

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

Date of Reserved: 03.09.2021

Date of Decision : 16.09.2021

+ **W.P.(C) 8896/2021 & CM APPLs. Nos. 27945-48/2021**

RAJESH KUMAR TOMAR Petitioner
Through Ms.Pinky Anand, Sr. Adv. with
Mr.Sumit Teterwal, Ms.Kirti
Dua and Mr.Rajkumar Sharma,
Advocates
versus

UNION OF INDIA & ORS. Respondents
Through Mr.Harish V. Shankar, CGSC
& Ms.S.Bushra Kazim, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J.

1. This petition has been filed by the petitioner praying for the following reliefs:

“(i) Direct the respondent to provide the petitioner with the complete copies including findings of the orders dated 06.08.2021 and 10.08.2021.

(ii) Direct that the limitation period for preferring the petition under Section 131 read with Rule 168 shall be reckoned from the date on which the petitioner receives the orders dated 06.08.2021 and 10.08.2021 passed by the General Force Court.

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(iii) Direct that the petitioner be relocated / transferred to any ITBP facility in New Delhi or in the NCR region for preparing his pre confirmation petition and post confirmation petition.

(iv) Direct that the petitioner will not be detained in close arrest until the post confirmation petition is disposed off.”

2. It is the case of the petitioner that the petitioner is serving as a Commandant in the Indo-Tibetan Border Police Force (hereinafter referred to as 'ITBP') in General Duty Cadre. Vide an order dated 28.10.2020, a General Force Court (hereinafter referred to as 'GFC') was ordered to be convened to try the petitioner and for the said purpose to assemble on 18.11.2020 at 39th Battalion ITBP Greater Noida. On 17.11.2020, the petitioner was ordered to be kept under open arrest at 39th Battalion ITBP, Greater Noida Campus from 18.11.2020 till completion of the GFC proceedings. The place of the GFC was later changed to the Service and Supply Battalion ITBP Saboli, Haryana vide order dated 22.04.2021. On 06.08.2021, the GFC concluded its proceedings and the petitioner was found guilty of seven charges out of the twenty charges leveled against the petitioner; seven charges were dropped and on six charges, the petitioner was found not guilty. However, copies of the findings of the GFC were not supplied to the petitioner. By an order dated 10.08.2021, the GFC sentenced the petitioner to rigorous imprisonment for one year with dismissal from services and forfeiture of all arrears of pay and allowances and other

public money payable to him at the time of dismissal. However, again the copy of the reasons for the order was not supplied to the petitioner. On 10.08.2021 itself, the petitioner requested the commanding officer that the petitioner be retained at any ITBP facility in New Delhi or National Capital Region (hereinafter referred to as 'NCR') in order to have access to services of a legal professional for enabling him to effectively avail of the remedy under Section 131 of the Indo-Tibetan Border Police Force Act, 1992 (hereinafter referred to as the 'Act'), however, the petitioner was transported under escort to SHQ (Lucknow) ITBP and then put under closed custody without any formal order.

3. The petitioner further asserts that on 12.08.2021 the petitioner made an application to his commanding officer for relocation to any ITBP facility in New Delhi or in the NCR so as to enable him to present a pre-confirmation petition under Section 131 of the Act against the order of the GFC. The petitioner also requested that the record of the GFC be provided to the petitioner in order to enable him to effectively avail of his statutory remedies under the Act. The petitioner made a similar request to the Director General cum Confirming Authority of ITBP on 13.08.2021. Having failed to receive any response, the petitioner filed the present petition.

4. At the outset, we may note that during the course of hearing on 24.08.2021 we were informed that the petitioner is also pursuing his remedies before the National Commission for Scheduled Castes. On

being confronted that the petitioner cannot be pursuing his remedy in two different forums, the petitioner had filed an affidavit on 25.08.2021 undertaking not to assail the findings and final order of the GFC dated 06.08.2021 and 10.08.2021 before the National Commission for Scheduled Castes.

5. As far as the prayer (iv) of the petitioner is concerned, we were informed that the petitioner has since been shifted to Saboli (near Narela) and is being kept under open arrest. In view of the same, no further orders are required and have even been pressed before us as far as prayer (iv) is concerned.

