

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

(125)

**CRWP-1795-2023 (O&M).
Date of Decision:-28.02.2023.**

Ald Fulmali Suresh Anna through his wife Sonali Suresh Fulmali

.....Petitioner

Versus

Union of India and others

.....Respondent

CORAM: HON'BLE MR. JUSTICE ALOK JAIN

Present: Mr. Mayur Karkra, Advocate for the petitioner.

Ms. Anita Balyan, Senior Panel Counsel for
UOI-respondent Nos.1 to 3.

Mr. Arun Gupta, AAG, Punjab.

ALOK JAIN, J. (Oral)

CRM-W-236-2023

Application for exemption from filing the certified / true typed/more legible copies of documents Annexures P-1 to P-8 is allowed as prayed for, subject to just exceptions.

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The present petition is for issuance of a writ in the nature of certiorari, seeking quashing of the order dated 16.02.2023 (Annexure P-8), whereby the application (Annexure P-7) moved by the petitioner under Section 126 of the Army Act, 1950 (for short 'the Act') read with Rule 8 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978, has been dismissed. It is further prayed that a writ in the nature of *mandamus* be issued to respondent No.5 to refer the matter to respondent No.1 for taking the decision regarding the case in which the petitioner has

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been arrayed as an accused for transfer to the Criminal Court having Original Jurisdiction from the Court-Martial proceedings.

Learned counsel for the petitioner has vehemently raised the issue that Section 126 of the Act when read with Rule 8 of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1978 (for short 'the Rules, 1978'), it was incumbent upon the Magistrate as the word mentioned in Rule 8 records "*Court-Martial if since instituted*" and, therefore, the matter had to be referred to the Central Government for determination as to the Court before which the proceedings shall be instituted. Learned counsel for the petitioner has further argued that there is blatant abuse of process of law and non-compliance of Rule 23 (2) & (3) of the Army Rules, 1954 (for short 'the Rules, 1954'), as the petitioner has not been granted any opportunity to cross-examine the witnesses and he further submits that as the husband of the complainant is a Lieutenant Colonel due to which, the petitioner is not getting a fair trial. Learned counsel for the petitioner has also raised the issue that there is non-compliance of Section 130 of the Act. To substantiate his arguments, learned counsel for the petitioner relies upon the judgment of the Hon'ble Supreme Court of India in the case of **Ranjit Thakur Vs. Union of India and others, 1987 AIR, Supreme Court 2386**, to submit that it has been held therein as under:-

"What emerges, therefore, is that in the present case there is a non-compliance with the mandate of Section 130 with the attendant consequence that the proceedings of the Summary Court-Martial are rendered infirm in law. This disposes of the first of the contention (a)."

As regards the second argument raised by learned counsel for

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the petitioner with regard to non-compliance of Rules 23 (2) and 23 (3) of the Rules, 1954, is concerned, counsel for the petitioner has drawn the attention to Annexure P-5, whereby, it has been recorded that the statements have been read out to the petitioner in the language he understands, however, the petitioner has declined to sign on the said evidence in the absence of any independent witness.

On the strength of the above, learned counsel for the petitioner prays for allowing the present petition.

Notice of motion.

Ms. Anita Balyan, Advocate, has put in appearance on behalf of respondent Nos.1 to 3 and accepts notice and has vehemently contested the petition. Mr. Arun Gupta, AAG, Punjab, accepts notice on behalf of respondent No.4.

Learned counsel for respondent Nos.1 to 3 has vehemently argued that the present petition, *per se*, is not maintainable. She submits that, in fact, the petitioner was presented before the Magistrate and vide order dated 01.11.2021 and on an application under Section 475 of **Cr.P.C.**, the matter was referred to the concerned Commanding Officer. She further relies upon the provisions of Section 125 of the Act, to substantiate her arguments. She has also argued that the case has already been committed for trial and much water has flown and the trial is at an advanced stage and the present application was filed only to derail the process and procrastinate the proceedings. She further submits that the present application in the present form is *per se* not maintainable under Section 126 of the Act, as the same relates to power of Criminal Court to require delivery of offender, therefore, the question of reading Rule 8 of the Rules, 1978 with Section

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126 of the Act, does not arise.

Learned counsel for respondent No.1 to 3 has also submitted that the petitioner has never raised the objection with regard to non-compliance of Section 130 of the Act and, therefore, he cannot be permitted to now raise the same at the fag end of the trial. This right, if held to be a right, had to be exercised at the threshold of the proceedings.

At this stage, learned counsel for the petitioner has reiterated and vehemently argued that the petitioner is not getting a fair trial, as the documents and orders of the respondents are not supplied to the petitioner and there is every likelihood of miscarriage of justice. He has also relied upon Rule 147 of the Rules to submit that there is a right of the person who is tried by Court-Martial to get the copies of the proceedings.

For the ready reference, the relevant provisions of Sections 125, 126 and 130 of the Army Act read as under:-

“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 proceedings 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*

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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.

130. Challenges. *(1) At all trials by general, district or summary general court- martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.*

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer decide on the objection.

(3) If the objection is allowed by one- half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his

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vacancy may be filled in the prescribed manner by another officer subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.

Rule 8 of the Rules, 1978 is reproduced as under:-

“8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval or air force authorities, the Magistrate may by a written notice require the commanding officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court-martial if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted.”

Rule 23 (2) and 23 (3) of Rules, 1954 are reproduced hereinbelow:-

“(2) The accused may put in cross-examination such

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question as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by the mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked; “Do you wish to make any statement? You are obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence”. Any statement thereupon made by the accused shall be taken down and read over to him, but he will not be cross-examined upon it. The accused may then call his witnesses, including if he so desires, any witnesses as to character.”

After hearing the counsel for the parties and perusing the record, it has borne out that provisions of Rule 8 of the Rules, 1978 cannot be read into or in conjunction to Section 126 of the Army Act at this stage, for the reason that the Criminal Court, while exercising powers under Section 475 of Cr.P.C., had already committed the trial to the Commanding Officer, vide order dated 01.11.2021. Had it been a situation where the petitioner would have been arrested by the Police and then presented, then at that stage, kith and kin or the guardian or the petitioner himself had contested the matter to be tried by the Criminal Court and had sought consent of the parties to carry on the proceedings by the Criminal Court.

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I am of the opinion that there is no infirmity in the order passed by the Court below. A perusal of Section 126 of the Act and Rule 8 of the Rules, 1978 shows that they both operate in different realms and cannot be read into each other. As regards the non-compliance of Rule 23 (2) & (3) of the Rules, 1954, the petitioner has not been able to carve out its non-compliance, as the petitioner himself had refused to sign the evidence.

However, as regards Rule 147 of the Rules, 1954 which specifically states that the said right of the person that is to get copies of proceedings is to be exercised only “*on a request made by such person*” but admittedly, the petitioner has never made any request.

In light of the above provisions of law and factual matrix, I do not find any merit in the present petition and for the reasons recorded above, the same is dismissed.

However, this order shall not preclude the petitioner to raise all such pleas of non-compliance(s) as alleged by him, before the appropriate Authority, in accordance with law.

(ALOK JAIN)
JUDGE

February 28, 2023.

Sandeep

Whether speaking/reasoned:- Yes/No

Whether Reportable:- Yes/No