

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

+ **WP(C) No.8480/2011**

% **Date of Decision: 02.12.2011**

Sepoy Rajesh Kumar Petitioner

Through Mr. K. Ramesh & Ms. Archana Ramesh,
Advocates

Versus

UOI & Ors. Respondents

Through Mr. Sumeet Pushkarna, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

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1. The petitioner has challenged the order dated 1st September, 2010 passed by the Armed Forces Tribunal, Principal Bench in OA No.122/2009 titled as Ex. Sepoy Rajesh Kumar Vs Chief of Army Staff and Ors., dismissing his original application against the order dated 12th December, 2007 passed by Summary Court Martial (SCM), whereby the petitioner was held guilty of committing the offence under Section 40(b) of the Army Act and the punishment of dismissal from service was imposed on him.

2. The petitioner was a sepoy of 24 Rashtriya Rifles (Bihar) and was charged for using threatening language to his superior officer, Company Hawaldar Major U.S. Pandey. The allegation against the petitioner was that on 30th May, 2007 he used abusive language to CHM U.S. Pandey. Though tentative charge sheet was issued to the petitioner under Section 40 (a) of the Army Act, however, after the summary of evidence was recorded, the charge sheet under Section 40(b) of the Army Act for using insubordinate language and criminal force to the superior officer was issued.

3. Though in the summary of evidence, a number of witnesses were recorded, however, during the Summary Court Martial only two witnesses were recorded on behalf of the respondents besides the evidence of the petitioner and on the basis of the evidence recorded during Summary Court Martial, petitioner was found guilty of the charge made against him and he was dismissed from service on 12th December, 2007.

4. The petitioner challenged his dismissal pursuant to Summary Court Martial contending, *inter alia*, that he was falsely roped in the case due to enmity and that he had not pleaded guilty to the charge and the respondents purposefully withheld material witnesses during trial.

5. The petitioner also pleaded that though initially a charge sheet under Section 40(a) of the Act was issued to him, however, after recording summary of evidence, the charge was modified. The petitioner also challenged his dismissal pursuant to Summary Court Martial on the ground that he was not afforded full opportunity which resulted into non-compliance of various provisions of the Army Act and consequently, the proceedings against him, which resulted into his dismissal, are vitiated.

6. The petition filed by the petitioner was contested by the respondents contending, inter alia, that from the date of joining, the petitioner had the tendency of questioning his superior officer and arguing with them and he had not even spared his Company Commander with whom he had entered into altercation. During the altercation, he used abusive language with his superior officers, which fact was established by the evidence produced by the respondents.

7. The respondents asserted that on 30th May, 2007, the petitioner, with Ex. Sepoy Sunil Kumar Marandi, showed resentment and used rude and offensive language against CHM US Pandey. The petitioner not only used abusive language against his superiors but sought interview with Company Commander as he was not ready to perform the duty assigned to him by his superior. The interview with the Company Commander was granted at the instance of the petitioner, however, his

request not to assign him the duty was turned down by the Company Commander. The further allegation against the petitioner is that while boarding the vehicle he had threatened CHM U.S. Pandey by pointing his weapon towards him and stating that if they come back they will shoot him. On 4th July, 2007, also the petitioner and Sepoy Sunil Kumar Marandi manhandled and beat CHM U.S. Pandey and used insubordinate language against him.

8. The petitioner had challenged the Summary Court Martial findings before the Armed Forces Tribunal on the ground that the evidence of PW-1 CHM U.S. Pandey, who had fixed the duties of the petitioner, could not be relied on and had to be rejected which plea was repelled by the Tribunal relying on Masalti Vs. State of UP, AIR 1965 SC 220. The Tribunal had noticed that the Supreme Court had held that it would be unreasonable to contend that the evidence given by a witness should be discarded only on the ground that it is evidence of partisan or interested witnesses, as rejection of deposition of such witnesses would invariably lead to failure of justice. The Tribunal also noticed that the statement of CHM U.S. Pandey was corroborated by Subedar P.K. Singh, who had detailed as to what was done by the petitioner and the other sepoy Sh. Sunil Kumar Marandi. The Tribunal, after perusing the testimonies of the two witnesses of the respondents and the statement of the petitioner had held that there was no reason to disbelieve the testimony of the witnesses of the respondents.

