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

Reserved on: 20.07.2015
Pronounced on: 14.09.2015

+ **W.P.(C) 350/2010**

SEP. AKHALESH KUMAR RAY Petitioner
Through : Sh. S.M. Dalal, Advocate.

versus

UOI AND ORS. Respondents
Through : Sh. Kavindra Gill, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner, in these proceedings under Article 226 of the Constitution challenges the order of the Chief of the Army Staff (“COAS”) dated 10.01.2008 which upheld the findings and the sentence of the Summary Court Martial (“SCM”). The petitioner was held guilty of misappropriating government property, under Section 52(b) of the Army Act, 1954 (“the Act”) and a penalty of two months rigorous imprisonment in military custody along with reduction to the ranks was imposed on him.

2. The petitioner was enrolled in the Army as a Sepoy Driver, Mechanical Transport (Dvr/MT) on 28.04.1994 and assigned to Corps E.M.E. He was held guilty for selling petrol belonging to the government at cheap rates to one Vivek Kumar, the owner of M/s. Harsh Medical Stores in

Kherli Phatak, Kota. The respondent alleged that on 26.01.2007, at about 4:00 pm, the petitioner handed over five Pepsi bottles containing ten litres of petrol to Vivek Kumar and said that he would collect the money that evening. The shop owner informed Nk/ MP Ajit Singh Yadav of 18 Infantry Division Provost Unit about this incident. Nk/ MP Ajit Singh and Hav/MP Ashok Kumar Payra reached the area by 5:00 pm and hid near the store. They also gave four marked notes of ₹ 100/- each to the shop-owner. At around 7:00 pm, the petitioner came to the shop again. Upon signal given by Vivek Kumar they moved in and apprehended the petitioner. As soon as the petitioner saw them, he threw the marked notes from his hands. It was alleged that he pleaded for forgiveness and admitted his mistake before them.

3. A Court of Inquiry was convened in April for ascertaining and investigating the circumstances under which Akhalesh Kumar Ray was caught collecting money on 26.01.2007 by flying squad of 18 Infantry Division Provost Unit. The Court of Inquiry held that the petitioner was guilty. On 04.09.2007, the proceedings under Rule 22 of the Army Rules, 1954 were held by the Commanding Officer and the petitioner was charged under Section 52(b) of the Army Act, 1950 for dishonestly misappropriating property of the government. Summary of evidence was also recorded.

4. Subsequently, on 26.11.2007, a Summary Court Martial was constituted which was presided by Commanding Officer, Col. Bikramdeep Singh. The proceedings were concluded on 19.12.2007 and the petitioner was held guilty of misappropriating government property. The following penalties were imposed on the petitioner-

a) To be reduced to the ranks.

b) To suffer rigorous imprisonment for two months in military custody.

5. Aggrieved by the findings of the Summary Court Martial, the petitioner filed Post Confirmation Petition before the COAS under Section 164(2) of the Army Act. The petition was rejected and the sentence awarded by the Summary Court Martial was confirmed. Hence, the petitioner is before this Court challenging the findings of the SCM and the penalty imposed.

6. Learned counsel for the petitioner contends that there is no evidence to prove that firstly, the petrol was the property of the government and secondly, that the petitioner delivered the petrol to Vivek Kumar for wrongful gain. This is supported by the fact that the first Court of Inquiry, as averred by the petitioner, did not find anything adverse against the petitioner. The photos of the petrol bottles which were produced during the Court Martial were taken only on 27.11.2007, one day after trial commenced. Finger prints on these bottles were also not taken. The four marked hundred rupee currency notes allegedly thrown by the petitioner down too were not produced before the SCM. Further, the petitioner was not seen handing over petrol bottles to the Vivek Kumar. It is argued in addition by Mr. Dalal that there is no proof that the petrol belonged to the government. Further, the kilometre per litre chart does not show that there was any deficiency of petrol in the month of January 2007.

