

CWP No.17387 of 2015

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No.17387 of 2015
Date of decision:24.09.2015**

Paras Yadav

...Petitioner

Versus

Union of India and others

...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Mukesh Rao, Advocate,
for the petitioner.

Mr. Vivek Singla, Advocate,
for the respondents.

Rakesh Kumar Jain, J.

The petitioner, a Sepoy (Lance Naik) of 7th Infantry Division Provost Unit attached to 3 CAVALRY, was accused of “aggravated sexual assault on a minor girl child” and “absenting himself without leave”. On 04.03.2014, the Chief Executive Officer, Ferozepur Cantt., requested the Headquarters of the 7th Infantry Division to inquire into the allegations levelled against the petitioner. Resultantly, the convening order was passed for a Court of Inquiry on 05.03.2015. Statements were recorded in the inquiry and on the basis thereof, the petitioner was charge-sheeted on 14.07.2015, with the following charges:-

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<u>First Charge</u> <u>Army Act</u> <u>Section 69</u>	<i>COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, AGGRAVATED SEXUAL ASSAULT, CONTRARY TO SECTION 10 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012.</i> <i>in that he,</i> <i>at Ferozepur Cantonment, on 22 February 2014, with sexual intent, held Miss `A' daughter of Shri `B' a civilian, aged about 10 years, between his thighs and forcibly kissed her twice on her lips and thereby committed aggravated sexual assault.</i>
<u>Second Charge</u> <u>Army Act</u> <u>Section 39(a)</u>	ABSENTING HIMSELF WITHOUT LEAVE <i>in that he,</i> <i>at Ferozepur Cantonment, absented himself without leave, from the unit lines from 21 September 2014 to 05 November 2014.</i>

The General Commanding Officer convened General Court Martial (hereinafter referred to as the “GCM”) to try the petitioner on the aforesaid charges. The petitioner allegedly challenged the jurisdiction of the GCM in regard to charge No.1. The petitioner filed an application on 07.08.2015 under Rules 49 and 51 of the Army Rules, 1954 (hereinafter referred to as the “Rules”) along with his written arguments. The application dated 07.08.2015 filed by the petitioner was allegedly dismissed by the GCM on 08.08.2015. The petitioner applied for copy of the order dated 08.08.2015 which was not supplied to him. However, the petitioner filed an appeal under Section 164(1) of the Army Act, 1950 (hereinafter referred to as the “Act”) against that order, which is still pending.

It is alleged that the GCM was informed about the pendency of appeal filed by the petitioner on 12.08.2015 and requested for an adjournment but the GCM continued with the trial. It is alleged that on the one hand the appeal is not being decided by the Appellate Authority and on the other hand, the trial is being conducted by the GCM on day-to-day basis.

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It is also alleged that the GCM has erred in not supplying copy of the order dated 08.08.2015, rejecting objections filed by the petitioner on 07.08.2015.

Thus, on the basis of the aforesaid pleadings, the petitioner prayed that a direction may be issued to the respondents to supply him copy of the order dated 08.08.2015 passed on his objections dated 07.08.2015 in regard to jurisdiction of the GCM to try charge No.1 and further to direct the Appellate Authority to decide his appeal, after taking on record the additional points, which may be raised by him, after receipt of copy of the order dated 08.08.2015.

In reply, it is submitted that the petitioner has a remedy to approach the Armed Forces Tribunal in view of the provisions of Section 15 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the “AFT Act”). It is further averred that as per the provisions of the Act and Rules, which is a self contained Code, the law provides following specific rights at the trial to an accused:-

- “(a) Right to challenge the members forming the Court under Army Act section 130 read with Army Rule 44.
- (b) Right to raise objection to charge under Army Rule 49.
- (c) Right to raise special plea to jurisdiction under Army Rule 51.
- (d) Right to raise a plea in bar under Army Rule 53, and
- (e) Right to raise a plea of no case under Army Rule 57.”

