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

+ **W.P.(C) No. 4781/2012**

SATENDRA PAL Petitioner

Through Ms. Archana Ramesh, Advocate.

versus

UNION OF INDIA & ORS. Respondents

Through Ms. Barkha Babbar, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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28.01.2020

1. The Petitioner who serves in the Army has in this petition assailed the findings and the sentence of the Summary Court Martial ('SCM') dated 16th November, 2006, as well as the order of the General Officer Commanding-in-Chief ('GOC'), South Western Command dated 11th August, 2007 rejecting his mercy petition under Section 164 (2) of the Army Act, 1950 (hereinafter, 'Army Act'), which was directed against the above order of the SCM.

2. The background facts are that the Petitioner enrolled as a Sepoy in the Grenadiers Regiment on 27th October, 1993. He came to be promoted to the rank of Naik and Havildar on 1st May, 1998 and 1st October, 2001, respectively.

3. On 4th August, 2006, while the Petitioner was serving as a Havildar in the 16th Infantry Division, Defence and Employment Company, a scuffle took place between him and Lt. Col Ravinder Singh, who was his superior officer and serving as the Commanding Officer ('CO') of the 16th Infantry Division, Defence and Employment Company, during which both the Petitioner and Lt. Col Ravinder Singh are alleged to have bitten each other's fingers in a scuffle. At this, the Petitioner is also alleged to have addressed Lt. Col Ravinder Singh in a derogatory manner.

4. On the very next day i.e. 5th August, 2006, a Court of Inquiry ('CoI') came to be convened at the 516th ASC Battalion, pursuant to the order of GOC 16th Infantry Division. The three-member CoI was tasked with investigating the circumstances in which the scuffle between the Petitioner and Lt. Col Ravinder Singh took place. Based on the CoI's examination of witnesses, a "tentative charge sheet" was drawn up on 3rd October, 2006 by the Commanding Officer ('CO'), 616th EME Battalion, whereby the Petitioner came to be charged with having committed offences under Sections 40 (a) of the Army Act, 1950 i.e. "using criminal force to his superior officer"

5. Subsequently, the CO, 616th EME Battalion issued a final charge sheet dated 12th October, 2006 incorporating the charge under Section 40 (a) and adding a second charge under Section 63 of the Army Act of the Petitioner having committed "an act prejudicial to good order and military discipline". By a "Certificate" of even date, the CCO, 616th EME Battalion, ordered an SCM to

try the Petitioner for the aforesaid offences under the Army Act, satisfied that the Summary of Evidence, Additional Summary of Evidence and all the material evidence showed that there existed a *prima facie* case against the Petitioner. By an order dated 19th October, 2006 of the CO, 616th EME Battalion the Petitioner was moved from the 16th Infantry Division, Defence and Employment Company and attached with the 616th EME Battalion for the SCM.

6. The proceedings of the SCM, a copy of which has been annexed as “Annexure P-6” to the petition, commenced on 15th November, 2006 and the CO, 616th EME Battalion was the presiding officer. A perusal of the proceedings reveals that a translation of the charge sheet was read over and explained to the Petitioner. In his arraignment, the Petitioner pleaded “Not Guilty” to the charge under Section 40 (a) and “Guilty” to the charge under Section 63.

7. In respect of the charge under Section 40 (a) to which the Petitioner pleaded “Not Guilty”, seven Prosecution Witnesses (‘PWs’), including the Lt. Colonel Ravinder Singh, PW-1, were examined. The proceedings demonstrate that the Petitioner also cross-examined six PWs, having declined to cross-examine PW-7. As part of his defence, the Petitioner tendered his statement.

8. On examining the evidence led by the Prosecution and the Petitioner’s defence statement, the SCM found the Petitioner to be guilty of the charge

under Section 40 (a) of the Army Act. Based on the nature of the charges against him and his service record, the Petitioner was awarded the sentence of “to be reduced to the ranks”.

9. In response to a letter dated 24th April, 2007, by the Petitioner’s wife, a letter dated 3rd May, 2007 came to be issued from the HQ 16th Infantry Division, intimating to her that based on the findings of the CoI that was conducted, action was recommended both against the Petitioner and his superior officer Lt. Colonel Ravinder Singh. Further thereto, in the SCM that was convened separately to try the Petitioner and Lt. Colonel Ravinder Singh, it was concluded that the Petitioner should be “awarded lenient punishment of reduced to Rks” and the Lt. Colonel Ravinder Singh, “forfeiture of six years of service for the purpose of pension” and “severe reprimand”. It was further stated in the said letter that the Petitioner could forward a petition in accordance with Section 164 (2) of the Army Act against the penalty imposed by the SCM.

