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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No. 1345/2010

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Date of Decision: 18.2.2011

BHM (Now Ex.Hav) Nirmal Singh *Appellant*
Through Mr.D.S.Kauntee, Advocate

Versus

Union of India & ors. *Respondents*
Through Mr.Jatan Singh with Mr.Ashok Singh,
Advs.

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MS. JUSTICE VEENA BIRBAL

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported in the Digest? | NO |

VEENA BIRBAL, J.

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1. By way of this petition, petitioner has prayed for issuance of a writ in the nature of certiorari for quashing the summary punishment order dated 28.5.2005 passed by the respondent no.3 as well as order dated 8.10.2005 passed by the Reviewing Authority. Petitioner has also prayed for issuance of directions in the nature of mandamus directing respondent nos.3 & 4 to give effect to order of promotion dated 1.3.2005 approved by the DPC with all consequential benefits.

2. Briefly the facts as alleged by the petitioner are as under:-

Petitioner was enrolled in the Army (Regiment of Artillery) as Soldier Gunner/Driver on 7th July, 1981. On 1st May, 1997, he was promoted to the rank of Havildar. On 3rd July, 2003, he had passed promotion cadre test for next higher promotion from Havildar to Naib Subedar. From 22nd September, 2004 to 8th October, 2004, petitioner had availed 12 days casual leave which was sanctioned by the competent sanctioning authority of the respondents. On 1st March, 2005, DPC had cleared his name for promotion to the rank of Naib Subedar and the same was also approved by the Competent Authority but promotion was never given effect to. On 24th May, 2005, the Disciplinary Authority framed a tentative charge sheet against him wherein it was alleged that on 1st October, 2004, at Ferozepur, while performing the duties as BHM of 38 Field Battery, he improperly detailed no.14385661K NK Amrik Singh for guard duties at 2 ASD (17FAD) despite the above named NCO having four red ink entries due to indiscipline contrary to instructions that indisciplined persons were not to be detailed for important guard duties. Without giving the petitioner a fair opportunity to make any statement in defence and without giving him an opportunity to cross examine the prosecution witnesses the Commanding Officer tried the petitioner summarily and awarded punishment of 'Severe Reprimand' vide impugned order dated 28th May, 2005. Petitioner stood retired w.e.f 1st August, 2005 in the lower rank of Havildar. Thereafter, petitioner filed a review petition.

Petitioner also filed a statutory petition under section 26 of the Army Act, 1950. Finding no response, petitioner filed WP(C) 18023/2005 before this court. On 16th September, 2005, the said petition was disposed of by the Division Bench of this court with the directions to the respondents to dispose of the petitioner's review petition expeditiously in accordance with law. On 8th October, 2005, respondent no.5 rejected the review petition of the petitioner.

Aggrieved with the same, petitioner filed another petition being WP(C) 22143/2005 before this court challenging the aforesaid rejection order. Pursuant to coming into existence of the Armed Forces Tribunal (hereinafter referred to as 'the Tribunal'), the writ petition was transferred to the said Tribunal and was numbered as TA 467/2009 for adjudication. The Tribunal dismissed the said TA vide order dated 3rd February, 2010 as barred under section 3(o)(iii) of the Armed Forces Tribunal Act, 2007.

As the grievances of the petitioner were not redressed on merits, the petitioner filed the present petition challenging the orders dated 28th May, 2005 and 8th October, 2005 of respondents.

3. The stand of the respondents in the counter affidavit is that merely because the petitioner was on 12 days casual leave from 27th September, 2004 to 8th October, 2004, the same did not absolve him of his responsibility in detailing unsuitable person for important guard duty. It is stated that whenever a large guard is provided by the

Regiment, all the sub units are informed well in advance to identify and detail suitable persons for the guard duty. The BHM has an important duty to perform in forwarding the names of suitable persons. It is further stated that in the present case, all the sub units of 13 Fd Regt were informed well in time that a guard party was to be detailed at 2 ASD (17FAD) w.e.f 1st October, 2004 and accordingly the names of suitable persons were to be detailed well in time. Petitioner at the relevant time was performing the duties of BHM of 38 Field Battery of 13 Field Regiment and it was primarily his responsibility to ensure that the names of suitable persons were forwarded and detailed for the important task. However, the petitioner failed to carry out his responsibility and improperly forwarded the name of NK Amrik Singh who had four red ink entries against his name and such an individual was unsuitable for the guard duty. Their further stand is that on 4th December, 2004, LNK Gursewak Singh of 38 Field Battery and L NK Kala Singh of 36 Field Battery who were members of the said Guard consumed liquor and had a quarrel wherein LNK Gursewak Singh fired at LNK Kala Singh with his service rifle, as a result, LNK Kala Singh died due to gun shot. NK Amrik Singh was guard Commander. The court of inquiry was ordered to investigate into the circumstances wherein the present petitioner had given a statement that he had detailed NK Amrik Singh as guard Commander for the said guard. Respondents have further stated that there was no violation of any rule

or procedure while dealing with the case of the petitioner. The Commanding Officer fully appreciated the evidence brought before him during the hearing of charge. During the summary trial proceedings, the petitioner pleaded guilty to the charge and was accordingly awarded the punishment of 'Severe Reprimand'. Their further stand is that all the relevant material was supplied to the petitioner at the time of hearing. The review petition of the petitioner was duly considered by the Reviewing Authority and had rightly rejected as it lacked in merit and substance. It is further stated that as per promotion rules, no individual can be promoted to next higher rank unless disciplinary proceedings are finalized and as disciplinary proceedings were pending, his promotion was withheld. As per respondents, no case is made out by the petitioner, as such no interference of this court is required.

