

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

+ WP (C) No.1376/2006

% Date of decision: 01.05.2008

L/NK JAYANTA PRAMANIC ...PETITIONER
Through: D.S. Kauntae, Advocate.

Versus

UNION OF INDIA & ORS. ...RESPONDENTS
Through: B.S. Godara, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE MOOL CHAND GARG

- | | | |
|----|---|-----|
| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. | To be referred to Reporter or not? | No. |
| 3. | Whether the judgment should be reported in the Digest? | No. |

SANJAY KISHAN KAUL, J. (ORAL)

1. The petitioner was serving in the Army as a Ambulance Driver in Army Medical Corps under command of Commanding Officer Military Hospital Mathura since November 2002. A tentative charge sheet was prepared by Lt. Col. P.S. Santosh, Offg. Commanding Officer 4001 Field Ambulance under Section 69 of the Army Act (hereinafter referred to as said Act) on 14.7.2004. On that day itself, the petitioner was informed that Summary of Evidence has to be recorded shortly and was asked

to submit full particulars of the DWs. This ROE was on account of a complaint lodged against the petitioner by the husband of Mrs. Bobby Chaudhary alleging that on 27.4.2004, the petitioner committed an offence of using criminal force on her with intent to outrage her modesty. Court of enquiry was held by recording statement of 10 witnesses on 21.8.2004. On that basis, a conclusion was derived against the petitioner and it was that he should be tried for an offence on 27.4.2004 as lodged against him and therefore an order was passed by the third respondent for the trial of the petitioner by GCM vide order dated 28.8.2004.

2. On 8.1.2005, a charge-sheet was framed against the petitioner under Section 69 of the Army Act i.e., to say "committing a civil offence". An order was passed by the Commander 1 Corps Arty Bde i.e., sixth respondent, that the petitioner be tried by Summary Court Martial; the petitioner was tried by Summary Court Martial held on 3.2.2005 which commenced at 900 hours and concluded at 1300 hours on the same day and the petitioner was sentenced "to be dismissed from service".

3. A statutory appeal in terms of section 164(2) of the said Act was filed by the petitioner against the aforesaid order which was also dismissed vide order dated 20.10.2005 after directions were given in a Civil Writ Petition bearing No. 5008/2005 filed by the petitioner on 15.7.2005 vide order dt. 18.10.2005. It is against

the order of dismissal of the appeal, the petitioner has filed the present writ petition.

4. The petitioner has challenged his sentence and the order in appeal mainly on the grounds that Col. K.K. Sharma (C.O of 4001 Field Ambulance) was not his Commanding Officer; hence he was not empowered to proceed against the petitioner. He was neither entitled to record Summary of Evidence nor he was entitled to hold Summary Court Martial in view of the provisions of Section 116 of the Army Act which reads as under:-

“116. Summary Court martial (1) A summary court martial may be held by the Commanding Officer of any corps, department or detachment of the regular army, and he shall alone constitute the court.

5. A bare perusal of this provision does not show that only the Commanding Officer of the Command in which the petitioner is posted alone is empowered to hold the Summary Court Martial. However, the petitioner also wishes to take benefit of Note 5 appended to Section 120 F of the Act which stood deleted at the time when the offence was allegedly committed. The said Note which was earlier in existence has been appended to sub-Section 120 of the Army Act and reads as under:-

120 Powers of Summary Court Martial—(1) Subject to the provisions of Sub-section (2), a Summary Court martial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a District Court

Martial or an active service a Summary General Court Martial for the trial of the alleged offender, an officer holding a Summary Court Martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69 or any offence against the officer holding the Court.

(3) A summary Court martial may try any person subject to this Act and under the command of the officer holding the Court, except an officer, junior commissioned officer or warrant officer.

(4) A Summary Court Martial may pass any sentence which may be passed under this Act, except a sentence of death or (imprisonment for life) or of imprisonment for a term exceeding the limit specified in Sub-section(5).

(5) The limit referred to in Sub-section (4) shall be one year if the officer holding the Summary Court martial is of the rank of Lieutenant-Colonel and upwards, and three months if such officer is below that rank.

Note 5 A NCO or a sepoy can not be attached to another unit for the purpose of his trial by SCM except as provided in Regs Army para 381.

Regulation 381 of Army Regulation Act reads as under:-

381. Trial of Deserters.- Under normal circumstances trial by Summary Court Martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column one of table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by Summary Court Martial by the CO of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter insurgency operation or active hostilities or Andaman and Nicobar Islands. In no circumstances will a man be tried by Summary Court martial held by a CO other

the CO of the unit to which the man properly belongs; a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs.

TABLE

<i>Column one</i>	<i>Column two</i>
<i>Armoured Corps Regiment</i>	<i>Armoured Corps Centre and School</i>
<i>A unit of Artillery Regimental Centre concerned</i>	<i>A Unit of Engineers Headquarters Engineers Group, concerned</i>
<i>A unit of Signals Signal Training Centre, Jabalpur Gorkha Rifle battalion.</i>	<i>Gorkha Regimental Centre concerned</i>
<i>ASC Unit ASC Centre concerned</i>	<i>RV Corps RVC Centre</i>

6. It is submitted that in November 2002, the petitioner was posted on permanent strength of Commanding Officer, Military Hospital Mathura. On 27.4.2004 at about 1330 hrs the petitioner was put under the Duty Medical Officer as a Driver of Ambulance, when Smt. Bobby Chaudhary wife of another Army Personnel visited the Duty Medical Officer to take the medicine, as the said lady was under family way. Despite the fact that no complaint was made by that lady, the petitioner was still proceeded with Summary Court Martial and in fact the Commanding Officer failed to exercise his powers under Rule 22(1) and Rule 180 of the Army Rules, 1954. It is also submitted that the proceedings taken against him were contrary to the judgment delivered in the case **Ex.-Hav. Mahipal Singh Vs. Union of India and Others** reported in **55(1994) Delhi Law Times 176**. Relying upon Regulations 401 to 406, it was also contended that since the

petitioner was taken into Military custody with effect from 27.4.2004, he was denied a fair opportunity to defend the case which is violative of Rule 33(7) of the Army Rule, 1954.

