

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.23712 of 2017

Arising Out of PS. Case No.-372 Year-2016 Thana- GOVERNMENT OFFICIAL COMP.
District- Nawada

=====

Ramesh Kumar Choudhary, son of Sri Bhupendra Choudhary, resident of Village- Chandrayan, P.S.- Nauhatta, District- Saharsa, posted as Lance Nayak No. 15569488F (House Keeper) under Mr. Atul Bhardwaj, Colonel, Commanding Officer, 104, Engr. Regt. (PVC), Dippa Toli Cant Pin- 914104.

... .. Petitioner/s

Versus

1. The State of Bihar.
2. The Union of India through Mr. Atul Bhardwaj, Colonel, Commanding Officer, 104 Engineering Regiment (PVC), Ranchi, Pin- 914104, C/o- 56 APO.
3. Sri Ravindra Kumar Singh, S.I., Excise, at Samekit Janch Chowki, Rajouli, Nawada.

... .. Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr. N.K.Agrawal, Sr. Advocate.
Dr. Bidhu Ranjan, Advocate.
Mr. Ashok Kumar Jha, Advocate.

For the UOI : Mr. S.D.Sanjay, Addl. Solicitor General
Mr. Rajesh Kumar Verma, Advocate.

For the State : Mr. Nityanand Tiwary, APP.

=====

CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR
CAV JUDGMENT

Date : 02-05-2018

Heard learned counsel for the petitioner, learned counsel appearing on behalf of Union of India and learned counsel appearing on behalf of the State.

2. The petitioner sole accused of G.O.Case No. 372 of 2016 registered for the offence under Section 47(a) of the Bihar Excise (Amendment) Act, 2016 (hereinafter referred to as the



‘Excise Act’) has filed the instant application for transfer of the said case from the court of the learned Chief Judicial Magistrate, Nawada where presently pending to the military court i.e., Court Martial at Ranchi.

3. Before moving this Court, the petitioner filed a petition for transfer the said case to the Court-Martial at Ranchi on the ground that petitioner is a military personnel governed by the Army Act, 1950 (hereinafter referred to as the ‘Act’) to be tried by Court-Martial for committing civil offence, but the learned Chief Judicial Magistrate, Nawada rejected the prayer on the ground that petitioner being an accused under the Excise Act and the offence under Section 47(a) of the Excise Act is considered only in the State of Bihar and not in other States; moreover, it is also not an offence in defence service and exclusively triable by a Special Court.

4. The brief fact giving rise to the case is that petitioner, Ramesh Kumar Choudhary, Lance Nayak bearing No. 15569488F (House Keeper), serving in the Indian Army, presently posted at 104 Engr. Regt. (PVC) Deepa Toli Cant. Ranchi under Commanding Officer, Mr. Atul Bhardwaj, Colonel of the said Regiment, while travelling on 13.01.2016 in a private bus, the said bus was checked by the Sub Inspector of Excise Department



in the territorial jurisdiction of Rajauli in the Nawada District of State of Bihar and during checking, the petitioner was found carrying 18 bottles of foreign liquor of “While Hall” brand each containing 750 ml and also 09 bottles of “Vodka Magic Moment” each containing 750 ml of foreign liquor, so in total 20.250 litres of foreign liquor was recovered from the possession of the petitioner, as the same was being carried in suit case by the petitioner. As per allegation, the petitioner was apprehended and forwarded to the learned Chief Judicial Magistrate, Nawada on 14.08.2016 and remanded to judicial custody.

5. Mr. N.K.Agrawal, learned senior counsel appearing on behalf of the petitioner submits that petitioner is posted as Lance Nayak in Indian Army under Mr. Atul Bhardwaj, Colonel Commanding Officer in the 104 Engr. Regt. (PVC) Deepa Toli Cant., Ranchi. Being military personnel, he is subject to the Army Act as he is still serving in the Indian Army, so his criminal case is required to be tried by the Court-Martial for committing an offence defined in the Act which also includes. It is further submitted that alleged offence of carrying foreign liquor, which is an offence under the Excise Act, comes under the purview of civil offence defined under the Act and referring to Section 69 of the Act, submits that subject to provision of Section 70 of the Act, any



army personnel, who has committed any civil offence at any place in India or beyond, is deemed to be guilty of an offence against this Act and shall be liable to be tried by a Court Martial. Learned counsel further draws attention to Sections 125 and 126 of the Act and submits that in view of Section 125 of the Act, in case a person subject to Army Act commits any civil offence in that eventuality criminal court as well as Court-Martial, both have jurisdiction for enquiry and trial in respect of the said offence, in such situation the Forum of trial of the army personnel is to be decided by the officer commanding the army wherein accused is serving and it is the discretion of the Commanding Officer for taking decision whether such army personnel requires to be tried by the Court-Martial, if it is decided to hold the trial by Court-Martial, in such situation the accused as well as concerned case should be transferred to the concerned Court-Martial of the specific jurisdiction.