7. Counsel further submits that he had an altercation with Naik/MP Ajit Singh on 11.01.2007 when he had gone to collect Sep Dharu Ram's I Card. In a heated conversation, the petitioner said that "*Aaj tum humein ghuma rahe ho, kal hum tumhe ghumayengey*". This enraged Ajit Singh and he committed criminal conspiracy along with Vivek Kumar and Hav/ MP Ashok Kumar Payra and framed the petitioner.

8. It is further submitted by the petitioner that Rule 22 of the Army Rules 1954, which is a mandatory provision was violated since he was not given an opportunity to cross-examine prosecution witnesses, Ashok Kumar Payra and Ajit Singh Yadav. The petitioner also alleged that there were material variations in the statements of the witnesses in the Court of Inquiry, Summary Court Martial and record of proceedings. In addition, it is submitted that there were no independent witnesses during the proceedings, nor was seizure memo made of the items recovered. The copy of the charge-sheet and the complaint was also not given to the petitioner.

9. Learned counsel for the petitioner also submitted that the Commanding Officer is not legally trained and cannot be allowed to act as police, judge and jury, all together. The petitioner relies on the case of *R.S. Bhagat v. Union of India*, AIR 1982 Delhi 191 for the same. Moreover, the Summary Court Martial proceedings are liable to be set aside because the matter was not urgent and hence, the proper forum for the trial should have been a District Court Martial or a General Court Martial.

10. Learned counsel for the respondent contends that Vivek Kumar, the shopkeeper, informed Nk/ MP Ajit Singh that an Army Personnel had sold 10 litres of petrol in December 2006 and again offered to sell petrol at cheap

rates to him. Thereafter, the shop was put under surveillance by 18 Infantry Division Provost Unit from 08.01.2007 January to 23.01.2007 to look out for the petitioner. On 26.01.2007, the petitioner was apprehended by the Flying Squad. He confessed and asked for forgiveness but refused to sign the statement recorded by Military Police Personnel.

11. Learned counsel submits that the charge-sheet was framed and the charge was heard in the presence of the accused under Rule 22 on 04.09.2007. The accused was given full liberty to cross-examine witnesses at all stages as per Rule 22. Further, during the course of recording of summary of evidence, the petitioner was given full opportunity to call any witness in his defence under the provisions of Army Rule 33(1), 33(2), and (3) but he declined to call any witness in his defence. In addition, the petitioner was given a copy of the proceedings that was countersigned by the Commanding Officer. There were independent witnesses to the proceedings as well. The petitioner was found guilty based on material and circumstantial evidence that was placed before the court.

12. It is further submitted by learned counsel that the petitioner is a driver in the Army and has regular access to petrol and the fact that he was selling it at reduced rates shows that the property was illegally obtained and belongs to the government. Further, the currency notes were produced before the Court of Inquiry and Summary of Evidence.

Analysis and conclusions

13. The questions that arise for the consideration of this Court are-

- i. Whether the procedure for Summary Court Martial as given under the Army Act and Rules were followed and whether its constitution was valid;
- ii. Whether there was sufficient evidence to hold the petitioner guilty for a criminal charge.

Re Point No. (i)

14. To answer the first question, we must analyse the provisions of the Army Act, 1954 and its rules. Chapter V of the Army Rules, 1954 is titled '*Investigation of charges and Trial by Court Martial*'. Rule 22 prescribes the procedure for hearing of charge before the convening of court-martial. It provides that every charge must be heard in the presence of the accused and he must be given the opportunity to cross-examine. At the conclusion of the hearing of the charge, there are four options open to the Commanding Officer, including adjourn the case to record evidence or to order a trial by summary court-martial.