9. The plea of the petitioner that the initial charge framed against him under Section 40(a) of the Army Act could not be changed to Section 40(b) of the Army Act after recording the summary of evidence, was also rejected on the ground that it was not prejudicial to the petitioner in any manner and in any case, the petitioner was given full opportunity to rebut the charge under Section 40(b) of the Army Act. Reliance was also placed on *Shamnasaheb M. Multtani Vs. State of Karnataka* 2001 (2) SCC 577 holding that conviction would be valid even if there is omission or irregularity in the framing of the charge, provided it does not occasion in failure of justice. The Tribunal also relied on *State of Andhra Pradesh Vs. Thakkidiram Reddy and Ors.*, AIR 1998 SCW 2750 to repel the plea of the petitioner.

10. Before the Tribunal, the grievance was also made that while recording of summary of evidence there had been non compliance of statutory provisions. This plea was also repelled by the Tribunal holding that alleged irregularities in the course of investigation would not be relevant for the purpose of Summary Court Martial because the same had to be used for the purpose of contradicting the evidence recorded during full-fledged Summary Court Martial. It was held that such investigation loses its significance when there is ample evidence to prove the guilt of the accused during full fledged Court Martial and in any case, reasonable opportunity was given to the petitioner to cross-

examine all the witnesses, who had appeared in the Summary Court Martial. Reliance was placed on UOI & Ors. Vs. Major A. Hussain (1998) 1 SCC 537 holding that when there is sufficient evidence during Summary Court Martial to sustain conviction, it is not necessary to examine if pre-trial investigation was adequate or not.

11. The learned counsel for the petitioner has challenged the order of the Tribunal contending, *inter alia*, that in summary of evidence 13 witnesses were examined, however, the Commanding Officer while conducting the Summary Court Martial had called only two prosecution witnesses and had left balance 11 prosecution witnesses. The learned counsel contended that if a prosecutor drops any prosecution witness, who had deposed in summary of evidence, then under Army Rule-134 he has to produce them and surrender them to the accused for direct cross-examination. It was asserted by the learned counsel for the petitioner that though use of abusive language had been deposed by CHM U.S. Pandey and PW-2 Subedar P.K. Singh, however, they did not complain to Company Commander Major S. Bhattacharya on the same date.

12. Relying on the statement of Major S. Bhattacharya, recorded during the summary of evidence, it is contended that his statement in summary of evidence was conspicuously silent on this issue and thus,

the evidence recorded during the Summary Court Martial could not be relied on.

13. The grievance of the petitioner is also that Company Commander maliciously closed the prosecution case only with the deposition of 2 prosecution witnesses and dropped 11 prosecution witnesses specially Company Commander and Subedar Major, who would have spilled the beans in favour of the accused. The petitioner also challenged the verdict of Summary Court Martial on the ground that a tentative charge sheet was issued to him under Section 40(a), however later on the final charge sheet was issued under Section 40(b) of Army Act, 1950 and consequently entire Summary Court Martial proceedings were vitiated.

14. This Court has heard the learned counsel for the petitioner, as well as, the counsel for the respondent, Mr. Pushkarna, who has appeared for the respondents on advance notice. The learned counsel for the petitioner is unable to show any provision or rule which obligates the respondents to examine all the witnesses whose statements are recorded during the summary of evidence.

15. Section-134 of the Army Rules, 1954 rather contemplates that the Summary Court Martial court is not bound to call all the witnesses for the prosecution whose evidence is in the summary of evidence. Rule-

134 under part IV of general provisions regarding witnesses and evidence of Army Rules, 1954 is as under:-

“134. Calling of all prosecutor’s witnesses:- The prosecutor or, in the cases of a trial by summary court-martial, the court is not bound to call all the witnesses for the prosecution whose evidence is in the summary of evidence of whom the accused has been informed he or it intends to call, but he or it should ordinarily call such of them as the accused desires, in order that he may cross-examine them, and shall, for this reason, so far as practicable, secure the attendance of all such witnesses.”

