

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

% **Date of Decision:** 29.05.2012

+ W.P.(C) No.3357/2012 & CM No.7114/2012

Ex. Sep. Ranjeet Kumar ... Petitioner

versus

Union of India & Ors. ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Rajiv Manglik, Advocate
For Respondents : Ms.Barkha Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SUDERSHAN KUMAR MISRA

ANIL KUMAR, J.

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CM No.7114/2012

Allowed subject to all just exceptions.

W.P.(C) No.3357/2012

1. The petitioner has sought quashing of judgment dated 27th February, 2012 passed by the Armed Force Tribunal, Principal Bench, New Delhi in OA No.55 of 2011, titled as 'Ex. Sepoy Ranjeet Kumar v. Union of India & Ors.', dismissing his original application seeking the setting aside of the findings and sentence dated 22nd October, 2007 passed by the Summary Court Martial and the quashing of order dated 13th September, 2008 rejecting his statutory petition under Section 164 (2) of the Army Act, and to direct the respondents to reinstate the

petitioner back in service with all the consequential benefits.

2. Relevant facts to comprehend the pleas and contentions raised by the petitioner are that he was enrolled in the Indian Army on 28th February, 1995. He was posted to the 25 Rashtriya Rifles in Jammu & Kashmir on 13th May, 2005.

3. The petitioner alleged that on 22nd February, 2006 two militants were killed by his unit, however, their money, weapon and ammunition were taken away by various officers of the company which was objected to by the petitioner. According to the petitioner, his objection to the taking of the belongings of the militants by the officers had annoyed them, and it is for this reason that he was falsely implicated in this case and thereafter, dismissed from service and also awarded rigorous imprisonment.

4. The petitioner had gone on annual leave on 13th March, 2006. He alleged that before going on leave his entire luggage was checked in the Unit, as well as at the Jammu Railway Station, and that he had reached his home only on 14th March, 2006, however, on the same day he received a telephone call from his Commanding Officer of 25 Rashtriya Rifles that he had carried a weapon with him and that he should rejoin the Unit.

5. The petitioner alleged that he had told his Commanding Officer over the telephone that he had kept the weapon in the Unit location as was instructed by the Commanding Officer. The petitioner, however, left his home town on the same day and reported back to his Unit on 15th March, 2006.

6. According to the petitioner, on reaching back to his Unit, he was forced to sign blank papers and he was also told by Major P.K.Singh that a weapon had been found on searching his bag. The petitioner further contended that on 27th April, 2006, he was attached to 27 Rashtriya Rifles for disciplinary action under the directions of the Army Order 7/2000 and that the summary of evidence was recorded on 6th May, 2006 and thereafter, he was charged with committing the civil offence of dishonestly receiving the stolen property contrary to Section 411 of the Ranbir Penal Code as on 12th March, 2006 he had received and retained one Rifle AK-47 (Butt No.202 Registered No.TK 4681) belonging to Gunner D.S. Patil Sattappa Maruti knowing the same to be a stolen property, as it was stolen by Sh. Shabir Ahmed S/o Sh.Lal Hussain resident of Gonthal. Thereafter, Summary Court Martial was held on 22nd October, 2007.

7. The petitioner challenged his Summary Court Martial on the ground that for the purpose of disciplinary action against him he could not be attached to 27 Rashtriya Rifles under the provisions of Army

Order 7 of 2000 as it is not covered under the same and relied on para 7 of the said order in order to substantiate his plea. Reliance was also placed on Note-5 of Section 116 of the Army Act stipulating the circumstances under which the Commanding Officer of a different unit may hold a trial by Summary Court Martial of a person subject to the Army Act as contained in the Regulation for the Army para 381. The petitioner asserted that his case does not fall in the said category. The petitioner also referred to Note-2 of Section 120 of the Army Act stipulating that where the Commanding Officer of an accused is giving material evidence for the prosecution, thereby he renders himself ineligible for conducting the Summary Court Martial and, therefore, he should apply to the District Court Martial so as to secure an impartial trial. To argue his contentions, a reference was also made in Para 431 of the Regulations for the Army which contemplates that all the trials for loss of Arms are to be tried by District Court Martial. Para 431 of the Army Regulation is as under:-

"431. Trial for Loss of Arms.-Every NCO or man who loses any arm, whether Government property or private if borne in the unit" s arms register, or ammunition thereof will be tried by District Court Martial unless sanction to dispense with the trial is obtained from the division/area commander. In the case of a unit which is isolated, the division/area commander may order trial by Summary Court Martial."