4. Petitioner has filed rejoinder denying all the allegations made against him and reiterated the stand taken in the writ petition.

5. Learned counsel for the petitioner has contended that as per charge sheet the date of alleged incident is 1st October, 2004 whereas on the said date, petitioner was not physically present in the Unit but was on leave from 22.9.2004 to 8.10.2004, as such petitioner is not responsible for the alleged occurrence. It is further contended that petitioner was not given an opportunity to cross-examine the witnesses and was also not allowed to make defence statement and petitioner

never pleaded guilty, as such the order of punishment is bad and is liable to be set aside.

6. Learned counsel for the respondents has contended that petitioner pleaded guilty of his own in respect of the charge levelled against him. Learned counsel further submits that there is no violation of any rule or procedure while dealing with the case of the petitioner and the punishment awarded commensurate with the gravity of the offence committed by him. The stand now taken is an after thought.

7. The charge sheet dated 24th May, 2005 issued against the petitioner is as under:-

“The accused No.143582224A Rank BHM Name Nirmal Singh Sunit: 13 Field Regiment is charged with:-

Army Act Sec 63 AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

In that he,

At Ferozepur on or before 01 Oct 2004, while performing the duties as BHM of 38 Field Battery of 13 Field Regiment improperly detailed No.14385661K NK Amrik Singh for guard duties at 2 ASD (17 FAD) despite the above named NCO having four red ink entries due to indiscipline contrary to instructions that undisciplined pers are not to be detailed for important guard duties.”

Record of proceedings before the Commanding Officer under Rule 22 of the Army Rules, 1954 which is annexed with the counter affidavit shows that charge against the petitioner was read over and explained to him. The proceedings further show that prosecution witnesses namely Captain A.S.Negi, Adjt, 13 FD Regt and Sub Mohinder Singh, Offg SM,

13 FD Regt were heard in the presence of petitioner who was given full opportunity to cross-examine but petitioner had declined and further declined to make any statement in defence and no defence witness is produced and therefore the Commanding Officer on 28th May, 2005 had passed the order "To be tried summarily". In the summary trial, petitioner had pleaded guilty. Thereafter, punishment of 'Severe Reprimand' was awarded to him by the Commanding Officer on 28th May, 2005.

The stand of the petitioner is that he was on leave on the day of occurrence, as such false charge had been leveled against him. Learned counsel for the petitioner has shown the leave record of the respondents to show that petitioner was on leave from 22nd September, 2004 to 8th October, 2004. The same is not denied by learned counsel appearing on behalf of the respondents nor the same is denied in the counter affidavit on record of respondents. However the stand of the respondents is that simply because petitioner was on leave does not absolve him of his responsibility. The stand of respondents is that all the sub units of 39 Field Battery of 13 Field Regiment were informed well in advance for detailment as guard duty w.e.f 1st October, 2004 and names of persons to be detailed were to be forwarded well in time much prior to 1st October, 2004. The allegations are not specifically denied by petitioner in the rejoinder. Further petitioner has also not stated as to who had sent the name in question in his absence.

Petitioner ought to have stated so. The petitioner is silent on this aspect of the matter. Under the circumstances, the contention raised has no force and is rejected.

Perusal of the record shows that plea of guilt was recorded on 28th May, 2005 whereas the stand of the petitioner that respondents suo motu recorded the same and petitioner never pleaded guilty of his own. The stand taken is not believable. The petitioner had never raised any such objection in this regard in the earlier proceedings i.e in the review petition filed before the Reviewing Authority as well as in the earlier writ petition filed in this court being WP(C) 18023/2005 wherein directions were issued to the respondents to dispose of petitioner's review petition expeditiously. The said stand has been taken for the first time in the present petition that too in the rejoinder after a lapse of about five years. The plea taken is an afterthought and is not believable and hence rejected.

It has also come on record that petitioner was also punished on 24th March, 1995 for "AN OMMISSION PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE" and the punishment awarded was reduced to lower grade of pay for six months on 24.3.1995.

A copy of the said order is annexed with the counter affidavit filed by respondents.

In view of the above discussion, we find no reason to interfere with the orders which are challenged in this petition in exercise of our W.P.(C) No. 1345/2010

jurisdiction under Article 226 of the Constitution of India. In any event, grant of relief under Article 226 is a discretionary relief. Considering the facts and circumstances of the case, we do not wish to exercise the discretion in favour of petitioner. Petition stands dismissed. There is no order as to costs.

VEENA BIRBAL, J.

ANIL KUMAR, J.

FEBRUARY 18, 2011

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