10. The Petitioner then addressed a petition under Section 164 (2) of the Army Act to the GOC, which came to be placed before the GOC, South Western Command, who by a detailed order dated 11th August, 2007 declined to interfere with the findings and conclusions of the SCM. On a reading of the said order, it is seen that the Petitioner *inter alia* challenged the findings of the SCM on the following grounds:

a) The CoI was conducted by the 516 ASC Battalion, whereas the SCM was

presided over by the CO, 616th EME Battalion. This was a procedural infirmity.

- b) The punishment of “reduced to the ranks” was illegal “since the matter was investigated by two parallel courts that is by the Court of Inquiry as well as the Summary Court Martial”.
- c) The recording of an “additional summary of evidence” was “illegal” and prejudice was caused to the Petitioner on that count.

11. The order of the GOC in paras 4 and 5, substantively dealt with the Petitioner’s averments in his mercy petition as under:

- a) The CoI that was convened to investigate the incident on 4th August, 2006 was pursuant to para 522 of the Regulations for the Army, which mandated that incidents of affray between persons subject to the Army Act, would have to be investigated prior to the initiation of any disciplinary action.
- b) The attendance of PWs was dispensed with during the CoI as Rule 180 of the Army Rules, 1954 had been complied with.
- c) Upon recording the Summary of Evidence, the CO, 616 EME Battalion, directed additional evidence to be recorded. No prejudice however has been caused to the Petitioner on this count, as he was “allowed to exercise all legal rights that were afforded to him at the time of recording of Summary of Evidence”.
- d) The framing of an additional charge under Section 63 of the Army Act based on the “evidence adduced at the Summary of Evidence” is in

accordance with Rule 23 (3) (c) of the Army Rules, 1954.

- e) “Ample opportunity” was offered to the Petitioner to defend himself at the pre-trial stage as well as the SCM. There has been no violation of any provisions of the Army Act and the Rules.
- f) The sentence of “to be reduced to the ranks” is “legal, just, appropriate and commensurate” with the nature of the offence for which the Petitioner was found guilty.

12. Thereafter, the Petitioner filed a statutory petition on 8th September, 2009, which was rejected by the GOC, HQ South Western Command on the ground that para 364 of the Army Regulations, 1987 did not allow a statutory complaint against the findings and sentence of Court Martial, hence it was not maintainable.

13. The substance of the Petitioner’s challenge to SCM’s findings and sentence is essentially three-fold. First, the SCM “suffers from a patent infirmity” as it was presided over by a CO different from the CO of the unit in which he was serving at the time of the incident. Second, the evidence led before the SCM does not bear out the charge for which he has been found guilty. Third, the second charge under Section 63 of the Army Act could not have been framed as the Summary of Evidence merely pertained to the first charge.

14. On 8th August, 2012, while directing notice to issue in the present petition, the Court passed the following order:

“1. The decision dated January 25, 2008 reported as **147 (2008) DLT 202 L/Nk. Vishav Priya Singh v. UOI and Ors.** relied upon by learned counsel for the petitioner is under challenge before the Supreme Court. This would impact one major issue raised by the petitioner with respect to who could be the person acting as the Commanding Officer of the petitioner.

2. Rule.

3. Counter affidavit need not be filed since response to the Rule would be the production of the record of the Summary Court Martial, and needless to state the legal issue would be decided by the Supreme Court with reference to who could be acting as the Commanding Officer of the petitioner.”

15. Thereafter, CM APPL. 7010/2013 for early hearing came to dismissed as infructuous on 6th May, 2014, and the petition came to be listed as a ‘Regular Matter’ on 25th August, 2014. However, a subsequent CM APPL. 34970/2016 for early hearing was allowed on 23rd September, 2016.

16. Learned counsel for the Respondents sought, and was granted, leave to file a counter affidavit on 10th October, 2018.

17. A counter affidavit has been filed by the Respondents. The Respondents submit that the attachment of the Petitioner to another unit for the purposes of facing trial was in accordance with paragraph 7 of Army Order 7/2000, which reads as under:

“7. Where attachment is visualized in progressing disciplinary /vigilance cases under the Army Act, including the cases which

have been taken over from the Civil (Criminal) Courts for trial under the said Act, the procedure outlined in Para 3 above will be invoked by the competent authorities as specified therein. During attachment the individuals will continue to be held against the strength and appointment of the parent unit and no replacement will be made until completion of the disciplinary proceedings. This power, however, shall not be exercised merely to change the command with a view to secure award of enhanced punishment/penalty e.g. for a trial by Summary Court Martial.”