8. Before the Armed Force Tribunal, the petitioner had also contended that no Court of Inquiry had been held and if it was done, it is substantiated only on the basis of the blank paper which he was

made to sign by Major P.K. Singh. The petitioner had also contended that no hearing under the Army Rule 22 was held. Even during recording the summary of evidence, the statement of various witnesses were recorded, but he was not afforded any opportunity to cross-examine them and after the statement of every witnesses, it was merely appended that the petitioner had declined to cross-examine the witnesses, however, the signatures of the petitioner had not been obtained below the testimonies of the witnesses. The petitioner had also raised the plea before the Armed Force Tribunal that the weapon which was allegedly recovered had been hidden below the sand bag of the luggage vehicle of his unit and that he had not taken the weapon to his home town which is apparent from the Kote Register attached with the proceedings, which shows that the weapon which he had allegedly obtained did not bear the sequential dates as, in fact, the weapon was in the Kote itself till 16th March, 2006. According to the petitioner, the main culprit was civilian Shabir Ahmed who had though been mentioned in the charge sheet as well, had been subsequently let off and no action had been taken against him.

9. Before the Armed Force Tribunal, Principal Bench, the plea of the petitioner was contested by the respondents by contending, inter-alia, that Section 120 (2) of the Army Act is relevant for the issue raised by the petitioner which contemplates that for any offence to be tried under Section 69 of the Army Act, reference was required to be made to an

officer empowered to convene a DCM and only then the Commanding Officer could try any accused person. Section 120 (2) is as under:-

"120(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 on 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."

10. Regarding Summary Court Martial reliance was placed on Section 116 of the Army Act, which is 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.

(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such be sworn or affirmed".

11. The respondents contended that the petitioner was not transferred by the Commanding Officer of his unit to the other unit and was tried by the Commanding Officer of the other unit independently by the decision of the GOC Counter Insurgency Force (Romeo), who was the authority empowered to convene a DCM.

12. The respondents emphatically asserted that since the Commanding Officer of the petitioner unit was a witness in the charges framed against the petitioner, therefore, in order to have a fair and impartial proceeding to be conducted by an independent Commanding Officer the matter was referred to the General Officer Commanding, Counter Insurgency Force (Romeo), who was empowered to convene a DCM. The General Officer Commanding, Counter Insurgency Force (Romeo) in his capacity as the competent authority had directed the trial to be carried out by 27 Rashtriya Rifles by Summary Court Martial.

13. Referring to Army Order 7 of 2000, it was contended on behalf of the respondents that the said Army Order does not debar trial by a Summary Court Martial but only to ensure that the command should not be changed with a view to secure punishment/penalty. Regarding notes to Section 116 and 120 of the Army Act, it was asserted that they were not part of the statute and had been included for administrative convenience of the Army Officer and, therefore, do not have the force of law. Note 2 of the Section 120 of the Army Act was also explained by the respondents so as not to debar the applicability of Section 120 it was contended that it only contemplates that the Commanding Officer of the Unit should apply to the GOC CI (F) Romeo, who is the competent authority to convene a DCM. It was further asserted that it does not debar the attachment of soldiers to other units for processing disciplinary cases as enumerated in Army Order 7 of 2000.

14. Regarding Regulation 431 of the Army Regulations, the respondents clarified that the said regulation deals with the cases of loss of weapon and not with the case of a person possessing or receiving stolen property under Section 411 of the Ranbir Penal Code. The respondents also pointed out that there was no violation of the principles of natural justice and no illegality, irregularity or perversity has been shown by the petitioner in conducting the Summary Court Martial by the Commanding Officer of Unit 27 Rashtriya Rifles to which he was attached pursuant to the order of GOC CI (F).

