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

+ **W.P.(C)No.4286/2013**

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Reserved on : 5th September, 2013

Date of decision : 10th September, 2013

OM PRAKASH

..... Petitioner

Through : Mr. Narender Kaushik, Adv.

versus

UNION OF INDIA & ORS.

..... Respondents

Through : Mr. Ankur Chhibber, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MR. JUSTICE V. KAMESWAR RAO

GITA MITTAL, J.

1. By way of the present writ petition, the petitioner has assailed the order dated 27th April, 2012 passed by the Armed Forces Tribunal, Principal Bench, New Delhi rejecting the petitioner's challenge to the order dated 30th April, 2003 passed by the Chief of the Air Staff on the basis of general court martial revising its findings and the order dated 6th May, 2003 passed by the confirming authority and the order of rejection of the petitioner's appeal filed under Section 161(2) of the Air Force Act.

2. To the extent necessary, the relevant facts are noted hereafter. The petitioner was recruited as Airman in the Trade of Air Frame Fitter in the year 1981. He stood promoted in 1986 to

the rank of Corporal; in August, 1991 to the rank of Sergeant and on 1st December, 2012 as a Junior Warrant Officer. The petitioner claimed that he was so promoted after passing the requisite examinations and was also awarded three good conduct badges after four years of service.

3. On the 16th June, 2001, the petitioner was posted on the strength of 11 BRD, Air Force, Air Force Station, Ojhar, District Nashik. In January, 2002 he was given an additional appointment of Mess Caterer in the Senior Non-Commissioned Officer Mess for a period of one month. The petitioner was appointed as Barman of the mess as well. As part of his duties, he was required to purchase certain local items for the mess and was also required to provide the necessary articles for cooking when required by the Gallery. The petitioner submits that he had kept certain raw items in the cabin which was allotted to him in the mess as his family was staying at the quarter allotted to him in the Air Force Station, Palam, New Delhi.

4. The instant case arises out of an alleged incident of 5th February, 2002 in which one Naik J.D. Kale and AC Ambedkar were apprehended by Sergeant Kumar at 1740 hours in unauthorized possession of 21 bottles of liquor. On enquiry, Ex-Naik J.D. Kale revealed that he had purchased the same illegally from the petitioner. On 6th February, 2002, a warrant of search was issued by the competent authority and the items were seized. An inquiry was conducted into the matter by the Squadron Leader S.

Baizel. The petitioner was chargesheeted on 1st October, 2002 as well as tried under Rule 24 of the Rules framed under Air Force Rule, 1969.

5. Thereafter a General Court Martial was convened against the petitioner on the following charges:-

“CHARGE SHEET

The accused, 669510N Sgt. (Actg JWO paid) Om Prakash of 11 BRD, AF, an airman of the regular Air Force is charged with :-

First
Charge
Section
65 AF
Act,
1950

**AN ACT PREJUDICIAL TO
GOOD ORDER AND AIR FORCE
DISCIPLINE**

In that he,

At 11 BRD, AF, on 05 Feb. 02, improperly sold 21 bottles (15 bottles of McDowell Rum and 06 bottles of McDowell Whiskey) of liquor to the unauthorised person Ex-6468234 Nk JD Kale.

Second
charge
Section
52 (b)
AF Act,
1950

**COMMITTING DISHONEST
MISAPPROPRIATION OF
PROPERTY BELONGING TO
THE SNOCS' MESS OF 11 BRD,
AF**

In that he,

At 11 BRD, AF being caterer of the SNCO's Mess for the month of Jan. 2002 dishonestly misappropriated the following service rations of SNCOS' Mess:-

- | | | |
|------|------|-------------|
| (i) | Rice | - 337 Kgs. |
| (ii) | Dal | - 32.5 Kgs. |
| | Urd | |

	Black	
(iii)	Masala	- 07 Kgs.
(iv)	Condi- ments	- 3.5 Kgs.
(v)	Sugar	- 20 Kgs.
(vi)	Chilly	- 3.5 Kgs.
(vii)	Nutra- mul	- 0.500 Kgs.
(viii)	Jam	- 02 Kgs.
(ix)	Coffee	- 0.400 Kgs.
(x)	Tea leaves	- 7.750 Kgs.
(xi)	Cheese	- 2.85 Kgs.