7. It is also stated that justification given by the respondent by attaching the petitioner to some other unit by relying upon the Army order 7/2000 and also the plea of deletion of Note 5 is appreciated by the Division Bench of this Court in **L/Nk. Vishav Priva Singh** Vs. **UOI & Ors.** reported in **147(2008) DLT 208**. It is submitted that the plea of deleting Note 5 vide circular dated 28.8.2001 issued by the respondent was not accepted in the aforesaid writ petition as also in Writ Petitions Nos. 6185/2002, 2433/2003, and 20233/2005. It may be observed that Judgment in of **Ex. Hav. Mahipal's case(supra)** raises a similar point.

8. On the other hand, learned counsel appearing for the respondent submitted that the Judgment delivered by the Division Bench of this court is not applicable to the facts of this case as the offence committed by the accused/petitioner was after the deletion of Note 5 of which reference has been made in paragraph 10 of the judgment. It is submitted that once the said Note 5 was no more in existence in the Statute Book when the offence was committed by the petitioner he cannot take benefit of the said Note and as such the bar contained in Note 5 that a Sepoy cannot be attached to another unit for the purpose of trial does not hold water. As regard the plea of the petitioner that in the aforesaid Judgment an observation was also made that

deletion of Note 5 without issuing a gazette notification could not be considered as deleted is again of no consequence because when note 5 was added in the statute board, it was not done by way of gazette notification and, therefore, the question of deleting the same by issuing a Gazette Notification was not relevant. It is the matter of record that Note 5 appended Section 120 stood deleted on 28.7.2008 as per Annexure R 1 filed by the respondents whereas the offence in this case was committed by the petitioner on 27.4.2004.

9. It is thus submitted that only point taken by the petitioner that the Commanding Officer who held Summary Court Martial against the petitioner was not competent is of no consequence. Once the Army authorities were empowered to attach the petitioner to a different unit for the purpose of holding a Summary Court martial and the Summary Court martial is held in accordance with the law, no grievance can be made by the petitioner that he was not tried by the Commanding Officer of the unit to which he was attached.

10. Before the Appellate Authority, the petitioner primarily contended that the (Commanding Officer of 4001 Fd. Amb) had no jurisdiction to order Summary of Evidence as he was posted in Military hospital Mathura and could not be attached to any other unit that the provision of Army Rule 22 to 24 were not complied with and that the copy of the complaint made by the prosecutrix was not attached. Moreover, a circular as required under Section

23(3) read with Army order 256/72 with regard to the confession allegedly made by the petitioner was also not given and further none of the prosecution witness including Medical Officer corroborated commission of the alleged offence and as such it was a case of no evidence. Moreover, the petitioner ought to have been tried by DCM. The petitioner was also not provided required document thereby denying him an opportunity to prepare his defence. Thus, it was contended that petitioner was deprived of the services of preparing his defence properly. He was also deprived of service of the defence counsel. The friend of the accused provided to the petitioner was disqualified. The petitioner was also not explained the consequences of pleading guilty.

11. We have perused the original record and find that the petitioner was attached with C.O. 4001 Fd. Amb under provisions of Section 116 of the Act for taking disciplinary action against him. Hearing of the charge was carried out by the Commanding Officer who also recorded Summary of Evidence presence of the accused as per Rule 180 of the Army Rules. He was also given opportunity to lead his evidence. After perusal of the Summary of Evidence, the Commanding Officer under Army Rule 24 satisfied himself as to the prima facie nature of the case and then decided to deal with the case by SCM. Smt. Bobby Chowdhary, the prosecutrix was also examined during the Court of Inquiry and her statement forms part of Summary of Evidence which reflects

serious allegations leveled against the petitioner. A complaint was made by the husband of the lady to the Commanding Officer Mathura Cantt which has been produced before the court of enquiry. The petitioner was given an opportunity to cross-examine her which he exercised. He also pleaded guilty to the charge. The required certificate under Army 115 (2A) was duly signed by the petitioner and is attached to the Summary Court Martial proceedings which shows that petitioner pleaded guilty to the charges levelled against him. The order of the appellate authority goes to show that all procedural formalities were complied with including grant of friend of petitioner to remain present during the course of inquiry.

12. Taking all these facts into consideration and the factum of the deletion of Note 5 on which very strong reliance was placed by the petitioner, we find that the petitioner has no legs to stand and in fact the Judgment cited by the petitioner either in the case of **Ex.-Hav. Mahipal Singh (Supra)** and in the case of **L/Nk. Vishav Priva Singh (Supra)** has no application to the facts of this case. Moreover, in the facts of this case, taking into consideration the seriousness of the charges levelled against the accused to which he pleaded guilty and the manner in which the Summary Court Martial was conducted after recording the summary of evidence by a competent Officer and deletion of Note 5 from the Statute Book before the offence was committed, we do not find any reason to interfere in the order passed by the

Appellate Authority or by the Summary Court Martial, dismissing the petitioner from service.

12. Accordingly, the writ petition is dismissed with no order as to costs.

SANJAY KISHAN KAUL, J.

MAY 01 , 2008
rm

MOOL CHAND GARG, J.