15. The respondents emphasized the fact that the petitioner had pleaded guilty and had accepted the charged framed against him, and, therefore, he cannot contend that he has been prejudiced in any manner and that the punishment awarded pursuant to the Summary Court Martial is liable to be set aside.

16. Regarding the plea of the petitioner that the Court of Inquiry was not held and his signatures were taken on the blank paper and even during the summary of evidence the statements were not recorded in the presence of the petitioner, and rather at the end of the statement it was merely appended that the petitioner declined to cross-examine the witnesses and that even his signatures had not been appended to the said statements, cannot be raised by the petitioner as he had pleaded

guilty during the Summary Court Martial proceedings and had accepted the offences imputed against him. The respondents had pointed out that the petitioner had not raised any plea that he has not pleaded guilty and or that his plea of guilty cannot be accepted for any reasons. In any case, it was asserted by the respondents that full opportunity was given to the petitioner to cross-examine each of the witness, which appeared before the Court of Inquiry and the petitioner had signed each statement after he declined to cross-examine the said witnesses.

17. The Tribunal considering the pleas and contentions of the parties and also after perusing the original record of the Summary Court Martial and the Court of Inquiry had categorically noted that the signatures of the petitioner do appear below the testimonies of the witness and that the plea of the petitioner that he had been made to sign on some blank pages is not acceptable and is not even possible as his signatures appeared at different places on different pages and all this could not have been so meticulously fabricated, if the allegation of the petitioner was that his signatures were taken on blank pages by Major P.K.Singh. The observations of the Tribunal regarding the pleas of the petitioner are as under:-

“10. A reply has been filed by the Respondents who strongly urged that these issues which are now being raised by the Petitioner would not stand legal scrutiny as the Petitioner has pleaded guilty during the SCM proceedings and has accepted the offence. However, it was argued that a Court of Inquiry had been held wherein the provisions of

Army Rule 180 had been complied with and the petitioner had been given full opportunity to cross-examine each witness who appeared before the Court of Inquiry and his signature obtained against the statement of each such witness. We have heard learned counsel for the parties and perused the original record of the Court of Inquiry which has been placed before us, and note that the signature of the Petitioner appear below the testimony of the witnesses. Learned counsel for the Respondents urged that the contention of the Petitioner that he had been made to sign, on some blank pages was a figment of imagination and was not possible because his signature appeared at different places on different pages and all this could not have been so meticulously fabricated. With reference to Army Rule 22, learned counsel for the Respondents argued that Army Rule 22 has a special provision that where a Court of Inquiry has been held with full compliance of Army Rule 180, then a hearing under Army Rule 22 was not necessary and could be dispensed with. In the case of the Petitioner since a Court of Inquiry with compliance of Army Rule 180 has been held, the Respondents have decided not to hold the hearing under Army Rule 22. With reference to the statement of the Petitioner that he had hidden the weapon below the sand bags of the luggage vehicle, learned counsel for the Respondents drew our attention to the Petitioner's own statement given at the summary of evidence that "I brought out the weapon and magazine from my baggage and handed it over to the Company Commander. It was the same rifle AK-47 which was lost and was issued to No. 15776475W Gnr (DS) Patil Satapa Maruti." In addition to his own statement PW-4 Maj. P.K. Singh his Company Commander, and PW-6 Col. P.S. Gothra, his Commanding Officer have both testified, in the presence of the Petitioner, that the weapon was recovered from the possession of the Petitioner and there has been no cross-examination whatsoever on this count. Therefore, this was a total lie which the Petitioner was indulging in to save his skin. Learned counsel for the Respondents also stated that at the summary of evidence the accused is not required to append his signature on the testimony of each witness and is only required to sign his own statement, which has been

