

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

+ **W.P.(C) 17622/2004**

Reserved on: 26th July, 2017

Date of decision : September 22, 2017

SEP/CLERK S.K. NAIRPetitioner

Through

versus

UNION OF INDIA & ORS Respondents

Through MS.Barkha Babbar and
Ms.Dipanjali Tyagi, Advs.

WP(C) 18185/2004

SEP/CLERK BALWINDER SINGHPetitioner

Through

versus

UNION OF INDIA & ORS Respondents

Through MS.Barkha Babbar and
Ms.Dipanjali Tyagi, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J.

As the petitions raise a similar question of law, we propose to dispose of the same by way of this common judgment, after noting the facts of the two cases as below:

WP (C) No.17622 /2004, S.K. Nair v. UOI & Ors

S.K. Nair was tried by way of Summary Court Martial from 13.01.2003 to 03.03.2003 on the following charge:

“At Pathankot and Ramgarh Cantt. between 15 Mar 1995 to 01 May 1995, which came to the knowledge of the authority competent to initiate action on 27 Jan 2000, while performing the duties of Recruiting Clerk for the recruitment rally held at Pathankot during Mar 1995, with intent to defraud, processed application for enrolment in respect of Shri Niranjana Singh (now) No.3396225 Sepoy/Cook Niranjana Singh (of 5 Sikh Regiment), along with enrolment documents containing different addresses and religion/caste as given below, well knowing that the said Niranjana Singh was ineligible for enrolment due to height criteria applicable to Agra (UP):

<u>Address-Agra (UP)</u>	<u>Address:Kangra (HP)</u>
<u>Caste-Hindu (Rajput)</u>	<u>Caste-Hindu/Dogra</u>
(i) Enrolment Form	(i) Nominal Roll
(ii) Rahdari Certificate	(ii) Board Proceedings
(iii) Verification Roll	(iii) Postage Account
(iv) AFMSF-2A	(iv) Call Letter.”

2. Bare reading of the charge sheet would show that the allegation against the S.K. Nair relates to the period March to

May 1995, while the Summary Court Martial was convened only on 06.01.2003 i.e. after a period of more than 7 years.

3. The respondents in their counter affidavit, to explain this gap, have stated that Headquarter B & O Sub Area(Now HQ JOB Sub Area) convened a Staff Court of Inquiry vide Convening Order No. 4210/99/A3 dated 05.09.1998 to investigate the contents of the complaint against Hav/Clk Tehsildar Singh and the then Commandant ASC Centre (North) was detailed as the Presiding Officer. The Staff Court of Inquiry was concluded on 30.11.1999 and the proceedings were forwarded to GOC-in-C Central Command with recommendation of GOC, MP B&O Area. The GOC-in-C Central command vide its order dated 15.02.2001 agreed with the recommendation of disciplinary action against S.K. Nair, who was the Recruiting Clerk of Recruitment Rally held at Pathankot in March, 1995, amongst others. The summary of evidence in respect of the petitioner commenced on 17.01.2001 was pursued by CO, No 1 Trg Bn (AT), ASC Centre (North) on 16.08.2001. The pre-trial documents along with summary of evidence and all connected documents were then forwarded to Cdr B & O Sub Area along with recommendation of CO, No.1 Trg Bn(AT) and Comdt.ASC Central(North). The HQ MB Area vide letter No. 065/646/A1 dated 21.10.2002 addressed to HQ JOB Sub Area (A) directed that S.K. Nair be tried by Summary Court Martial and accordingly S.K. Nair was tried by Summary Court Martial on 13.01.2003.

WP (C) No.18185/2004, Balwinder Singh v. UOI & Ors

4. Balwinder Singh was tried by way of Summary Court Martial from 13.01.2003 to 03.03.2003 on the following charge:

“At Bhatinda and Ramgarh Cantt. between 15 Nov 1995 and 05 Jan 1996, which came to the knowledge of the authority competent to initiate action on 27 Jan 2000, while performing the duties of Recruiting Clerk for the recruitment rally held at Bhatinda during Nov 1995, with intent to defraud, processed application for enrolment in respect of Shri Ranvir Singh (now) No.3396859 Sepoy/Cook Ranvir Singh (of 13 Sikh Regiment), along with enrolment documents containing different addresses and religion/caste as given below, well knowing that the said Ranvir Singh was ineligible for enrolment due to height criteria applicable to Agra (UP):

<u>Address-Agra (UP)</u>	<u>Address:Kangra (HP)</u>
<u>Caste-Hindu (Rajput)</u>	<u>Caste-Hindu/Dogra</u>
(i) Enrolment Form	(i) Recruitment Inspection Card
(ii) Rahdari Certificate	(ii) Nominal Roll
(iii) Verification Roll	(iii) Board Proceedings
(iv) AFMSF-2A	(iv) Postage Account”
(v) Call Letter	

5. Bare reading of the charge sheet would show that allegation against Balwinder Singh relates to the period November 1995 to

January 1996, while the Summary Court Martial was convened only on 06.01.2003 i.e. after a period of more than 7 years.