Third
Charge
Section
65 AF
Act,
1950
(Altern
ative to
the
second
Charge

**AN ACT PREJUDICIAL TO
GOOD ORDER AND AIR FORCE
DISCIPLINE**

In that he,

At 11 BRD, AF on 06 Feb. 2002
during the search of room No.3 of the
SNCO's Mess occupied by him was
found in improper possession of the
following service rations belonging to
the SNCOs' Mess:-

(i)	Rice	- 337 Kgs.
(ii)	Dal Urd Black	- 32.5 Kgs.
(iii)	Masala	- 07 Kgs.
(iv)	Condi- ments	- 3.5 Kgs.
(v)	Sugar	- 20 Kgs.
(vi)	Chilly	- 3.5 Kgs.
(vii)	Nutra- mul	- 0.500 Kgs.
(viii)	Jam	- 02 Kgs.
(ix)	Coffee	- 0.400 Kgs.

Fourth
Charge
Section
65 AF
Act,
1950

- (x) Tea - 7.750
leaves Kgs.
- (xi) Cheese - 2.85 Kgs.

**AN ACT PREJUDICIAL TO
GOOD ORDER AND AIR FORCE
DISCIPLINE**

In that he,

At 11 BRD, AF, on 06 Feb. 2002
during the search of Room No.3 of the
SNCO's Mess occupied by him was
found in improper possession of the
following unauthorized items:-

- a Rubber Stamps of
 - i) (BS Siwach)
Air Cmde
AOC
3 wing Air Force
 - ii) Round Stamp of Station
Medicare Centre, AF,
Stn. Palam.
 - iii) MO i/c MI Room
Army Hospital (R&R)
Delhi Cantt
Date.....
 - iv) Duty Medical Officer
No.3 Wing, AF
Air Force Station,
Palam
New Delhi-110010
 - v) (VS Kochak)
Wg. Cdr.
Stn. Adjt.
3 Wing AF
 - vi) (IP Vipin)
Wg. Cdr.
Commanding Officer
41 Squadron, AF
 - vii) (KS Multani)
Flt Lt

Medical Officer

viii) Round Stamp of 3
Wing. Af Stn. Palam

ix) Round stamp of QAS
21 C

x) Round Stamp of QAS
21 C

b Specimen signatures of :-

i) Wg Cdr KK Pooniwala

ii) Wg Cdr MS chaudhary
SMO

iii) Wg Cdr J
Mukopadhyay

iv) 3 Wing AF – (OIC
Core Group), STO
(MT)

c Documents:-

i) Location list wef Dec.01-09
sheets

ii) Trade/New TBM/ Present
/Strength/Deficiency/Surplus
dated 13 Jul. 01 One hand
written sheet

iii) Letter from Min of HRD
No.F21-35/85 – ES.5 dated 11
Oct. 01

iv) DG AQ AS, Inspection
Note No.610/3/112/RCP 956 Set
No.3 Copy No.8 dated 18 Sep 01
– two sheets.

v) Airports Authority of India,
Reminder No.AAI/NOC/2001/
67/342 dated 05 Nov. 01– two
sheets.

vi) Citi Bank savings
accounts deposit slip of A/C
no.5306846223 Krishna Swamy
Shogokar – Full booklet.

vii) Anonymous letter to

AOC 3 Wing AF dated 10 Sep
01.”

6. The Summary of Evidence was recorded in the matter in which Squadron Leader VRS Raju was one of the persons who remained present.