It is further averred that in case the petitioner is aggrieved by the decision of the GCM with respect to any of the foregoing remedies, he had a right to challenge that decision under Section 164(1) of the Act. It is further averred that the petitioner had challenged jurisdiction of the GCM

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while invoking Rule 51 of the rules which was, however, dismissed by the GCM and the petitioner had filed his appeal on 10.08.2015 to the Confirming Authority against the decision of the GCM. According to the respondents, the petitioner has already availed the remedy of appeal, therefore, he cannot file the present petition. As regards the copy of the order dated 08.08.2015, the respondents have referred to Rules 93, 147 and 162 of the Rules.

Counsel for the petitioner has submitted that as per Rules 49 and 51 of the Rules, the petitioner had a right to object to the charge and also the jurisdiction of the GCM, trying a particular charge, and in case of any order passed on the objection, he has a right to challenge it by way of an appeal in terms of Section 164 of the Act. He further submitted that the grievance of the petitioner is that the documents/evidence collected during the Court of Inquiry were not supplied to him for which he had even filed an application under Rule 184 of the Rules on 08.08.2015.

As regards to the plea of the respondents that the petitioner has a remedy to approach the Armed Forces Tribunal in view of the provisions of Section 15 of the AFT Act, counsel for the petitioner has relied upon a judgment of the Supreme Court in the case of **Union of India and others vs. Major General Shri Kant Sharma and another**, 2015(2) SCT 519 to contend that the power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.

On the other hand, counsel for the respondents has vehemently

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argued that once an effective alternative remedy is available to the petitioner under Section 15 of the AFT Act to challenge any order, decision, finding or sentence passed by a court-martial or any matter connected therewith or incidental thereto, the present petition filed under Article 226 of the Constitution of India is not maintainable. In support of his submissions, he has also relied upon the judgment of the Supreme Court in **Major General Shri Kant Sharma's case (supra)**.

Counsel for the respondents has further argued that against all the grievances of the petitioner with regard to non-supply of copy of the order dated 08.08.2015, non-adjudication of his appeal filed against that order by the Appellate Authority and continuation of the trial by the GCM during the pendency of his appeal involving issue of jurisdiction to try the Charge No.1, the remedy lies with the petitioner under Section 15 of the AFT Act. In support of his submission, he has relied upon a decision of the High Court of Jammu and Kashmir in the case of **Col. Rajesh Mehta vs. Union of India and another**, SWP No.381 of 2015, decided on 26.03.2015.

It is further argued that the petitioner has been supplied documents/summary evidence against receipt on 26.07.2015, 01.08.2015 and 12.08.2015. It is submitted that the petitioner cannot be held entitled to be supplied a copy of the order dated 08.08.2015 passed by the GCM on demand since the said document has been passed during trial and can be inspected in view of Rule 93 of the Rules which is *para materia* to Rule 100 of the Air Force Rules, 1969, which has been interpreted by the Supreme Court in the case of **Union of India and others vs. Ex. Flt. Lt. G.S.Bajwa**, Appeal (Civil) No.10383 of 1996, decided on 02.05.2003, in which it has

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been held that for the purpose of obtaining copy of the day-to-day proceedings, the petitioner has to inspect the proceedings but the GCM would provide copies of the proceedings, free of cost, at any time after the confirmation of the finding and sentence and before the proceedings are destroyed.

In this regard, counsel for the respondents has also relied upon another judgment of the Supreme Court in the case of **Major General Inder Jit Kumar vs. Union of India and others**, decided on 20.03.1997, in which Rule 184 of the Rules was interpreted and it has been held that the Court of Inquiry and participation in the Court of Inquiry is at a stage prior to the trial by Court martial. It is the order of the Court Martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of evidence be recorded or that a Court martial be convened. The principles of natural justice are not attracted to such a preliminary inquiry.

I have heard learned counsel for the parties and examined the available record with their able assistance.

Before taking up the main issue(s) involved in this case, I would refer to certain provisions of the Act, Rules and the AFT Act, which are relevant for proper adjudication by this Court.