15. Rule 23 prescribes the procedure for taking down the summary of evidence which, *inter alia*, provides recording of the evidence of each witness, and opportunity to the accused to cross-examine each such witness. After the evidence is recorded, it shall be read over to the accused and shall be signed by him. The accused may further, make any statements or call any witnesses. Rule 24 provides that the summary of evidence so recorded shall be considered by the Commanding Officer who at that stage has again three courses open to him, (a) remand the accused for trial by a court-martial, (b) refer the case to the proper superior military authority; and (c) if he thinks it

desirable, re-hear the case and either dismiss the charge or dispose it of summarily. Further, whenever an inquiry affects the character or military reputation of a person, then full opportunity must be given to the accused to be present throughout and to cross-examine any witness. In case Rule 180 has been followed, then Rule 22 could be dispensed with.

16. The petitioner urged that Rule 22 which is a mandatory provision as held in *Lt. Col. Prithi Pal Singh Bedi v. Union of India*, 1983 SCR (1) 393, was violated as he did not get an opportunity to cross-examine a few witnesses. However, in the present case, the record clearly shows that the accused was present during the examination of witnesses and has cross-examined the prosecution witnesses exhaustively at all stages. The statements of the witnesses had been read over to the accused which were in turn signed by him. He had made a statement in his defence which had been recorded as well. Further, during the course of recording of summary of evidence the petitioner was given full opportunity to call any witness, but he declined to call anyone in his defence.

17. Rule 34 provides that the accused shall be informed of every charge for which he is to be tried. The interval between his being so informed and his arraignment shall not be less than ninety-six hours. Sub rule (2) also provides that the officer shall give the accused a copy of the charge sheet. Rule 129 provides that an accused person may have a person to assist him during the trial, also known as friend of the accused. As per Rule 147, the person tried by a Summary Court Martial shall also be entitled to copies of proceedings on a request made by such person. As to whether it is

mandatory to hold a Court of Inquiry, the Supreme Court in *Lt. Col. Prithi Pal Singh Bedi (supra)* had this to say:

“When an offence is committed and a trial by a general court martial is to be held, there is no provision which requires that a court of enquiry should be set up before the trial is directed.

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...To ensure that such a person whose character or military reputation is likely to be affected by the proceedings of the court of enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation, Rule 180 merely makes an enabling provision to ensure such participation...”

18. In the present case, the accused was informed of the charge against him. He has also received a copy of the proceedings. A friend of the accused was present throughout the Summary Court Martial proceedings. A copy of the charge sheet was also given to him on 13 November, 2007 as per the records. The copy of the tentative charge sheet was not given to him. It was, nevertheless, read and explained to him. The Supreme Court in case of *Major G.S. Sodhi v. Union of India* (1991) 2 SCC 382, has held that the procedural defect unless vital and substantial will not affect the trial when accused duly participated in the proceedings and there is no flagrant violation of any procedural provision causing prejudice to the accused. It was held that:

“It must be noted that the procedure is meant to further the ends of justice and not to frustrate the same. It is not each and every kind of defect preceding the trial that can affect the trial as such. In the instant case we have referred to almost all the so-called defects pointed out in the procedure preceding the court-martial

and we are not convinced even remotely that anyone of them is of vital nature so as to affect the trial substantially”.

In this Court’s opinion, the irregularities pointed out, in the facts and circumstances of this case, did not prejudice the Petitioner. He was informed of the charges much before trial begun and has cross-examined the witnesses as well.

19. The petitioner submitted that a Commanding Officer was not competent to hold a Summary Court Martial. The Army Act is a specialised Act with a special procedure. The Commanding Officer is competent to hold a Summary Court Martial under Section 116 of the Army Act, 1954. This position was decisively ruled in *Vidya Prakash v Union of India* 1988 (2) SCC 459:

*“13 - The Commanding Officer of the Corps, Department or Detachment of the Regular Army to which the appellant belongs, is quite competent in accordance with the provisions of **Section 116** of the said Act and as such the constitution of the summary court martial by the Commanding Officer of the Corps cannot be questioned as illegal or incompetent. It is neither a general court martial nor a district court martial where the appellant's case was tried and decided. In case of general court martial or district court martial Rule 39(2) of the Army Rules, 1954 is applicable and the Commanding Officer is not competent to convene general or district court martial. The summary court martial was held by the Commanding Officer of the corps, Major P.S. Mahant and there are two other officers including Capt. K.J. Singh and another officer to attend the proceedings. In such circumstances, the summary court martial having been convened by the Commanding Officer of the corps according to the provisions of the Army Act, 1950, the first submission made on behalf of the appellant fails.”*

The position was again reiterated in *Union of India v. Dinesh Prasad*, (2012) 12 SCC 63 .