7. By an order dated 27th January, 2003, a General Court Martial was ordered to be convened against the petitioner. Squadron Leader VRS Raju was appointed as the prosecutor. The court martial included Wing Commander Upendra as a member.

8. Four witnesses were examined before the court martial while additional one witness was examined as a court witness. The parties were also heard.

By an order dated 19th February, 2003, the court martial found the petitioner not guilty of the first, second and third charges but found him guilty of the fourth charge. The general court martial imposed the punishment of forfeiture of six months service for the purpose of pension, subject to its confirmation.

9. It appears that Confirming Authority passed an order dated 23rd April, 2003 for revision of the findings of the court martial on the charge no.1,2 and 3. As a result, the court martial was reassembled with effect from 29th April, 2003. No fresh finding was recorded. The petitioner was heard and he was thereafter found guilty also of charge no.1,2 and 3 and awarded sentence of dismissal from service subject to confirmation.

10. On consideration of the matter, the Confirming Authority reduced the sentence imposed upon the petitioner to reduction in rank. As a result, the petitioner was reduced to the lower rank of 'Leading Air Craftsman' from the rank of 'Junior Warrant Officer'.

11. The petitioner submitted an appeal against the above to the Chief of the Air Staff which was also rejected. The petitioner thereafter assailed the same by way of writ petition being WP(C)No.1907/2004 in this court. This writ petition was transferred for consideration to the Armed Forces Tribunal and registered as T.A.No.408/2010. After hearing, the petition was rejected by the Armed Forces Tribunal by an order dated 27th April, 2012 resulting in filing of the case in hand.

12. The petitioner has assailed the proceedings of the court martial primarily on the ground that the same were in violation of Rule 45 as well as Rule 48 of the Air Force Rules. It is contended that Squadron Leader VRS Raju was a witness to the proceedings conducted under Rule 24 proceedings and therefore, could not have been appointed as prosecutor.

13. Rule 45 of the Air Force Rules, 1969 provides the ineligibility and disqualification of officers for court martial. Sub-Rule (2) of Rule 45 which mandates disqualification reads as follows:-

“45. Ineligibility and disqualification of officers for court-martial

(1)

xxx

xxx

xxx

(2) An officer is disqualified for serving on a general or district court-martial if he-

- (a) is the officer who convened the court; or
- (b) is the prosecutor, or a witness for the prosecution, or
- (c) investigated the charges before trial, or took down the summary of evidence or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the flight, squadron, station, unit, or other commander who made preliminary inquiry into the case, or was a member of previous court-martial which tried the accused in respect of the same offence, or
- (d) is the commanding officer of the accused or of the unit to which the accused is attached or belongs; or
- (e) has a personal interest in the case.”

14. It is noteworthy that Squadron Leader VRS Raju was neither cited as a prosecution witness nor was he examined as a witness in the court martial. Squadron Leader VRS Raju was not a witness even during the inquiry or in the summary of evidence.

15. It is not the petitioner’s objection before us that Squadron Leader VRS Raju was arrayed as a witness in the prosecution or that he investigated the charges before trial or took down the summary of evidence. Squadron Leader VRS Raju was not a member of the court inquiry regarding the matter on which the charges against the petitioner were based. The objection that Squadron Leader VRS Raju could not be appointed as prosecutor

has therefore, been rightly rejected by the Armed Forces Tribunal.

16. The second legal objection urged by the petitioner rests on Rule 48 of the Air Forces Rules and is premised on the appointment of Wing Commander Upendra as one member of the General Court Martial. So far as Rule 48 is concerned, the same provides as follows:-

“48. Unit of members of court-martial – A General or district court-martial shall not be composed exclusively of officers of the same unit, unless the convening officer states in the order convening the court that in his opinion other officers are not (having due regard to the public service) available, and in no case shall it consist exclusively of officers belonging to the same unit as the accused.”