Rules 49 and 51 and of the Rules deal with “objection by accused to charge” and “special plea to the jurisdiction” respectively, under which the petitioner had filed objections in regard to jurisdiction of the GCM to try charge No.1. Rules 49 and 51 of the Rules are as under:-

“49. **Objection by accused to charge.** —The accused, when

required to plead to any charge, may object to the charge on the ground that it does not disclose an offence under the Act, or is not in accordance with these rules. The court after hearing any submission which may be made by the prosecutor or by or on behalf of the accused, shall consider the objection in closed court and shall either disallow it and proceed with the trial, or allow it and adjourn to report to the convening authority or, if it is in doubt, it may adjourn to consult the convening authority.”

“51. Special plea to the jurisdiction. - (1) The accused, before pleading to a charge, may offer a special plea to the general jurisdiction of the court, and if he does so, and the court considers that anything stated in such plea shows that the court has no jurisdiction it shall receive any evidence offered in support, together with any evidence offered by the prosecutor in disproof or qualification thereof, and, any address by or on behalf of the accused and reply by the prosecutor in reference thereto.

(2) If the court overrules the special plea, it shall proceed with the trial.

(3) If the court allows the special plea, it shall record its decision, and the reasons for it, and report it to the convening authority and adjourn; such decision, shall not require any confirmation, and the convening authority shall either forthwith convene another court for the trial of the accused, or order the accused to be released.

(4) If the court is in doubt as to the validity of the plea, it may refer the matter to the convening authority, and may adjourn for that purpose or may record a special decision with respect to such plea, and proceed with the trial.”

Rule 184 of the Rules provides right to certain persons to copies of statements and documents, which reads thus:-

“184. Right of certain persons to copies of statements and documents. (1) Any person subject to the Act who is tried by a court-martial shall be entitled to copies of such statements and documents contained in the proceedings of a court of inquiry, as are relevant to his prosecution or defence at his trial.

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(2) Any person subject to the Act whose character or military reputation is affected by the evidence before a court of inquiry shall be entitled to copies of such statements and documents as have a bearing on his character or military reputation as aforesaid unless the Chief of the Army Staff for reasons recorded by him in writing, orders otherwise.”

Rules 93 and 147 of the Rules also deal with the “custody and inspection of proceedings” and “right of person tried to copies of proceedings”, relying upon which the respondents have denied to supply copy of the order dated 08.08.2015 to the petitioner. Rules 93 and 147 of the Rules are as under:-

“93. Custody and inspection of proceedings. -The proceedings shall be deemed to be in the custody of the judge-advocate (if any), or, if there is none, of the presiding officer but may, with proper precaution for their safety, be inspected by the members of the court, the prosecutor and accused, respectively, at all reasonable time before the court is closed to consider the finding.”

“147. Right of person tried to copies of proceedings. - Every person tried by a court-martial (other than summary court-martial) shall, after the proceedings have been signed by the presiding officer and in the case of summary court-martial the officer holding the trial, and before they are destroyed, on a request made by such person in writing to the court or the officer holding the trial or the person having the custody of his proceedings, be entitled for the supply of a copy of such proceedings, within a reasonable time and free of cost, including the proceedings upon revision, if any.”

Section 164 of the Act provides that any person facing trial/proceedings before a Court-Martial, on feeling aggrieved by any order passed by the Court-Martial, can seek redressal of his grievance by presenting a petition before the officer or authority empowered to confirm the finding or sentence of that Court-Martial and the said officer or authority

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has the power to issue an appropriate order in regard to correctness, legality or propriety of the order or regularity of the proceedings of the Court-Martial. Section 164 of the Act reads thus:-

“164. Remedy against order, finding or sentence of court-martial. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit.”