20. The related issue is with regard to the validity of summary court martial. Learned Counsel for the petitioner submitted that a Summary Court Martial could not have been constituted since no reference was made by the Commanding Officer to the officer empowered to convene a district court-martial or on active service a summary general court-martial as per proviso of Rule 22(3). Further, it was urged that the charges are neither grave nor immediate since the trial took place 11 months after the incident. Thus, the Summary Court Martial must be invalid. Learned counsel relied upon the case of *Ex-Havildar K.P. Pandey v. Union of India*, 2003 (3) SLJ 463 Delhi, for this contention.

21. Section 120 of the Act deals with powers of Summary Court Martial. In the present case, the Commanding Officer was competent to try by Summary Court Martial without making a reference as per Section 120 of the Army Act. Reliance is placed on the case of *Brijesh Kumar Singh v Union of India, Writ Petition No. 6840 (S/S) of 2002*, where the Allahabad High Court held that the offence under Section 47 does not have to be referred as per Section 120 of the Army Act. Thus, the present case also falls within the exception. Further, any violation of the rules does not invalidate the proceedings of the court martial if no prejudice has been caused to the accused as held in *Major G.S. Sodhi v. Union of India* (1991) 2 SCC 382. Therefore, in the opinion of this Court, trial by Summary Court Martial was valid.

Re Point No. (ii)

22. Turning now to the second question, before we enter into the sufficiency of the evidence, it is important to ascertain the scope of judicial review of the High Court under Article 226. Referring to the scheme of the proceedings of a Court Martial, as conceived under the Army Act and the Rules made thereunder, a two Judge Bench of the Supreme Court, in *Union of India and Ors. v. Major A. Hussain* AIR 1998 SC 577 while holding that the procedure for trial prescribed by a Court Martial, is fair, observed and held as follows:

“23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that

the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment.”

23. Article 226 of the Constitution, therefore, does not empower the High Court to re-appreciate the findings if it were sufficient for the conclusion reached. However, the power is available for the limited purpose of determining if the proceedings of the Court Martial were conducted in accordance with the requirements of law. If the findings reached are found to be perverse and/or contrary to, or in violation of any mandatory provisions, or in violation of principles of natural justice, the High Court may step in under Article 226. (Ref *Union of India v. Himmat Singh Chahar*, 1999 CriLJ 2894).

24. Section 133 provides that the Indian Evidence Act, 1872, shall, subject to the provisions of the Act, apply to all proceedings before a Court-martial. In the case of *Director General, Border Security Force and Ors. v. Iboton Singh (Kh)*, (2007) 1 GLT 903 a Division Bench of the Gauhati High Court held that if the provisions of the Evidence Act are ignored or are not taken into account by a SGFC, such non-compliance may compel the writ court to interfere when it results in gross miscarriage of justice. Hence, if the

decision is reached without taking into consideration a relevant fact or relevant aspect of law, then the High Court may exercise its power of judicial review. In *Avtar Singh v. Union of India and Ors.*, ILR (2014) 2 Delhi 850, a Division Bench of this Court pointed out the difference between a disciplinary proceeding and a court martial in the following words:

“.....the contours of the burden of proof before the disciplinary authority and a court martial would be different inasmuch as the court martial tries a person for criminal offence by the special procedure, which in the instant case is provided under the Navy Act and the prosecution would be required to discharge the onus of proof beyond reasonable doubt; whereas disciplinary proceedings tests the evidence produced before it on a principles of preponderance of probabilities”