done in this case. However the complete proceedings have been attended throughout by an independent witness and his signature appeared below the testimony of each witness and also at the end of the proceedings. Furthermore, the officer conducting the summary of evidence has also certified full compliance of Army Rule 23. Therefore the record clearly shows that ample and adequate opportunity was given to the Petitioner to put across his defence and he has done so by making a statement at the summary of evidence. Learned counsel for the Respondents also argued that the Kote register need not necessarily be sequential in nature and would depend upon the date of withdrawal and deposit of a-particular weapon. The contention of the Petitioner that Gnr (DS) Patil Satapa Maruti was supposedly on sentry duty with his weapon at the time when it was supposed to have been stolen by civilian Shabir and handed over to the Petitioner is incorrect because the testimony of Gnr (DS) Patil Satapa Maruti does not state any such fact. The statement as given by Gnr (DS) Patil Satapa Maruti is only that at 2045 hours on 12th March 2006 he found his rifle AK-47 missing from the lines and despite exhaustive search he was unable to recover his weapon. Lastly, learned counsel for the Respondents stated that the action against civilian Shabir was not a matter of this petition and they had no knowledge as to what action has been taken against civilian Shabir.

11. We have perused the Court of Inquiry and the other documents placed before us and also given the best of consideration to the arguments of the learned counsel for the parties and are of the opinion that there was no illegality in the attachment of the Petitioner to 27 RR for disciplinary purposes since his own CO i.e. CO 25 RR was incapable of conducting the SCM since he was a witness. The matter was referred to the competent authority who could convene a DCM, who in his discretion has ordered trial by SCM. We do not find anything illegal in this action by the competent authority. Keeping in view the other arguments as above, we do not find any ground to interfere with the findings and sentence of the SCM. Accordingly, the petition is dismissed with no order as to costs.”

18. The Tribunal also noted that during the summary of evidence the accused is not required to append his signatures on the testimony of each witness and is required to sign only on his own testimony, however, on perusing the summary of evidence, it was observed that it is apparent that all the proceedings had been attended to by an independent witness and his signatures were appended below the testimony of each witness as also the end of the proceedings. The Tribunal also referred to the certificate by an officer who conducted the summary of evidence stipulating that Army Rule 23 was complied which is reflective of the fact that ample and adequate opportunity was given to the petitioner to put across his defence which was also done by the petitioner by making a statement. The Tribunal further held that the Kote Register need not be in sequence, and therefore, only on the basis of the Kote Register and in view of the specific plea of guilty by the petitioner which has not been challenged, the sentence of dismissal and rigorous imprisonment awarded to the petitioner cannot be challenged. The Tribunal also considered the testimonies of the Gunner DS Patil Satapa Maruti to contradict the plea of the petitioner, who had deposed that he has found his Rifle AK-47 missing from the lines and that he was unable to recover despite exhaustive search made by him.

19. Regarding the plea of the petitioner that he could not be tried by the Commanding Officer of 27th RR, the Tribunal held that the Commanding Officer of the petitioner had applied for DCM to GOC CI

(F) Romeo, who was the competent authority to convene a DCM, however, the GOC CI (F) Romeo decided that the trial should be conducted by SCM and not by DCM which fact cannot be disputed and challenged by the petitioner under the power of GOC CI (F). Referring to para 381 of the Army Regulation, the Tribunal also held that the person deserting the Army can also be tried by the SCM by the Commanding Officer of another Unit and, therefore, the plea of the petitioner that the Commanding Officer of another Unit could not try the petitioner under the Army Act and Regulations framed was rejected. It was also noted that since the Commanding Officer of the unit to which the petitioner belonged was a witness in the charges framed against the petitioner, therefore, he was barred from conducting the SCM under the relevant rules, therefore, the Commanding Officer from the other unit had tried the petitioner as the GOC CI (F) had ordered so, since it is the competent authority to either try under the DCM or to direct the SCM by the Commanding Officer of another unit. It was also contended that the restricted meaning could not be given to the regulation contemplating that the cases of desertion are to be tried by the Commandant of the same unit.

20. The petitioner has challenged the order of the Tribunal dismissing his original application by order dated 27th February, 2012, inter alia, on the grounds that the Tribunal did not advert to the precedent relied on by the petitioner, Ex. L/N Vishwa Priya Singh v. Union of India &

Ors., 147 (2008) DLT 202 (DB) and Mahipal Singh v. Union of India & Ors., 1994 LAB. I. 2365, contemplating that the petitioner could not be tried by the Commanding Officer of the Unit to which the petitioner did not belong. According to the petitioner, he belongs to 25 RR, whereas, the Summary Court Martial (SCM) was convened, constituted and completed by the Commanding Officer of 27 RR. The petitioner asserted that his attachment for conducting of the SCM was illegal and against the provisions of Section 120 of the Army Act especially in view of note No.5 appended to Section 120, which contemplates that an NCO or Sepoy cannot be attached to another unit for the purpose of his trial by SCM except as provided in Army regulation Para 381. The petitioner also asserted that before the SCM he had not pleaded guilty and he had not been afforded a proper opportunity to defend himself.