17. The only prohibition therefore, is that members of the General Court Martial cannot be composed exclusively of officers of the same unit. It is evident from the reading of the above that the prohibition is restricted to appointment of all members of court martial from one unit. There is no prohibition if one or more (but less than five) out of the five officers constituting the General Court Martial are of the same unit. The petitioner contends that other officers of the court martial belong to the unit to which Wing Commander Upendra belonged.

18. In para 8 of its judgement, the Armed Forces Tribunal has placed reliance on the pronouncement of the Supreme Court reported at *(1982) 3 SCC 140 Lt. Col. Prithipal Singh Bedi v. Union of India* rendered in the context of Rule 40 of the Army Rules. Rule 40 of the Army Rules is parimateria with Rule 48 of

the Air Force Rules. It has been held by the Tribunal that the requirements of Rule 48 are not mandatory. It is in compliance with the provisions of natural justice that the court martial should not include “the persons from same unit” so that there will be objectivity and they will not have command influence.

19. The present case arises under the Air Force Act in similar facts. In the given facts, we see no reason to take a different view.

20. The objection of the petitioner to Wing Commander Upendra having been included as a member of the General Court Martial is misconceived and hereby rejected. Mr. Narender Kaushik, learned counsel for the petitioner has made vehement objection that the petitioner was denied the benefit of a defending officer in the proceedings held by the General Court Martial in the revision proceedings which commenced on 29th April, 2003. In this regard, our attention is drawn to a letter dated 23rd April, 2003 written by the petitioner requesting for appointment of Wing Commander G. Chandra as the defending officer. In response thereto, by a letter dated 25th April, 2003, the Station Headquarters informed the petitioner that he had already declined to take defending officer from the service during the General Court Martial proceedings which were held between 4th February, 2003 to 19th February, 2003. The petitioner had made an application dated 1st February, 2003 and had been permitted to engage a defence counsel from civil. The respondents had thus not acceded to the request for the defending officer but had permitted the petitioner to

engage the same defence counsel who conducted his defence in the General Court Martial.

21. The petitioner does not say that the counsel was not available to him. The objection of the petitioner is therefore, devoid of legal merit.

22. The petitioner has lastly assailed the finding and sentence of the Court Martial as well as the findings and sentence on revision on the ground that there was no evidence to support the charges.

23. The respondents alleged that they had recovered 21 bottles of liquor from Ex-Naik J.D. Kale. The petitioner objects that neither the seizure memo was produced nor the recovered property was produced. The only evidence which the prosecution relied upon in support of this charge was that of Ex-Naik J.D. Kale to the effect that the recovered bottles had been received by him from the present petitioner.

24. It is noteworthy that this recovery was the subject matter of the first charge framed under Rule 65 of the Air Force Act, 1950 against the petitioner.

25. With reference to the record, we may note that the aforementioned submission of the Naik J.D. Kale was the only witness in support of this charge is incorrect. In para 10 of the judgment, the Armed Forces Tribunal has recorded in detail the depositions of PW1 – Sergeant Kumar who had clearly stated that on 5th of February, 2002 at about 1730 hours he noticed one motorcyclist waiting near boundary wall near SNCOs mess. He waited at SMC

to see as to what was happening there. After a few minutes, he had seen another person jumping over the boundary wall of the mess with two bags in his hands. In his deposition, Sergeant Kumar further deposed that he reached the spot and caught them red handed. On checking of the bags, it was found that it contained 21 bottles of liquor which was detailed by the witness. These two persons were taken to the guard room for further questioning during which they disclosed their identity as Ex.Naik J.D. Kale and second person as Ex. AC P.D. Ambedkar and further that they purchased the said liquor from the petitioner. Sergeant Kumar made contemporaneous entries in the guard register and informed the JWO In-charge police and also the security officer. Sergeant Kumar prepared the panchanama at the guard room in the presence of Orderly Officer and the seizure panchanama was attached with the police investigation report. So far as identification of the bottles were concerned, Sergeant Kumar stated that he identified the seized liquor bottles from the label marked 'for defence services only'. After interrogation, these bottles were given to SNCO's Mess.