6. The respondents in their counter affidavit, to explain this gap, have stated that Headquarter B & O Sub Area (Now HQ JOB Sub Area) convened a Staff Court of Inquiry vide convening order dated 05.09.1998 to investigate the contents of the complaint against Hav/Clk Tehsildar Singh and the then Commandant ASC Centre (North) was detailed as the Presiding Officer. The Court of Inquiry was concluded on 30.11.1999 and the proceedings were forwarded to GOC-in-C Central Command with recommendation of GOC, MP B&O Area (Now GOC MB Area). The GOC-in-C Central Command vide its order dated 15.02.2001 agreed with the recommendation of taking disciplinary action against the petitioner who was the Recruiting Clerk of Recruitment Rally held at Bhatinda in November, 1995 amongst others. The summary of evidence in respect of the petitioner commenced on 05.04.2001. The pre-trial documents along with summary of evidence and all connected documents were then forwarded to Cdr B & O Sub Area (Now JOB Sub Area) alongwith recommendation of CO, No.1 Trg Bn (AT) and Comdt. ASC Central (North) on 21.08.2001. The pre-trial documents were confirmed by DJAG on 25.10.2002. The HQ MB Area vide letter dated 21.10.2002 addressed to HQ JOB Sub Area (A) directed that Balwinder Singh be tried by Summary Court Martial and accordingly Balwinder Singh was tried by Summary Court Martial on 13.01.2003.

7. The above petitions were listed before us pursuant to the order dated 05.07.2016, *UOI & Ors v. Vishav Priya Singh*, 2016 (8) SCC 641 passed by the Supreme Court remanding the above and other cases.

8. The Supreme Court in the above judgment has held that the power to hold Summary Court Martial must be exercised rarely and only when it is absolutely imperative and immediate action is called for. We quote herein below the relevant paragraphs from *Vishav Priya Singh (supra)*:

“19. Section 116 of the Act empowers the CO of any Corps, Department and Detachment of the regular Army to hold an SCM and specifically states that he alone shall constitute the Court. Sub-Section (2) then prescribes that the proceedings shall, however, be attended throughout by two other persons specified therein. However, such persons are not to be sworn or affirmed. Unlike Section 113, 115 and 114, where composition of the Court Martial concerned is prescribed to consist of at least three officers, it is the CO alone who constitutes of Court under Section 116 in respect of SCM. Further, under Rules 39 and 40 of the Rules, CO of the accused, or of the Corps to which the accused belongs is specifically disqualified for serving on a GCM or DCM and composition of a GCM ought to compose of officers of different corps or departments. However, no such restriction applies to SCMs and in fact the CO himself must constitute the Court. The Act has thus given drastic power to one single individual, namely, the CO who alone is to constitute the Court. No doubt, this power

comes with restrictions insofar as the power to award sentence is concerned in terms of sub-section (4) and (5) of Section 120. However, even with such restrictions the power is quite drastic. The reason for conferment of such power is obvious that in order to maintain discipline along the soldiers and units, the CO must have certain special powers, for it is the discipline which to a great extent binds the unit and makes it a cohesive force.

20. The High Court of Delhi was therefore completely correct in observing that such power must be exercised rarely and when it is absolutely imperative that immediate action is called for. The satisfaction in that behalf must either be articulated in writing or be available on record, specially when the matter can be considered on merits by a tribunal, with the coming into force of the Armed Force Tribunal Act, 2007”.

33. In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions. We fully endorse and affirm the view taken by the High Court that SCM is an exception and it is imperative that a case must be made out for immediacy of action. The reasons to convene an SCM must be followed by well articulated reasons or the record itself must justify such resort.”

(emphasis supplied)

9. As far as the direction that the satisfaction to hold Summary Court Martial must be articulated in writing, Supreme Court, by way

of order dated 16.02.2017 passed in Review Petition (Civil) No.3927/2016, clarified that the same shall apply on and with effect from the date of judgment i.e. 05.07.2016. The relevant portion of order dated 16.02.2017 reads:-

“7. However, it is observed, that the requirement, as stipulated in aforesaid paragraphs 20 and 33, of recording reasons for convening Summary Court Martial, shall apply on and with effect from the date of the judgment mainly from 05.07.2016. Except for this clarification, we are satisfied, that no case for review of the judgment dated 05.07.2016 has been made out.”