21. The petitioner also challenged the verdict of the SCM on the basis of various discrepancies alleged by the petitioner such as that witness No.2, Sh.Shabir Ahmed had deposed that he met the petitioner on 7th March, 2006 at Surankot Bus Stand, whereas 7th March, 2006 was a dry day and thus, no vehicles were permitted on that day and, therefore, the petitioner could not have reached Surankot Bus Stand on 7th March, 2006 from his location which was approximately 10 Km. away; Sh.Shabir Ahmed is a known source, who provided the information to CO of 25 RR and has direct access to Commanding

Officer; the petitioner was made to sign documents that he gave an amount of Rs.5,000/- to Sh.Shabir Ahmed on 20th February, 2006 which has not been deposed by PW2 and it was not possible for a Sepoy to arrange that kind of money in the field area; the petitioner had withdrawn only Rs.3,000/- from his salary of March, 2006 whereas PW-2 deposed that the petitioner gave him Rs.8,000/- on 12th March, 2006; deposition of PW3 Gunner D.S.Patil Sattappa Maruti is not trust worthy since he deposed that he was on duty in the night of 11/12th March, 2006 and thus, in the capital CI Operation no Jawan is permitted the duty without a weapon; that PW-3 had stated that he had observed the loss of the weapon at around 2045 hours on 12th March, 2006, whereas, the petitioner had left with the convoy for Jammu during the morning hour; Kote Register attached with the proceedings showed that the weapon had been issued between 12th March, 2006 to 16th March, 2006 and thus, it is evident that there has been manipulation made in the entries; the loss of weapon was never reported, nor was any FIR lodged with the civil police station against the person who allegedly stole the weapon and PW1 had not seen the weapon hidden in the bag unless he was told by the petitioner.

22. Learned counsel for the respondents, Ms.Barkha Babbar, opposed the pleas and contentions of the petitioner and relied on the

reasoning of the Tribunal and reiterated the stand taken by the respondents before the Tribunal.

23. In Ex. L/N Vishwa Priya Singh (supra), relied on by the petitioner another Bench had considered two common questions of law pertaining to Summary Court Martial i.e. (a) whether an SCM can be convened, constituted and completed by the Commanding Officer (CO) of a unit to which the accused does not belong and, (b) circumstances in which an SCM can be convened rather than General Court Martial (GCM) or District Court Martial (DCM) or Summary General Court Martial (SGCM) as envisaged in Section 108 of Army Act, 1950. In the case of Vishwa Priya Singh (supra), Ex.L/N had made a complaint against the Commanding Officer of 19 BN Mahar Regiment of in-judicious treatment meted out by him to L/N. Initially the Brigade Commander had nominated the Commanding Officer 17 BN Kumayun to investigate into the L/N's complaint. The Commanding Officer of 19 BN Mahar Regiment got his close friend, the Commanding Officer of 18 BN Punjab Regiment, detailed to investigate these complaint and the petitioner was ordered to proceed to the 18 BN Punjab Regiment. Eventually, the Commanding Officer of 18 Punjab Regiment tried the L/N by the Summary Court Martial and convicted/sentenced him to suffer rigorous imprisonment of 6 months in the civil Jail and dismissed him from service. The plea taken by the charged officer was that he belonged to