18. In the Respondents’ submission, the law in this regard has been further clarified by the Supreme Court in *Union of India v. Vishav Priya Singh (2016) 8 SCC 641*,

19. It is submitted that the SCM was conducted in accordance with the provisions of Rule 116 (1) of the Army Rules, 1954, (‘Army Rules’) and there was sufficient evidence adduced during the proceedings to return the impugned findings against the Petitioner.

20. Further, the Respondents state that the Petitioner was only served with a tentative charge sheet on 3rd October, 2006, which mentioned only 1 charge under Section 40 (a) of the Army Act, 1950 against the Petitioner. Thereafter, the Commanding Officer, upon perusal of the Summary of Evidence, framed an additional charge under Section 63 of the Army Act, in accordance with 22 (4) of the Army Rules.

21. It is submitted that the mercy petition made by the Petitioner to the GOC,
W.P.(C) 4781/2012

HQ, Western Command was rejected on 11th August, 2007 on the basis of “evidence and after due consideration.” Further, it is contended that the statutory complaint dated 8th September, 2009 preferred by the Petitioner was not maintainable since he had already exhausted his right to represent against his conviction, by making the aforesaid mercy petition dated 31st March, 2007, in terms of Note 3 (e) to Section 164 of the Act, which reads as under:

“(e) The orders of the officer or authority to whom the petition is addressed will be final and will exhaust the legal rights of redress under AA but see note 3 (c) above. Such orders will be attached to the proceedings, if the proceedings have been called for, or will be forwarded to the JAG, Army Headquarters, for attachment to the proceedings.”

22. The Respondents have also submitted that the Petitioner had no right to have access to the GCM proceedings against Lt. Col Ravinder Singh, which in any event have been produced before this Court.

23. No rejoinder has been filed on behalf of the Petitioner.

24. The Court has heard Ms. Archana Ramesh, learned counsel for the Petitioner and Ms. Barkha Babbar, learned counsel for the Respondents, and has perused the proceedings of the SCM and the impugned order of the GOC dated 11th August, 2007. For the reasons explained hereafter, the Court is not persuaded that any grounds have been made out by the Petitioner for interference with the findings and sentence of the SCM or the order of the GOC dated 11th August, 2007.

25. Turning first to the Petitioner's contention that the proceedings against him lack jurisdiction since it was ordered by the Commanding Officer of a unit different from his, the Court finds that the law in this regard has been clarified by the Supreme Court in *Union of India v. Vishav Priya Singh* (*supra*), whereby the decision of this Court in *Vishav Priya Singh v. Union of India 147 (2008) DLT 202 (DB)* was, to the extent that it held that an SCM could only be convened, constituted, and completed by the CO of the unit to which the accused belonged, set aside. In this regard, the Supreme Court, specifically with reference to instances wherein an SCM is ordered by the CO of a unit to which an accused is sent after the commission of the alleged offence, observed as under:

“27. In a given case, the offence itself may have been committed against the CO of the former unit or the CO may be an important witness reflecting on matters in issue or for the purposes of discipline the accused may be required to be moved out of the unit in question. In some cases, the presence of the accused even during the conduct of SCM in the Unit in question may be detrimental to maintenance of discipline. The situations could be varying in degree or context and the concept of propriety and expediency may demand that the accused be sent on attachment to and tried in a different unit. Paragraph 24 of the judgment of the High Court of Delhi shows its concern in that behalf and the fact that the High Court was alive to such complexities. But on a view that the CO of the unit other the one to which the accused belonged would be incompetent, the High Court was persuaded to accept the submission advanced on behalf of the accused.”

26. In conclusion, the Supreme Court held as under:

“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.”

27. Therefore, the Court finds that there is no substance in the objection of the Petitioner that the proceedings against him were initiated by the CO of the unit to which he was subsequently attached. The judgment of the Supreme Court in ***Vishav Priya Singh (supra)*** is categorical in this regard. It is significant that the facts of the instant case are akin to the situation envisaged in paragraph 27 of the aforesaid judgment, in that the offence herein has allegedly been committed against, and by, the CO of the Petitioner’s unit.

28. Proceeding to deal with the Petitioner’s submission that the evidence led before the SCM does not sustain a conclusion of guilt as regards the charge under Section 40 (a) of the Army Act; the Court is of the view that it is not for it in a writ petition under Article 226 of the Constitution to enter the realm evaluating whether the evidence led before the SCM, which is a Court of trial, was sufficient. This is a proposition that has been consistently affirmed by the Supreme Court in a catena of decisions. Illustratively, reference may be made to the following observations of the Supreme Court in ***Union of India v. W.P.(C) 4781/2012***

Bodupalli Gopalaswami (2011) 13 SCC 553:

“24. The principles relating to judicial review in regard to court-martial proceedings are well settled. Unless the Court Martial has acted without jurisdiction, or exceeded its jurisdiction or had acted perversely or arbitrarily, the proceedings and decision of the Court Martial will not be interfered in exercise of the power of judicial review.