6. As far as the prayer for supply of complete copies, including the finding of the orders, of the GFC dated 06.08.2021 and 10.08.2021 is concerned, the learned senior counsel for the petitioner submits that in terms of Section 131 of the Act the petitioner has a right to file a petition challenging the findings of the GFC before its confirmation as also post confirmation. Such a right can be exercised only if the petitioner is supplied a copy of the proceedings of the GFC and its complete records. In this regard, she also places reliance on Rule 168 of the Indo-Tibetan Border Police Rules, 1994 (hereinafter referred to as the 'ITBP Rules').

7. The learned senior counsel for the petitioner has also drawn our reference to the order dated 06.07.2021 passed in W.P. (C) 1977/2020 titled *Upendra Prakash Balodi vs. Union of India and Ors.*, to

submit that the plea for supply of copies of the GFC under the Sashastra Seema Bal Act, 2007 and Sashastra Seema Bal Rules, 2009, which have provisions *pari materia* to the Act and ITBP Rules, was also dealt with by this Court in that petition.

8. On the other hand, the learned counsel for the respondents submits that Section 131 of the Act provides for only a post confirmation petition in respect of findings and sentence of the GFC. He submits that Rule 130 of the ITBP Rules, in fact, creates a right in a person to claim copies of the GFC proceedings only upon the confirmation of the findings and sentence under Section 121 of the Act. He further submits that the distinction between a pre confirmation and a post confirmation stage is also evident from Rule 169 of the ITBP Rules which provides for exclusion of the period spent in obtaining copies of the GFC proceedings only in case of a post confirmation petition.

9. He also places reliance on the judgment of the Supreme Court in *S.N. Mukherjee vs. Union of India*, (1990) 4 SCC 594 to submit that interpreting *pari materia* provisions in the Army Act, 1950, the Supreme Court had clearly held that there is no right in the officer to demand the record of the court martial proceedings prior to the confirmation stage.

10. We have considered the submissions made by the learned counsels for the parties.

11. Section 121 of the Act provides that no finding or sentence of a General Force Court shall be valid except so far as it has been confirmed by the Central Government or by any officer empowered in that behalf by the Central Government under Section 122 of the Act.

12. Section 131 of the Act provides for remedy to an officer against any order, finding or sentence of the Force Court and reads as under:

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

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

13. Rule 130 of the ITBP Rules on which reliance has been placed by the counsel for the respondents is reproduced hereinunder:

*“130. **Right of person tried to copies of proceedings.** Every person tried by a Force Court shall be entitled to obtain on demand, at any time after the confirmation of the finding and sentence, when such confirmation is required and before the proceedings are destroyed, from the Judge Attorney General a copy thereof, including the proceedings upon revision, if any.”*

(Emphasis supplied)

14. A reading of the above Rule would clearly show that a right to demand copies of the GFC proceedings and its findings is created only at the post confirmation stage.

15. In *S.N. Mukherjee* (supra), the Supreme Court while considering a *pari materia* provision in Section 164 of the Army Act, 1950 has held as under:

“52. Section 164 of the Act provides as under:

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

or as to the regularity of any proceeding to which the order relates.

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

53. In sub-section (1) reference is made to orders passed by a court-martial and enables a person aggrieved by an order to present a petition against the same. The said petition has to be presented to the officer or the authority empowered to confirm any finding or sentence of such court martial and the said authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order or as to the regularity of any proceedings to which the order relates. Sub-section (2), on the other hand, makes specific reference to finding or sentence of a court martial and confers a right on any person feeling aggrieved by a finding or sentence of any court martial which has been confirmed, to present a petition to the Central Government, Chief of the Army Staff or any prescribed officer. The use of the expression “order” in sub-section (1) and the expression “finding or sentence” in sub-section (2) indicates that the scope of sub-section (1) and sub-section (2) is not the same and the expression “order” in sub-section (1) cannot be construed to include a “finding or sentence”. In other words insofar as the finding and sentence of the court martial is concerned the only remedy that is available to a person aggrieved by the same is under sub-