19 Mahar Regiment but was tried by the SCM held by Commanding Officer of 18 BN Punjab Regiment and, therefore, the trial was rendered to be Coram non-judice. In the said case, the L/N had made a complaint against his Commanding Officer on 26th March, 1990; he was interviewed by the Brigade Commander on 30th May, 1990; was asked to appear before the Commanding Officer of 18 BN Punjab Regiment on 15th July, 1990; was charged under Section 41 (2) of the Army Act for disobeying the lawful command given by the superior officer, in that he, then asked to accept a letter dated 16th July, 1990, requiring his presence in the Commanding Officer's office for investigation in the unit, refused to do so and thus, disobeyed the verbal orders. In these circumstances, the Division Bench held that Ex.L/N could not be tried by the Commanding Officer of the another unit especially since the L/N had leveled allegations against the Commanding Officer of the Unit to which the petitioner belonged and in the circumstances, the solution lied in constituting any other Court Martial on an emergency footing. In contradistinction, in the present matter the CO of the petitioner was a witness against the petitioner and, therefore, it was not feasible to conduct an SCM by the said CO. Therefore, in order to ensure proper justice and fair trial and to afford full opportunity to the petitioner, the matter was referred to the GOC, Counter Insurgency Force (Romeo), who was the authority empowered to convene a DCM. The SCM, in the circumstances, was not convened by a Commanding Officer of another unit to which the petitioner had been transferred but instead the GOC,

CI (F) Romeo, who in his capacity as a competent officer had directed that the trial be carried out by SCM by the CO of 27 RR. The case of Vishwa Priya Singh (supra) relied on by the petitioner is, therefore, clearly distinguishable from the case of the petitioner.

24. Similarly, the case of Mahipal Singh (supra) relied on by the petitioner is also distinguishable, as Mahipal Singh was transferred to another unit only for the purpose of trial by the CO and the matter was not referred to GOC or the authority competent or empowered to convene DCM for GCM. In the case of Mahipal Singh, he was tried by the CO of ZRO with which Mahipal Singh was placed on temporary duty and in these circumstances, it was held that Mahipal Singh ought to have been tried by the CO of his own unit No.27 AD. It is only after Mahipal Singh had been transferred on temporary duty to another unit in violation of Section 116 of the Act supplemented by note 5 that subsequently, execution instructions were issued by order dated 22nd May, 1985. Even the plea regarding the subsequent execution instruction being issued belatedly was taken up by the charged officer. In these circumstances, the Court had held that the circular was issued to tie over the particular situation which had arisen out of a particular incident and that such a circular could not circumvent the intent of statutory provisions as contained in Section 116 and note 5. Thus apparently, the case of Mahipal Singh is clearly distinguishable.

25. Apparently, the cases relied on by the petitioner are distinguishable and on the basis of the ratio of the above noted case, it cannot be held that in the case of the petitioner it can be held that he could not be tried by CO of another unit pursuant to the order passed by the GOC, Counter Insurgency Force (Romeo), who was the authority empowered to convene a DCM. While appreciating a precedent, it must be remembered that the ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. A decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances in two cases. The Supreme Court in *Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr.* (AIR 2004 SC 778) had held that a decision cannot be relied on without considering the factual situation. In the said judgment, the Supreme Court had observed as under:-

" Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too

taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

26. The plea of the petitioner is also not sustainable in view of the Army Order 7/2000, which does not debar any trial by SCM but which contemplates that there should not be a change of command only with a view to secure award of enhanced punishment/penalty. The relevant portion of the Army Order 7/2000 reads as under:-

“This power, however, shall not be exercised merely to change the command with a view to secure award of enhanced punishment/ penalty e.g. for a trial by Summary Court Martial”

27. The Tribunal also held that a harmonized construction of this provision implies that attachment to another unit should not be for the sole purpose of securing enhanced punishment/penalty. The Tribunal also noted that the notes to Sections 116 to 120 do not have the force of law and in any case, note 5 of Section 116 permits attachment of individuals who are deserters but does not debar attachment on other grounds/eventualities as enumerated in Army Order 7/2000.

Apparently, strict meaning could not be given to Army Order 7/2000 and the notes attached to the various provisions of the Army Act.

28. In any case, in compliance of note 2 of Section 120 of the Army Act, the CO had applied for a DCM to GOC CI (F) Romeo, who was the competent authority to convene a DCM. He, however, instead had decided that the trial should be conducted by an SCM and not by DCM. Even Para 381 of the Army Regulation does not contemplate such an eventuality under which the persons deserting the Army cannot be tried by SCM by CO of other unit, nor does it debar the attachment of a soldier to other unit for processing the disciplinary case as enumerated in Army Order 7/2000.