6. Learned counsel also submits that in view of Section 125 of the Act, on 26.08.2016, Mr. Ajay Kapoor, Captain, Adjutant, on behalf of the Commanding Officer of the petitioner, vide letter no. 15569488/RKC/FRI/A, intimated his decision that the concerned authority requires to conduct the trial of the petitioner, a military personnel, in military court i.e., Court-



Martial. He further submits that again on 17.11.206, Mr. Rahul A.Pawar, Lieutenant Colonel, Company Commander, of 104 Eng. Regiment (PVC), Deepa Toli Cant. Ranchi, reiterated similar request before the District Magistrate, Nawada by sending a letter bearing No. 0066/324/18/A. Subsequently, Mr. Atul Bhardweaj made a prayer before the Hon'ble the Chief Justice Patna High Court for transfer of G.O.Case No. 372 of 2016 to the military authority for conducting trial. Learned counsel submits that on 18.11.2016, the petitioner filed petition for transferring the case to the military court at Ranchi but the same was rejected by the learned Chief Judicial Magistrate, Nawada by the impugned order without properly appreciating the provisions of law enumerated in the Army Act for conducting trial in case of a military personnel subject to the Act for committing any civil offence.

7. Learned counsel further refers to Section 475 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') and submits that in exercise of powers conferred by the court, the Central Government has made rules i.e., The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978, wherever any dispute arises regarding the forum of trial in case of a person subject to the Army Act with regard to trial by Court-Martial or a criminal court, said rule is applicable and in a



such situation the Magistrate is required to follow that rule in proper cases to deliver the accused to the Commanding Officer of the Unit for the purpose of trial by the Court-Martial and also referring Rule 1636, learned counsel submits that after taking cognizance by the court, the Magistrate requires to transfer the case to Court-Martial.

8. Mr. S.D.Sajnay, learned Addl. Solicitor General, representing O.P. No. 2, the Union of India, through Mr. Atul Bhardwaj, Colonel Commanding Officer, 104 Engineering Regiment (PVC), Ranchi, submits that the petitioner, being military personnel in service, requires to be tried by Court-Martial for committing alleged civil offence. A counter affidavit also has been filed on behalf of the O.P. No. 2. The learned counsel further submits that despite request made by the Commanding Officer to the learned Chief Judicial Magistrate, Nawada for transferring the case of the petitioner for putting him on trial before Court-Martial, same was rejected erroneously without appreciating the facts on record as well as ignoring the law applicable in the case of the petitioner. He further submits that Excise Act does not oust the jurisdiction of the Court-Martial as there is concurrent jurisdiction of the Court-Martial as well as criminal court and the discretion in the matter of selection of forum of trial lies to the Commanding



Officer and it becomes mandatory to transfer the case to the Court-Martial after decision taken by the competent authority i.e., the Commanding Officer of the army personnel in this regard; however, in the present case the Commanding Officer has taken decision to put the petitioner on trial before the Court-Martial.

9. Learned counsel appearing on behalf of the State/O.P. No., submits that trial may proceed also in the Special Court at Nawada and placed reliance to a decision passed by order dated 21.06.2011 in Cr. Misc. No. 8540 of 2007 (*Retd. Subedar Major Anand Lal Sahani & Ors. vs. The State of Bihar & Ors.*).

10. Having considered the rival submission and on perusal of case record, the Court finds that the ratio decided in the case of Retd. Subedar Major Anand Lal Sahani (supra) does not apply in the present one. In that case, the military authority did not choose to exercise its discretion opting for Court-Martial; whereas in the case at hand such discretion has been exercised under Section 125 of the Army Act, 1950. In the present case factual aspect of the case is that petitioner being serving in the Indian Army to the post of Lance Nayak in 104 Engineer Regiment (PVC), Deepa Toli Cant. at Ranchi, his Commanding Officer is the Colonel of the said regiment and accusation against the petitioner is under Section 47(a) of the Bihar Excise



(Amendment) Act, 2016 of carrying in total 20.250 liters of foreign liquor in the State of Bihar, which constitutes an offence under the aforesaid Excise Act. The petitioner, being a military personnel, is subject to Army Act, 1950. The offence enumerated under Chapter VI of the Act committed by a military personnel subject to the Act is triable by the criminal court as well as by the Court-Martial, so each court has got jurisdiction for enquiry and trial in respect of offence committed by a military personnel. In the present case, civil offence has been committed by the petitioner, which includes the present offence under Section 47A of the Excise Act. For the reason civil offence is defined in Section 3(c) (ii) of the Act; according to which “civil offence” means an offence which is triable by a Criminal Court. Section 69 of the Act further elaborates the definition of the civil offence, which reads as such:

“69. Civil offences.- Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a Court-Martial and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and



(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.”