10. Supreme Court, while holding that the mandate of recording or articulating reasons in writing was prospective, did not disturb and withdraw the requirement of the same to be “be available on record”. Supreme Court in paragraph 34 of the above judgment of **Vishav Priya Singh (supra)** also referred to the recommendation of a Committee of Experts appointed by the Defence Minister to review service and pension matters and held that such recommendations summed up the approach that needed to be adopted quite well. We again quote from the judgment:

“Before parting, we must mention recommendations of a Committee of Experts appointed by the Defence Minister to review service and pension matters including strengthening of institutional mechanisms related to redressal of grievances, which recommendations appears at p.172 of the Ministry of Defence Report of 2015 in the following terms:

“... the Committee recommends that the environment may be sensitised that the provision of

SCM should be used sparingly and exceptionally and preferably only in operational areas where resort to a regular trial is not practicable or when summary/administrative action would not meet the requirements of discipline. It may be emphasised that SCM is an exception and not the rule and was not even originally meant to be a peace-time provision or regular recourse. In the times to come, the desirability of even having such a provision of the statute book may be examined with the suitability of a replacement by a more robust system meeting the aspirations of judiciousness and constitutional norms. We may however caution that we are not, in any manner, underestimating the requirement of discipline in the uniformed services but are simply stating that SCM may not be treated as a routine recourse when other effective tools of enforcing discipline are available”.

These recommendations sum up the approach that needs to be adopted, quite well”.

11. The judgment of this High Court dated 25.01.2008 passed in W.P.(C) 2511/1992 **Ex. LN.Vishav Priya Singh v. Union of India & Ors.** and other connected petitions was approved by the Supreme Court on this issue by holding that Summary Court Martial can be resorted to only as an exception and not as a rules, and only if there was grave and compelling cause for taking an immediate and instantaneous decision. We may herein quote from the judgment dated 25.01.2008 passed by this High Court:

“20. An SCM can legitimately be convened where there is grave and compelling cause for taking immediate

action which would be defeated if reference to a District Court Martial or Summary General Court Martial is made. In other words, holding of an SCM is the exception and not the rule. From the multitude of possible offences it is only those envisaged in Sections 34, 37 and 69, that can be tried by an SCM, further fortifying the exceptional and extraordinary character of an SCM. We think it necessary to underscore that it is not proper to convene an SCM merely because the offence(s) with which a sepoy of the force is charged finds mention in the enumeration contained in these three Sections. What is of preeminence in convening an SCM is that it should be found imperative that immediate action is manifestly necessary. Therefore, it is essential that this factor, viz. need to hold a trial immediately, is articulated and reasoned out in writing in the order convening the SCM. Failure to do so would create good reason to quash the SCM itself. Routinely, and certainly far too frequently, the sentence passed by SCMs violates the spirit of Regulation 448(c) (supra) thereby taking away the sepoys' livelihood without affording them the normal procedural protections of law.

23. Secondly, an SCM must be the exception and not the Rule. It can only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications. Obviously, where the delinquent or the indisciplined action partakes of an individual character or has civil law dimensions, an SCM should not be resorted to. Delay would thus become fatal to an SCM”.

12. High Court in its order dated 25.01.2008 had, set aside the Summary Court Martial on the ground that it was not convened, constituted and completed by the Commanding Officer of the unit to which the petitioner belonged. Supreme Court did not agree with this

proposition of law and has held that it is not imperative that the Summary Court Martial be convened, constituted and completed by the Commanding Officer of the unit to which the accused belonged. The above petitions were, remanded for consideration on merits.

13. We have not examined and commented on merits of the allegation and the evidence against the two petitioners as the Summary Court Martial proceedings have to be quashed by us on the ground of delay between the date of instance and the convening of the Summary Court Martial proceedings. It has been held by the Supreme Court that for convening the Summary Court Martial proceedings, there has to be an absolute urgency and it should be imperative to take immediate action. Delay of 7-8 years can certainly not be called an emergent situation for which convening of the Summary Court Martial proceedings were the right and prescribed procedure. The delay of over 7 years in initiation would be fatal to the Summary Court Martial and, therefore, we have no hesitation in allowing the present petitions and setting aside the Summary Court Martial proceedings against the two petitioners with all consequential benefits to them.

In view of above, the petitions are allowed with no orders as to costs.

NAVIN CHAWLA, J

SANJIV KHANNA, J

SEPTEMBER 22, 2017/vp