requirement.

4. The proceedings against the petitioner were initially under Chapter V of the Army Rules, 1954 ( hereinafter to be referred to as, 'the said Rules' ). The scheme of Section 1 of the said Chapter deals with investigation of charges and remand for trial. Rule 22 of the said Rules provides for the hearing on charge by the Commanding Officer in the presence of the accused with full liberty to the accused to cross-examine any witness against him. In case the Commanding Officer finds that the evidence does not show any offence under the Army Act, 1950 had been committed, the charge is dismissed or he can proceed for taking down the summary of evidence under Rule 23 of the said Rules. The relevant provisions of Rule 22 of the said Rules are as under :-

**“22. Hearing of Charge. –** (1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence:

Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been complied with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed and may do so if, he is satisfied that the charge ought not to be proceeded with.

Provided that the commanding officer shall not dismiss a charge which he is debarred to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.”

5. The present case was one where the Commanding Officer did not dismiss the charge, but proceeded to take down the summary of evidence under Rule 23, the relevant portion of which is as under :-

**“23. Procedure for taking down the summary of evidence. –** (1) where the case is adjourned for the purpose of having the evidence reduced to writing, at the adjourned hearing evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer or such officer as he directs.”

6. The Commanding Officer under the scheme of the said Rules has to thereafter exercise the options in terms of Rule 24 of the said Rules, which reads as under :-

**“24. Remand of accused. –** (1) The evidence and statement (if any) taken down in writing in pursuance of rule 23 (hereinafter referred to as the “summary of evidence”), shall be considered by the commanding officer, who thereupon shall either –

- (a) remand the accused for trial by a court-martial; or
- (b) refer the case to the proper superior military authority; or
- (c) if he thinks it desirable, re-hear the case and either dismiss the charge or dispose of it summarily.

(2) If the accused is remanded for trial by a court-martial, the commanding officer shall without unnecessary delay either assemble a summary court-martial (after referring to the officer empowered to convene a district court-martial when such reference is necessary) or apply to the proper military authority to convene a court-martial, as the case may require.”

7. A reading of the aforesaid rules shows that three options were available to the Commanding Officer. It is no-one's case that clause (a) aforesaid was made applicable, but the dispute arises on account of the fact that as per the petitioner, the Commanding Officer dismissed the charge while, according to the respondents, there was a reference of the case to a proper superior military authority. The respondents proceeded to hold a General Court Martial ( for short, 'GCM' ) where the petitioner was held guilty and was

imposed the sentence as under :-

- “(i) To take rank and precedence as if his appointment as substantive Major bore date 22.12.1995 (forfeiture of future seniority of rank for 5 years).
- (ii) To forfeit 3 years past service for the purpose of pension.
- (iii) To be severally reprimanded.”

8. The gravamen of the case of the petitioner is that the action of the respondents in holding the GCM is contrary to Rule 24 of the said Rules since a final finding was arrived at by the Commanding Officer that the petitioner was not guilty. It is, thus, the submission of the learned counsel for the petitioner that the Commanding Officer being the *persona designate* to take a decision in this behalf and the decision being so taken, there is no option available to a superior authority to proceed in the matter by directing a GCM until and unless the Commanding Officer refers that case to a proper superior military authority.

9. In order to appreciate this submission, it is necessary to reproduce what the Commanding Officer had recorded in the summary of the case and the opinion of the Commanding Officer dated 27.09.1995 made in the prescribed form. After considering the material and the testimonies, it was recorded in paras 8 and 9 as under :-

“8. I have carefully considered the Summary of Evidence. Evidence given by prosecution witnesses and documentary proof as recorded therein do not indicate any offence having been committed by the accused. To protect the

interests of justice, it is a fit case where all the six charges are required to be dismissed.

9. Since the accused has been attached to my unit by Army HQ, I therefore forward the case to higher authorities."

10. A reading of the aforesaid shows that the Commanding Officer after consideration of the summary of evidence held that the same did not indicate any offence having been committed by the accused. Thereafter, the conclusion is stated to be that to protect the interest of justice, it was a fit case where all the six charges are required to be dismissed.

11. It is the submission of the learned counsel for the respondents that the Commanding Officer did not actually dismiss the charges but had only formed an opinion to dismiss the charges. It is also submitted that there was no basis for making the noting of para 9 aforesaid as there was no requirement for the case to be placed before higher authorities on the ground that the petitioner was attached to the unit of the Commanding Officer until and unless the Commanding Officer was of the view that he would not like to take a decision in the matter and would like to forward the case for further consideration to the superior authorities.

12. The most relevant aspect in the present case is that the petitioner had received intimation from the superior authorities for forwarding the case. In pursuance thereto,

the following noting was made :-

“(In the opinion of Commanding Officer, the case is fit to be dismissed. The application for pre-trial advice is submitted as directed by convening authority vide DG Assam Rifles (D & V Br) Signal Nos. A 3710 dt. 19 Oct 95 and A 3748 dt. 27 Oct 95 for obtaining legal advice).”