section (2) and the said remedy can be invoked only after the finding or sentence has been confirmed by the confirming authority and not before the confirmation of the same. Rule 147 of the Rules also lends support to this view. In the said rule it is laid down that every person tried by a court martial shall be entitled on demand, at any time after the confirmation of the finding and sentence, when such confirmation is required, and before the proceedings are destroyed, to obtain from the officer or person having the custody of the proceeding a copy thereof, including the proceedings upon revision, if any. This rule envisages that the copies of proceedings of a court martial are to be supplied only after confirmation of the finding and sentence and that there is no right to obtain the copies of the proceedings till the finding and sentence have been confirmed. This means that the appellant cannot make a grievance about non-supply of the copies of the proceedings of the court martial and consequent denial of his right to make a representation to the confirming authority against the findings and sentence of the court martial before the confirmation of the said finding and sentence. Though a person aggrieved by the finding or sentence of a court martial has no right to make a representation before the confirmation of the same by the confirming authority, but in case such a representation is made by a person aggrieved by the finding or sentence of a court martial it is expected that the confirming authority shall give due consideration to the same while confirming the finding and sentence of the court martial.”

(Emphasis supplied)

16. The provisions of Section 164 of the Army Act, 1950 being *pari materia* to the provision of Section 131 of the Act, the above ratio of

the Supreme Court would clearly be applicable, and the petitioner cannot, therefore, demand supply of copies of the GFC record or its findings prior to the confirmation stage. The same position is also evident from Rule 130 of the ITBP Rules, which has been reproduced hereinabove.

17. In this regard reference should also be made to Rule 169 of the ITBP Rules which is reproduced hereinbelow:

*“169. **Period of Limitation.**-(1) A petition, before confirmation, shall be submitted, within two weeks of the conclusion of trial.*

(2) A petition after confirmation shall be submitted within 3 months of the date on which the sentence was promulgated: ,

Provided that the time taken by such person to obtain a copy of the proceedings shall be excluded in computing period of 3 months.”

18. A reading of the above Rule would clearly show that while an extension of period of limitation is provided for time spent in obtaining copies of proceedings of the GFC at a post confirmation stage, there is no such extension granted at the pre confirmation stage. This is clearly evident of the fact that at a pre confirmation stage, copies of the proceedings of the GFC need not be supplied to the officer.

19. Rule 168 of the ITBP Rules on which the learned senior counsel for the petitioner has placed much reliance cannot also be read to modify the position in law as held by the Supreme Court in **S.N. Mukherjee** (supra). Rule 168 merely prescribes for a right which is otherwise provided in Section 131 of the Act. The use of the word ‘petition’ at both pre confirmation and post confirmation stage would not create any further right in an officer to demand copies of the GFC proceedings at a pre confirmation stage. The Rule has to be harmoniously construed along with the main provision of the Act.

20. As far as reliance of the learned senior counsel for the petitioner on the order of this Court in **Upendra Prakash Balodi** (supra), the order itself makes it clear that it does not intend to lay down any law in general as the said order has been passed without hearing the parties fully in the matter. Paragraph 14 of the order is reproduced hereinunder:

“14. In the circumstances, for the purposes of the present case and not intending to lay down any law in general inasmuch as we have not heard the counsels fully in the matter, we direct the respondents SSB to supply at least copies of the orders dated 29th June, 2021 and 30th June, 2021 to the petitioner/applicant within 3 days of today. As far as the remaining proceedings are concerned, the petitioner/applicant, for the time being, shall be entitled only to inspection thereof.”

(Emphasis supplied)

21. It is also evident from a bare reading of the above order that the judgment of the Supreme Court in *S.N. Mukherjee* (supra) was not brought to the notice of the Division Bench of this Court in *Upendra Prakash Balodi* (supra). The same, therefore, cannot be treated as a precedent on the issue raised in the present petition.

22. In view of the above, we find no merit in prayer (i) of the present petition.

23. As far as prayer (ii) is concerned, as the period for filing of a petition at a pre confirmation stage may have expired for the petitioner during the pendency of the present petition, the petitioner may make such a petition within a period of two weeks from the date of the present judgment. The same shall be considered by the concerned authority in accordance with law.

24. The present petition and application are disposed of in the above terms.

NAVIN CHAWLA, J

MANMOHAN, J

SEPTEMBER 16, 2021/Arya/rv/U/AB