16. The said rule contemplates that if the accused desires to call any of the witnesses whose statements are recorded during summary of evidence, then such witnesses would ordinarily be called by the Court to be cross-examined by the accused, if he so desires.

17. The learned counsel for the petitioner is unable to show any request made on behalf of the petitioner to call any of the witnesses, which were recorded during summary of evidence. Under the said rule, it was not obligatory on the part of the Court to call all the witnesses, who were recorded in summary of evidence and who had not been examined during the Summary Court Martial for the cross-examination by the accused unless so desired by the accused. The petitioner did not raise any plea to cross-examine any of the witnesses which were not recorded before the Summary Court Martial but who had been examined during the summary of evidence as no such request was made on behalf of the petitioner. Even before the Tribunal while

challenging the order of punishment and the Summary Court Martial proceedings no ground was taken that the petitioner wanted to cross-examine some of the witnesses, who were recorded during the summary of evidence but they were not called at the time of Summary Court Martial despite specific demand by the petitioner.

18. The learned counsel for the petitioner has contended that he had filed an application for review of the order of the Tribunal dated 1st September, 2010 being RA No. 20/2011, however, the same was withdrawn. The counsel has contended that the application for review was withdrawn as the Armed Forces Tribunal had no power to review its own order. Be that as it may, it has not been demonstrated by any pleadings that the request was made on behalf of the petitioner to call any of the witnesses which were recorded in summary of evidence but were not allowed to be cross examined by the Court during trial by Summary Court Martial despite specific request by the petitioner. The plea of the petitioner is, therefore, rejected.

19. Though this Court does not have to re-appreciate the evidence recorded before the Summary Court Martial, however, the evidence recorded can be considered in order to ascertain whether any of the findings of Summary Court Martial is perverse or not. If the inferences drawn by the Summary Court Martial on the basis of evidence recorded before it are probable, then even if a different inference is feasible, this

Court, in exercise of its jurisdiction, does not have to substitute its inference with the inference drawn by the Summary Court Martial on the basis of evidence recorded before it.

20. Perusal of the statement of prosecution witnesses, CHM U.S. Pandey and Subedar P.K. Singh, it is apparent that the charge against the petitioner is made out. The deposition of the petitioner cannot be considered in isolation without taking into consideration the deposition of the prosecution witnesses. On the basis of deposition of the petitioner it could not be inferred that the deposition of respondents' witnesses were unreliable. This has not been disputed by the petitioner that he had sought an interview from company commander on account of order given to him to do a particular duty by his superior officer. The petitioner could not challenge the order of his superior officer directing him to carry out certain work. In a disciplined force like army, the petitioner had no right to challenge the order of his superior officer. If it is admitted that the petitioner had challenged the order of the superior officer, the version as given by the witnesses of the respondents is more probable and it cannot be held that the inferences drawn by respondents were perverse. In the circumstances, this Court does not find any such illegality or perversity in the order of the Tribunal which will require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

21. The plea of the petitioner that initially the charge under Section 40(a) of the Army Act, 1950 was framed against the petitioner, however, after recording the summary of evidence, the charge was converted under Section 40(b) of the Army Act does not vitiate the Summary Court Martial proceedings. As has been held by the Tribunal that such a change of charge could not be held to be prejudicial to the interest of the petitioner as the petitioner had full opportunity regarding the charge framed against him during the proceedings in the Summary Court Martial.

22. The learned counsel for the petitioner has also not cited any precedent laying down the law contrary to what has been relied on by the Tribunal. No other plea or contention has been raised on behalf of the petitioner.

23. In the totality of the facts and circumstances, there are no grounds to interfere with the orders of the Tribunal. In the circumstances, the writ petition is without any merit and it is, therefore, dismissed.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

December 02, 2011.

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