11. In view of definition of civil offence, if any person subject to the Army Act commits any civil offence at any place in India or beyond India is deemed to be guilty of an offence against the Army Act and shall be liable to be tried by a Court-Martial and on conviction also likely to be punished accordingly. The only exception is the offence mentioned under Section 70 of the Army Act, which reads as follows:

“70. Civil offences not triable by Court-Martial.- A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Court-Martial, unless he commits any of the said offences-

- (a) while on active service, or
- (b) at any place outside India, or
- (c) at a frontier post specified by a Central Government by notification in this behalf.”

12. According to this provision, a person subject to the Army Act if commits an offence of murder or of culpable homicide not amounting to murder or rape to a person not subject to any military, naval or air force law, in such situation then the



offence committed by the concerned military personnel is not deemed to be guilty of an offence against this Act and shall not be tried by a Court-Martial rather by criminal court, however, there are three exceptions, if a military personnel commits aforesaid three offence (i) while on active service, (ii) at any place outside India, or (iii) at a frontier post specified by the Central Government by notification in this behalf, in such a situation, he shall be tried by Court-Martial.

13. In the case in hand, Sections 125 and 126 of the Act are most relevant provisions, which read as such:

“125. Choice between Criminal Court and Court-Martial.- When a Criminal Court and a Court-Martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which Court the proceeding shall be instituted, and, if that officer decides that they should be instituted before a Court-Martial, to direct that the accused person shall be detained in military custody.

126. Power of Criminal Court to require delivery of offender.-

(1) When a Criminal Court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in section 125 at his option, either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall



forthwith refer the question as to the Court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final”.

14. In view of Section 125 of the Act, if any occasion arises for considering the choice of the forum of trial i.e., Criminal Court or Court-Martial in context of an offence committed by a military personnel subject to the Army Act, in such situation, each court has got jurisdiction, in other words the Criminal Court as well the Court-Martial has got jurisdiction of inquiry and trial. Further this section gives discretion to the officer commanding the army where accused person is serving, to decide the forum for initiating proceeding either before the criminal court or the Court-Martial. If the Commanding Officer decides that proceeding be initiated before a Court-Martial it becomes mandatory to initiate the proceeding for trial before the Court-Martial.

15. Another relevant provision to be applied in the present context is Section 475 of the Code, which reads as follows:

“475. Delivery to commanding officers of persons liable to be tried by Court-martial.-(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or



by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial”.

16. The Central Government is empowered to frame rules under the said provision for determination of forum of trial by a Court-Martial or criminal court for putting a military personnel on trial for alleged offence defined under the Army Act.

17. In exercise of powers conferred by the Code, the Central government has framed Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978 (hereinafter referred to ‘Rules, 1978’). The rules provide the procedure to resolve any dispute concerning the trial of the person subject to the Army Act, whether such person is to be tried by Court-Martial or a criminal court. If the forum of trial is not resolved and the Magistrate seeks delivery of such person for trial before criminal court or seeks stay of the proceedings against such person before the Court-Martial, if proceeding already instituted there in such situation requires to make a reference to the Central Government



for determination as to the court before which the proceeding should be instituted. Rule 1636 of the Rules, 1978 reads as such:

“[1636] Cognizance by Magistrate- Where a person subject to military, naval, air force or coast guard law, is brought before a magistrate and charged with an offence for which he is also liable to be tried by a court martial or coast guard court, such magistrate shall not proceed to try such person or to commit the case to the court of session, unless:(i) he is moved thereto by a competent military, naval, air force or coast guard authority; or (ii) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.”

18. In view of this rule, there is no bar for taking cognizance against by a Magistrate and to proceed to issue summons to the accused after following the provisions contained under Sections 200 to 204 in the Code. In similar manner, the Magistrate may take cognizance on a police report under the Code in respect of civil offence committed by a military personnel subject to the Army Act. In other words, there is no bar in taking cognizance by the Magistrate. However, after taking cognizance, the Magistrate is required to follow the procedure contained in Rules, 1978. The option as to whether the accused be tried before the Criminal Courts or by a Court-Martial could be exercised only after the police had completed the investigation and submitted charge sheet. This provision cannot be invoked in a case where the



investigation just started by the police against a police personnel subject to the Army Act.

19. Rule 1637 of the Rules 1978 mandatorily requires a Magistrate to give a written notice to the Commanding Officer or the competent military, naval or air force authority, as the case may be and until the expiry of a period of 15 days from the date of service of notice, the Magistrate shall not either frame charges or make over the case for inquiry, or commit the case for trial. In the case at hand, letter dated 26.08.2016 was issued on behalf of the Commanding Officer of the petitioner to the learned Chief Judicial Magistrate, Nawada for instituting a proceeding before the Court-Martial and followed by another letter issued by the Leutinent Colonel, Company Commander addressed to the District Magistrate, Nawada regarding decision of conducting the trial of the Lance Nayak Ramesh Kumar Choudhary, petitioner, at military court. The Commanding Officer also sent letter to Hon'ble the Chief Justice, Patna High Court for transferring the case of the petitioner to military court for trial.