13. The aforesaid shows that the Commanding Officer was of the opinion that the case was fit to be dismissed, but the same was being forwarded for pre-trial advice as per the directions of the convening authority. Thus, the Commanding Officer having formed his own opinion proceeded to send the papers over to the convening authority as per the directions of the convening authority.
14. Learned counsel for the respondents submits that there was, in fact, no such signal sent which can be construed as a direction by the convening authority and the papers were forwarded in view of the dilemma in the mind of the Commanding Officer. It is, thus, submitted that what the Commanding Officer did was within the parameters of clause (b) of sub-rule (1) of Rule 24 of the said Rules.
15. We are unable to accept the aforesaid plea on the bare reading of what has been noted. The noting clearly shows that the Commanding Officer had come to a conclusion which is clearly recorded that there was no case made out against the petitioner. Once having done that, the matter should have been put to rest. It is obvious that having arrived at the finding, there was no question of

further forwarding of papers to the convening authority and the same was obviously under a direction. The aforesaid conclusion formed by us is fortified by what the Commanding Officer himself has stated when he was called as a witness during the GCM proceedings. The Commanding Officer has categorically stated that he had no doubt in his mind and that after hearing the charges under Rule 22 of the said Rules, he complied with the provisions of Rule 24(1)(c) of the said Rules and thereafter recorded his findings. The Commanding Officer did not produce any document in respect of the said compliance but reiterated his view that what he had done was in terms of Rule 24(1)(c) of the said Rules.

16. The stand of the Commanding Officer being so categorically and what is recorded by the Commanding Officer being so apparent and clear, there can be no doubt that the said Commanding Officer proceeded to record the findings under Rule 24(1)(c) of the said Rules to the effect that there was no charge made out against the petitioner.

17. It may be noted at this stage that on the principles of law, there is no dispute in the submissions of the learned counsel for the parties that if the Commanding Officer has actually proceeded under Rule 24(1)(c), then that is the end of the matter and the question of holding any GCM or taking any further step would have arisen only in case any

reference had been made in terms of Rule 24(1)(b), which had to be of the own volition of the Commanding Officer and not under any dictat. This agreement is in conformity with the settled legal position as enunciated in C.W.P. No. 2726 of 1990 titled 'Lt. Col. Satish Kumar Sharma v. Union of India & Ors.' decided on 14.02.1991 of this Court, Lance Dafedar Laxman v. Union of India & Ors., DRJ 1992 (24) 125 and LPA No. 244 of 1985 titled 'Union of India & Ors. V. Maj. Virendrarai J. Kharod' decided on 15.07.1987 by the Gujarat High Court.

18. Learned counsel for the respondents did seek to persuade us to look into the proceedings of the GCM as also the additional summary of evidence recorded before the GCM to contend that this Court ought not to come to the aid of the petitioner.
19. We are unable to accept the plea for the reason that what has happened is not mere technical defect in GCM proceedings, but affects the very entitlement to initiate the GCM. If the Commanding Officer comes to an opinion that there is no case, there can be no question of holding a GCM. Interestingly, the additional summary of evidence before the GCM was done by changing the Commanding Officer and appointing a new Commanding Officer. The motive is obvious that in view of the opinion and decision recorded by the earlier Commanding Officer, it was not even considered

feasible to send the case to him as the convening authority apparently did not want to accept the finding of the Commanding Officer though they were fully conscious of the fact that once such a decision is made by the Commanding Officer, they have no such option to convene the GCM.

20. The judgments referred to by learned counsel for the respondents of Lt. Col. P.P.S. Bedi v. UOI & Ors., 1982 (3) SCC 140, Maj. G.S. Sodhi v. UOI, 1991 (2) SCC 382 and UOI & Ors. v. Maj. A. Hussain, AIR 1998 SC 577 are only to substantiate the plea that mere technical defects should not result in annulment of GCM proceedings, but we have already observed that what has happened is not mere technical defects, but the initiation of the GCM could not have taken place in view of the conclusion of the Commanding Officer. The convening authority has, in fact, used his command and influence to get the records from the Commanding Officer to proceed against the petitioner, which was not permissible as the designated authority was the Commanding Officer to take the decision with whom the petitioner was attached with and who had come to the finding of no guilt on the part of the petitioner.

21. A writ of mandamus is issued quashing the constitution and the findings arrived at by the GCM on 17.09.1998. A further direction is issued for consideration of the petitioner for promotion in accordance with law in

view of the first relief being granted to the petitioner. Needless to say, if in law it is permissible for the respondents to take out any other proceedings against the petitioner, the present order would not come in the way.

22. The parties are left to bear their own costs.

SANJAY KISHAN KAUL, J.

MAY 29, 2008  
*madan*

MOOL CHAND GARG, J.