Section 15 of the AFT Act confers on the Armed Forces Tribunals jurisdiction and power in relation to appeals against an 'order', 'decision', 'finding' or 'sentence' passed by a court-martial or any matter connected therewith or incidental thereto. Section 15(6)(f) of the Act also empowers the Armed Forces Tribunal to pass any order as it may think appropriate. Section 15 of the AFT Act thus:-

“15. Jurisdiction powers and authority in matters of appeal against court martial.- (1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable under this Act in relation to appeal against any order, decision, finding or sentence passed by a court martial or any matter connected

therewith or incidental thereto.

(2) Any person aggrieved by an order, decision, finding or sentence passed by a court martial may prefer an appeal in such form, manner and within such time as may be prescribed.

(3) The Tribunal shall have power to grant bail to any person accused of an offence and in military custody, with or without any conditions which it considers necessary:

Provided that no accused person shall be so released if there appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

(4) The Tribunal shall allow an appeal against conviction by a court martial where-

- (a) the finding of the court martial is legally not sustainable due to any reason whatsoever; or
- (b) the finding involves wrong decision on a question of law; or
- (c) there was a material irregularity in the course of the trial resulting in miscarriage of justice,

but, in any other case, may dismiss the appeal where the Tribunal considers that no miscarriage of justice is likely to be caused or has actually resulted to the appellant: Provided that no order dismissing the appeal by the Tribunal shall be passed unless such order is made after recording reasons therefor in writing.

(5) The Tribunal may allow an appeal against conviction, and pass appropriate order thereon.

(6) Notwithstanding anything contained in the foregoing provisions of this section, the Tribunal shall have the power to—

- (a) substitute for the findings of the court martial, a finding of guilty for any other offence for which the offender could have been lawfully found guilty by the court martial and pass a sentence afresh for the offence specified or involved in such findings under the provisions of the Army Act, 1950 (46 of 1950) or the Navy Act, 1957 (62 of 1957) or the Air Force Act, 1950, (45 of 1950) as the case may be; or
- (b) if sentence is found to be excessive, illegal or unjust, the Tribunal may—

- (i) remit the whole or any part of the sentence, with or without conditions;
 - (ii) mitigate the punishment awarded;
 - (iii) commute such punishment to any lesser punishment or punishments mentioned in the Army Act, 1950, (46 of 1950) the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950, (45 of 1950) as the case may be;
 - (c) enhance the sentence awarded by a court martial:
Provided that no such sentence shall be enhanced unless the appellant has been given an opportunity of being heard;
 - (d) release the appellant, if sentenced to imprisonment, on parole with or without conditions;
 - (e) suspend a sentence of imprisonment;
 - (f) pass any other order as it may think appropriate.
- (7) Notwithstanding any other provisions in this Act, for the purposes of this section, the Tribunal shall be deemed to be a criminal court for the purposes of sections 175, 178, 179, 180, 193, 195, 196 or 228 (45 of 1860) of the Indian Penal Code and Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974).”

A conjoint reading of the aforesaid provisions of law makes it clear that the petitioner has dual statutory remedy of filing appeal, i.e. under Rule 164(1) of the Act and Section 15 of the AFT Act, against any order, decision, finding, sentence passed by a Court-Martial or any matter connected therewith or incidental thereto and the Armed Forces Tribunal has the power to pass appropriate order to redress grievance of the petitioner.

In Major General Shri Kant Sharma's case (supra), the Supreme Court has held thus:

- “(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of

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the High Court under Article 226 of the Constitution of India.

- (ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.
- (iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
- (iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance.”

In view of the aforesaid decision of the Supreme Court in **Major General Shri Kant Sharma's case (supra)**, once the petitioner has an alternative efficacious statutory remedy under Section 15 of the AFT Act to approach the Armed Forces Tribunal in regard to all his grievances, which is also empowered to pass any order which it may think appropriate, the present petition filed under Article 226 of the Constitution of India cannot be entertained.

In view of the aforesaid discussion, the present petition is hereby dismissed in view of the availability of statutory remedy before the AFT. The petitioner is at liberty to avail his alternative remedy available to him, in accordance with law.

September 24, 2015
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(Rakesh Kumar Jain)
Judge