20. In the backdrop of the fact, it is quite clear that in view of Section 125 of the Act, the Commanding Officer of the petitioner has already taken decision to put him on trial before a court-martial, accordingly, intimated the decision to the learned



Chief Judicial Magistrate, Nawada and other authorities. Section 125 of the Act gives discretion to the Commanding Officer in the matter of choosing the forum of trial for selecting court martial or not making such option then in such situation the proceeding will continue before the criminal court. But in the present case, discretion was exercised by the Commanding Officer to opt forum of court-martial for putting the petitioner on trial. The law laid down under Section 125 of the Act explicitly gives discretion to the Commanding Officer for choosing the forum of trial in order to exercise the choice of putting a military personnel for committing civil offence between criminal court and Court-Martial. The grounds mentioned by the learned Chief Judicial Magistrate in its order dated 31.01.2017 is not proper. He refused to transfer the case to Court-Martial on two grounds (1) that the offence relates to Excise Act which is a special Act of the State of Bihar, and (2) offence committed by the petitioner is offence only within the territorial jurisdiction of the State of Bihar, which does not constitute an offence in defence service. The order of the learned Chief Judicial Magistrate is misconceived. A civil offence is defined in the Army Act and according to Section 3(c)(ii), civil offence means an offence which is triable by a criminal court. Further, section 69 of the Army Act also deals with civil offence,



already discussed in details in the preceeding paragraph. The offence committed under the Excise Act is also triable by a criminal court, so the said offence also comes within the purview of civil offence which is also triable by the Court-Martial.

21. In the case of *Major E.G.Barsay vs. State of Bombay* reported in *AIR 1961 SC 1762*, the Supreme Court has analysed the provisions of the Army Act in the context of resolving the issue relating to matter of choice for putting the army personnel subject to the Army Act for trial either in criminal court or before Court-Martial. The relevant paragraph of the decision are as follows:

“18. To the scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in S. 2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions, an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India; nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of a same offence, but also provide for successive trials of an accused in respect of the same offence.



19. Now let us apply this legal position to the facts of the case. Under S. 52 of the Act, any person subject to the Act who commits theft of any property belonging to Government or to any military, naval or air force mess, band or institution or to any person subject to military, naval or air force law, or dishonestly misappropriates or converts to his own use any such property, or commits criminal breach of trust in respect of any such property, or does any other thing with intent to defraud or to cause wrongful gain to one person or wrongful loss to another person shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in the Act mentioned. Section 2(xxv) says that all words and expression used but not defined in the Army Act and defined in the Indian Penal Code shall be deemed to have the meanings assigned to them in that Code. The section does not create new offences, but prescribes higher punishments if the said offences are tried by a court-martial. The appellant and the other accused were charged in the present case, among others, for having been parties to a criminal conspiracy to dishonestly or fraudulently misappropriate or otherwise convert to their own use the military stores and also for dishonestly or fraudulently misappropriating the same. The said acts constitute offences under the Indian Penal Code and under the Prevention of Corruption Act. They are also offences under S. 52 of the Army Act. Though the offence of conspiracy does not fall under S. 52 of the Act, it, being a civil offence, shall be deemed to be an offence against the Act by the force of S.69 of the Act. With the result that the offences are triable both by an ordinary criminal court having jurisdiction to try the said offences and a court-martial. To such a situation Ss. 125 and 126 are clearly intended to apply. But the designated officer in S.125 has not chosen to exercise his discretion to decide before which court the proceedings shall be instituted. As he has not exercised the discretion, there is no occasion for the criminal court to invoke the provisions of S. 126 of the Act, for the second part of S.



126(1), which enables the criminal court to issue a notice to the officer designated in S.125 of the Act to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government, indicates that the said sub-section presupposes that the designated officer has decided that the proceedings shall be instituted before a court-martial and directed in military custody. If no such decision was arrived at, the Army Act could not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law.”

22. In view of the discussions made hereinabove, as the Commanding Officer of the petitioner has already exercised the discretion of selecting the forum of putting the petitioner on trial before the Court-Martial as per Section 125 of the Act and the alleged offence committed by the petitioner is also triable by the Court-Martial, accordingly hereby it is directed that the case record of the petitioner be transferred to the Commanding Officer of the petitioner for putting him on trial before the Court-Martial at Ranchi.

23. The transfer application stands allowed.

(Arun Kumar, J)

sujit/-

AFR/NAFR	AFR
CAV DATE	01.12.2017
Uploading Date	03.05.2018
Transmission Date	03.05.2018