26. We may note that apart from the statement of Sergeant Kumar, the respondents adduced the evidence of Ex-Naik J.D. Kale as PW 2 who corroborated the above. Even though it could be urged that the Ex-Naik J.D. Kale's testimony could not have been relied upon by the respondents to find the petitioner guilty for the reason that he was party to the crime, the statement of PW-1

remained unchallenged and would support the conviction of the petitioner for the charge no.1 as has been held by the Armed Forces Tribunal.

27. So far as other charges are concerned, the other witnesses have deposed with regard thereto. Squadron Leader S. Baizel was examined as PW 3 who stated that on the 6th of February, 2002 he was working as Special Duty Officer and was required to carry out a search of the room which was occupied by the petitioner. The search was conducted in the presence of four other members which included the CMC, the duty officer and Orderly Officer no.1 and no.2 of the day. The Station Security Officer and two police personnel were also available besides the petitioner. During the course of search, the following search items were seized:-

- | | | |
|-----|------------------------------------|-------------------------------------|
| “1. | Rice | - 351 Kgs. |
| 2. | Dal (Urd Black) | - 32.5 Kgs. |
| 3. | Masala
(Imli, Haldi,
Dhania) | - 08 Kgs. |
| 4. | Hot Condiments | - 3.5 Kgs. |
| 5. | Sugar | - 23 Kgs.
(Gross wt
with Bag) |
| 6. | Chilly Dry
(Red) | - 3.5 Kgs |
| 7. | Nutramal
(500 g) | - 01 Pkt |
| 8. | Amul Butter
(500 g) | - 4 Pkts |
| 9. | Britania Cheese
(400 g) | - 07 tins |
| 10. | Mango Jam | - 02 tins |

	(1 Kg)	
11.	Nescafe (200 g)	- 02 Pkts
12.	Custard Powder (500 g)	- 02 Pkts
13.	Amul Pure Ghee (01 kg)	- 01 Pkts
14.	Noodles (200 g)	- 01 Pkts
15.	Amul Butter (100 g)	- 02 Pkts
16.	Pickle	- 02 Kgs (approx.)
17.	Papad (100 g)	- 03 Pkts
18.	Tea leaves (01 kg)	- 01 Pkt
19.	Tea leaves (500 g)	- 07 Pkts
20.	Tea leaves (250 g)	- 07 Pkts
21.	Dal Channa and Urad White	- 3.7 Kgs
22.	List of Rubber Stamps recovered	- List attached
23.	List of Documents Recovered	- List attached”

28. These articles were then kept in the guard room. These articles were also produced during the proceedings of the court martial. The testimony of PW 3 is corroborated on all scores by the evidence of PW 4 Retd. M.A. Bhaskaran who was deputed as the Special Duty Officer, Security Staff on the relevant date and the search was carried out in his presence. He has also stated that

rationed items retrieved from the room of the petitioner were taken into the custody of the Security Staff in his presence. These articles were brought on the charge of the mess on the 14th of March, 2002 which information was given to the Security Officer. This witness also verified the seized ration.

29. The above narration would show that the instant case was not a case of no evidence and that the deposition of the witnesses unequivocally implicated the petitioner.

30. We may note that the petitioner had filed a review petition seeking review of the order dated 28th April, 2012 of the Armed Forces Tribunal which came to be rejected by another reasoned order dated 16th April, 2013.

No other ground was raised or pressed before us.

31. In view thereof, we are of the view that no legally tenable grounds are made to support the challenge by the petitioner by way of the present petition therefore, required to be rejected.

This writ petition is therefore, dismissed.

(GITA MITTAL)
JUDGE

(V. KAMESWAR RAO)
JUDGE

SEPTEMBER 10, 2013
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