25. In the present case, the Summary Court Martial has imposed a punishment of (i) two months of rigorous imprisonment and (ii) a reduction in ranks. It can be seen that the evidence on the basis of which the adjudicating authorities reached their conclusions is scant, even if present. The prosecution witnesses had marked currency notes which were handed over to the accused before they allegedly caught him red-handed. These currency notes significantly, were not produced before the Court of Inquiry or the Commanding Officer. The hand-over memo did not include petrol bottles or currency notes. The photos of the five petrol bottles given in the Summary of Evidence were clicked only a day after the trial began on 27 November, 2007, i.e 10 months after the incident happened. Moreover, there were variations in the statements of the prosecution witnesses in the Court of Inquiry and the Summary of Evidence regarding the date of the incident and certain circumstances surrounding it. These are important elements of the

offence the petitioner has been charged with, i.e. misappropriation of property belonging to the Government. Keeping these facts in mind, in our opinion, it was a case where material facts were overlooked by the adjudicating authorities and where conviction and sentence were handed down without the basic proof required in order to establish the charge of criminal misbehaviour. The Court Martial clearly ignored the Evidence Act and the fundamental principles underlying it, in regard to proof of the offence. Neither was any material evidence produced; nor was any explanation offered for why it could not be brought forth.

26. On the other hand the Court notes that the material witness, Vivek Singh, deposed against the petitioner, as did the two other witnesses. The petitioner even cross examined these witnesses. These facts are undisputed and a matter of the record; no attempt was made to allege any motive on the part of the said Vivek Singh, to falsely implicate the petitioner. *Sawai Singh v. State of Rajasthan* (1986) 3 SCC 454 highlights that

“a departmental enquiry entailing consequences like loss of job which now-a-days means loss of livelihood, there must be fair play in action, in respect of an order involving adverse or penal consequences against an employee, there must be investigations to the charges consistent with the requirement of the situation in accordance with the principles of natural justice in so far as these are applicable in a particular situation.”

27. In *Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and Others* (1991) 2 SCC 716, the distinction between the standard of proof which prosecutions have to satisfy and those in departmental proceedings was noticed by the Supreme Court. It was held

as follows:

"It is thus well settled law that strict rules of the Evidence Act, and the standard of proof envisaged therein do not apply to departmental proceedings or domestic tribunal. It is open to the authorities to receive and place on record all the necessary, relevant, cogent and acceptable material facts though not proved strictly in conformity with the Evidence Act. The material must be germane and relevant to the facts in issue. In grave cases like forgery, fraud, conspiracy, misappropriation, etc. seldom direct evidence would be available. Only the circumstantial evidence would furnish the proof. In our considered view inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. There must be evidence direct or circumstantial to deduce necessary inferences in proof of the facts in issue. There can be no inferences unless there are objective facts, direct or circumstantial from which to infer the other fact which it is sought to establish. The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the fact must be more probable. Standard of proof, however, cannot be put in a strait-jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case. The standard of proof is the same both in civil cases and domestic enquires."

28. In the present case, as noticed earlier, the Petitioner extensively cross examined all the departmental witnesses, including Vivek Singh. Their testimonies collectively established that he had gone to the shop and was given the notes; the bottle was seized and most importantly, he admitted to the departmental witnesses about his wrongdoing. These statements could not be shaken during cross examination.

29. In the circumstances, this Court is of the opinion that though there is

merit with regard to the charge levelled against him, the evidence on record is insufficient to justify the imposition of a punishment of rigorous imprisonment for a term of two months as well as a reduction in ranks. The petitioner must, therefore, get the benefit of doubt so far as the quantum of punishment is concerned. Thus, in the present case, with such thin evidence, we hold that the sentence of rigorous imprisonment is improper and, therefore, set aside the same. We, however, do not see the need to interfere with the penalty of reduction in rank and deem it sufficient punishment. That part of the order is, therefore, sustained. There shall be no order as to costs. W.P.(C) 350/2010 is disposed of in the above terms.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

SEPTEMBER 14, 2015