29. The Tribunal also distinguished the case of the petitioner regarding the applicability of para 431 of the Army Regulation which deals with the trial of individuals by DCM under the case of loss of weapon. The case of the petitioner was, however, found to be distinct as the petitioner was charged with dishonestly receiving stolen property under Section 411 of the Ranbir Penal Code. Thus, it was held that in entirety of the fact and circumstances, the petitioner had not suffered any prejudice by his trial by CO of Unit 27 RR as CO of Unit 25 RR could not have conducted his trial keeping in view the principle of natural justice in law. Also, as discussed above, the SCM was ordered

by a competent authority who could have convened the DCM and thus in the circumstances, the plea of the petitioner that he could not be tried by the Commander of another unit, pursuant to the order of the competent authority GOC CI (F) cannot be accepted and is not sustainable and the order of the Tribunal does not suffer from any illegality or any irregularity.

30. Another relevant factor is that before the SCM, the petitioner had pleaded guilty and the petitioner has not propounded any ground, or raised any plea that he had not pleaded guilty before the SCM. The plea of the petitioner that he was not given due opportunity is also negated by the fact that the record clearly reveals that the petitioner was given due opportunity to cross-examine the witnesses, however, the petitioner declined to do so, which is also apparent from the fact that he had pleaded guilty before the SCM. In the circumstances, all the pleas raised by the petitioner before the Tribunal and now in the writ petition appears to be an afterthought and cannot be sustained, nor the orders passed against the petitioner are liable to be quashed in the facts and circumstances.

31. The decision of the Summary Court Martial can be interfered under judicial review on the grounds of "illegality"; "irrationality" and "procedural impropriety". The Court will not interfere unless the

decision is tainted by any vulnerability like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories is to be established and mere assertion in that regard may not be sufficient. To be "irrational" it has to be held that on material, it is a decision "so outrageous" as to be in total defiance of logic or moral standards. If the power is exercised on the basis of facts which do not exist having which are patently erroneous, such exercise of power shall be vitiated. Exercise of power will be set aside if there is manifest error in the exercise of such power or the exercise of power is manifestly arbitrary. To arrive at a decision on "reasonableness" the Court has to find out if the respondents have left out a relevant factor or taken into account irrelevant factors. It was held in (2006) 5 SCC 88, *M.V.Bijlani Vs Union of India & Ors.* that the Judicial review is of decision making process and not of re-appreciation of evidence. The Supreme Court in para 25 at page 96 had held as under:

‘25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analyzing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with.’

32. In Judicial review of the decision of Summary Court Martial, this Court will not take over the functions of the SCM. The writ petition is not an appeal against the findings of SCM, nor this court is exercising or assuming the role of the Appellate Authority. It cannot interfere with the findings of the fact arrived at by the SCM except in the case of mala-fides or perversity i.e where there is no evidence to support a finding or where the finding is such that no one acting reasonably or with objectivity could have arrived at or where a reasonable opportunity has not been given to the accused to defend himself or if it is a case where there has been non application of mind on the part of the SCM or if the charges are vague or if the punishment imposed is shocking to the conscience of the Court. The petitioner, however, had pleaded guilty before the SCM. In (1995) 6 SCC 749, B.C.Chaturvedi v. Union of India & Ors. Supreme Court at page 759 has held as under:-

‘12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither

the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case.'

33. The Tribunal has considered the testimonies of the various witnesses recorded before the SCM and has carefully analyzed the evidence and reached the conclusive finding that ample and adequate opportunity was given to the petitioner to put across his defense and that in spite of it the petitioner did not make any statement during the summary of evidence. In the circumstances, there is no justification for this Court to substitute the findings of the Summary Court Martial and the Tribunal with its own finding as the petitioner has failed to show that the findings are based on no evidence or are so absurd that no reasonable person could reach the same.

34. In the facts and circumstances, there are no grounds to interfere with the order of the Tribunal dismissing the original application of the petitioner. The writ petition is, therefore, in the facts and circumstances, without any merit and it is dismissed.

ANIL KUMAR, J.

SUDERSHAN KUMAR MISRA, J.

MAY 29, 2012

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