25. In *Union of India v. Major A. Hussain (1998) 1 SCC 537* this Court held:

“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 [CrPC] 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 the 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.”

26. The High Court after exhaustive consideration found that the trial was conducted in accordance with the rules and there was no violation of the procedure or principles of natural justice. On behalf of the prosecution, as many as 13 witnesses were examined. A large number of documents (marked A to Z, AA to ZZ and AAA to ZZZ and AAAA to GGGG), apart from three material objects (ME 1 to ME 3) were exhibited. The first respondent was supplied with the complete set of proceedings including all the exhibits. He was permitted to have the assistance of a legal practitioner. He was given due opportunity to cross-examine the witnesses and lead his own evidence. After completion of evidence, the General Court Martial put questions to the accused with reference to the evidence and gave him an opportunity to explain his position. Detailed submissions on behalf of the prosecution and the defence were heard. It was thereafter that the Court Martial gave its findings and imposed the punishment.

27. This is not a case of no evidence. Inadequacy and unreliability of evidence are not grounds for interference. The Court Martial had jurisdiction. Violation of prescribed procedure has not been made out. In exercise of power of judicial review, it is not possible to reassess the evidence or sit in judgment over the finding of guilt recorded by the Military Tribunal. The scope of interference with the findings of the GCM is very narrow and should be exercised in rare cases. This is not one of them. We, therefore, find no reason to interfere with findings of guilt regarding Charges 1, 4 and 5(c).”

29. Ms. Ramesh appearing for the Petitioner sought to point out that the medical evidence does not support the plea of the prosecution that the Petitioner bit the finger of the Commandant. According to her it pointed to the converse. She further questioned the medical evidence by wondering how the size of the wound on both the injured fingers of the Petitioner and the Commandant could be the same.

30. In order to satisfy itself that this is not a case based on no evidence or that the conclusions of the SCM were not perverse or contrary to the evidence, this Court has examined the transcript of the evidence of the witnesses at the SCM, and in particular PW-7, the DMO, whom the Petitioner declined to cross-examine. The fact is that PW-7 confirms that the Commandant’s finger had a 0.3cm x 0.3cm punctured wound on his index finger while there was an injury of the same dimension on the Petitioner’s thumb. The other PWs speak of the scuffle between the two. Both deserved to be tried and punished for this, and they rightly were. Additionally, the use of abusive language by the Petitioner against his superior stands fully substantiated by the evidence. Clearly this was

not a case of no evidence. Further, the conclusions of the SCM were neither perverse nor contrary to the evidence.

31. Turning to the Petitioner's contention that the summary of evidence only related to the first charge i.e. the charge under Section 40 (a) of the Army Act, reference must be made at the outset to Rule 22 (4) of the Army Rules, which reads as under:

“(4) Where the evidence taken in accordance with sub-rule (3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge”

32. A plain reading of the aforesaid Rule negatives the Petitioner's challenge to the framing of the second charge, inasmuch as it empowers the CO to frame charges in addition to those that might have formed the substratum of the initial inquiry. In other words, there was no bar on the CO to frame a charge for another offence by virtue of the Summary of Evidence that disclosed the first charge. Another aspect that bears noting is that the charge under Section 63 appears to have been framed not only on the basis of the Summary of Evidence, but also after considering an Additional Summary of Evidence, as evidenced by the Certificate of the CO dated 12th October, 2006.

33. Be that as it may, it is seen from the proceedings of the SCM annexed to the petition as “Annexure P-6”, that during his arraignment the charge under

Section 63 of the Army Act was read over and explained to him, and the Petitioner pleaded “guilty”. No occasion arises, therefore, at this stage for the Petitioner to question the legality of the order of the SCM on the basis that the charge under Section 63 of the Army Act was without substance.

34. The Court notices that the prayer in the present petition also seeks to assail the order of the GOC rejecting the Petitioner’s mercy petition. No specific averments have been raised in the petition in support of the said prayer. In any event, the Court finds that the order of the GOC, being a reasoned, speaking order, suffers from no legal infirmity. The GOC has evidently considered the Petitioner’s submissions at some length and given cogent reasons for their dismissal.

35. For the aforesaid reasons, the Court finds no merit in the petition and dismisses it, as such. No costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JANUARY 28, 2020
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