

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

% *Date of Decision: 31st January, 2011*

+ **W.P.(C) 1743/2003**

HAVILDAR SURENDER SINGH Petitioner
Through: Ms.R.Archana, Advocate

versus

UNION OF INDIA & ORS. Respondents
Through: Mr.Ankur Chhibber, Advocate with
Major Rahul Soni.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.(Oral)

1. Heard learned counsel for the parties and the record pertaining to the Summary Court Martial Proceedings against the petitioner has been perused.

2. At the outset, it may be noted that the record does not evidence any advice by the Deputy Judge Advocate General to record Additional Summary of Evidence, to test the authenticity or veracity of any statement made by the recruit Upender Prashar as pleaded in paras 9 and 10 of the writ petition. Learned counsel for the petitioner had been given an inspection of the record, as recorded in the order dated 28.1.2011, and makes a statement in Court today that the

record belies the assertion of the petitioner in paras 9 and 10 of the writ petition.

3. On the night intervening 1st and 2nd September 2001 a commotion took place in the barrack where the recruit Upender Prashar was sleeping on the bed with a mosquito net enclosing the bed. He is purported to have yelled out that the petitioner Hav.Surender Singh attempted to sodomize him by mounting on his top and that he fondled and caressed him. Recruit Dhananjay Kumar and Recruit Daya Kishan who were present in the barrack were stated to have heard the cries of Upender Prashar. 3 officers L/Nk Neel Kumar, Hav.Gurbaksh Singh and Subedar D.L.Parate were the persons to whom the matter was reported there and then.

4. The record produced shows that the petitioner was right away marched before the Commanding Officer who heard the 3 recruits and the 3 officers as also the petitioner and opined that he should proceed under Rule 22 of the Army Rules 1954. Hearing of the charge proceedings commenced, and as per Rule 23 the evidence was reduced to writing i.e. the summary of evidence was recorded pertaining to the allegation against the petitioner of having entered the bed of Recruit Upender Prashar, fondled him, kissed him and to attempt an act against the order of nature i.e. sodomy.

5. Recruit Upender Prashar PW-1 deposed against the petitioner. Recruit Dhananjay Kumar and Recruit Daya Kishan corroborated Recruit Upender Prashar as PW-2 and PW-3 respectively. L/Nk Neel Kumar, Hav.Gurbaksh Singh and Subedar B.L.Parate who appeared as PW-4, PW-5 and PW-6

respectively deposed that upon hearing commotion they reached the bed of Upender Prashar who told them of what had happened and that the petitioner was present at the spot.

6. The record shows that the petitioner cross-examined the witnesses and the summary of evidence was completed by 15.9.2001.

7. Relevant would it be to note that during recording of the Summary of Evidence, the petitioner stated that he did not commit any wrong and that on the night in question he had gone to the Lines to check the recruits; whether they were sleeping. It is thus apparent that the petitioner admitted visiting the barracks where the recruits were sleeping. It may be noted that the time of the incident is 22:00 hours i.e. past 10 in the night.

8. The Commanding Officer took a decision that the petitioner should be tried by and under a Summary Court Martial.

9. Before the Court Martial Proceedings could commence, on 14.10.2001 the petitioner obtained a statement purported to have been written in his own handwriting by Recruit Upender Prashar and as per which he expressed apology for having been influenced to depose falsely against the petitioner. Thereafter, the petitioner wrote various letters praying that he be not tried by a Summary Court Martial.

10. The Commanding Officer received another communication purportedly from Recruit Upender Prashar in which he retracted from the contents of the statement dated 14.10.2001, alleging that the petitioner had obtained the same

from him under duress.

11. Needless to state, Upender Prashar never went and gave any written communication to the Commanding Officer and thus there was every possibility that the communication dated 14.10.2001 and/or the subsequent one were not his.

12. Be that as it may, record shows that on 7.2.2002 the Court convened. The charge was read out to the petitioner being the act of: *'DISGRACEFUL CONDUCT OF AN INDECENT KIND, IN THAT HE , AT NASIK ROAD, ON THE NIGHT OF 01-02 SEP.2001 WITH INDECENT INTENT LIED DOWN OVER NO.14438435W RECT. (DMT) UPENDER PRASHAR OF THE SAME UNIT IN HIS BED'*.

13. As recorded, the petitioner pleaded guilty. He signed the plea of guilt thereafter.

14. Notwithstanding the petitioner pleading guilty, the Court passed an order as under:-

"After reading the Summary of Evidence, the Court observes that the statement made by the accused therein negates the plea of guilt and the said plea is required to be altered to one of not guilty in accordance with AR116.

The accused is informed at this stage. The accused submits that his unequivocal plea of guilt may be accepted and his statement at the Summary of Evidence may not be taken into consideration. The accused further submits that he is voluntarily pleading guilty and he may not be put to the hardship and agony of undergoing a trial on plea of not guilty.

In view of the above submission made by the accused the Court decides to proceed with the trial on a plea of guilt."

15. It is apparent that the petitioner pleaded guilty when the charge was put to him. Since he had cross-examined the witnesses when Summary of Evidence was recorded and had given a version exculpatory of the guilt at that stage, notwithstanding the petitioner pleading guilty, the Court rightly opined that it should proceed ahead as if the petitioner had pleaded not guilty. At that stage, the Summary of Evidence was read and explained and once again the petitioner pleaded guilty.

16. Thus, the submission urged that the department should have recorded further Summary of Evidence when petitioner handed over the statement dated 14.10.2001 made in writing by Recruit Upender Prashar for the reason the same evidenced Upender Prashar retracting from his complaint, is rejected by us for the reason there is no law which requires further Summary of Evidence to be recorded, except where the Commanding Officer finds a taint or an irregularity in the Summary of Evidence recorded and forms an opinion that further Summary of Evidence be recorded. Needless to state, the petitioner had every opportunity to plead not guilty and thus requiring Upender Prashar to be produced as a witness of the prosecution and on oath, the petitioner could have cross-examined Upender Prashar.

17. Learned counsel for the petitioner has not shown to us any blemish whatsoever in the proceeding conducted and has not been able to show any inherent lacuna or a contradiction in the statements of the 6 witnesses who were examined when Summary of Evidence was drawn up.

18. We note that the only plea sought to be projected was of the Deputy Judge Advocate General requiring Additional Summary of Evidence to be recorded, as pleaded in the writ petition, in respect whereof we have already noted record evidencing no such opinion.

19. We note that the penalty levied upon the petitioner is of reduction in rank and keeping in view the seriousness of the allegation against the petitioner we do not find the penalty shockingly disproportionate and hence we dismiss the writ petition.

20. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

January 31, 2011
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