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IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH,
NEW DELHI

T.A NO. 206 OF 2009

(WRIT PETITION NO. 3237 OF 1996)

JC-189312X

SUBEDAR/SKT JAGVIR SINGH

SON OF SHRI CHARAN SINGH

RESIDENT OF VILLAGE AND PO

BEHARA (LAKHOTI)

TEHSIL & DIST: BULANDSHAHR (U.P)

THROUGH: MR. C.S.S TOMAR, ADVOCATE

... PETITIONER

VERSUS

1. UNION OF INDIA
THROUGH SECRETARY
MINISTRY OF DEFENCE (D/AG),
SOUTH BLOCK, NEW DELHI-110011
2. CHIEF OF THE ARMY STAFF
ARMY HEADQUARTERS, SOUTH BLOCK,
DHQ P.O., NEW DELHI 110011
3. GENERAL OFFICER COMMANDING-IN-CHIEF

CENTRAL COMMAND

LUCKNOW, U.P

4. DIRECTOR GENERAL OF EME
MGO'S BRANCH
ARMY HEADQUARTERS,
DHQ P.O., NEW DELHI-110011
5. GENERAL OFFICER COMMANDING
33, MECHANISED DIVISION
CADRE OF 56 APO.
OFFICER-IN-CHARGE RECORDS
EME RECORDS,
SECUNDARABAD-21.
.. COMANDING OFFICER
633 EME BATTALION
CADRE OF 56 APO
8. 14550126P NAIK/SKT SHANKER BISWAS
633 EME BATTALION
CADRE OF 56 APO.

THROUGH: LT. COL. NAVEEN SHARMA

...RESPONDENTS

CORAM:

HON'BLE MR. JUSTICE S.S KULSHRESHTHA, MEMBER

HON'BLE LT. GEN. S.S DHILLON, MEMBER

JUDGMENT

1. This petition has been brought for quashing the General Court Martial (GCM) proceedings, whereby, the petitioner was found guilty for the offence punishable under Sections 354 of the Indian Penal Code and he was dismissed from service. A prayer has been made to reinstate him in service with all consequential pecuniary benefits.

2. It is contended that the petitioner had been falsely implicated in the case because of the personal vendetta of Nk/Sk Sankar Biswas (No.14550120P), who is stated to have borrowed Rs.500/- from him and with a view to avoid refund of that amount, he played the mischief. Early in the morning of 16th July 1992, the petitioner was called to his house for returning the amount. The petitioner reached his house at around 0500 hours on that day and called him to come out of the house. Sankar Biswas came out of the house and unexpectedly and gave blows to the petitioner and ran away. Soon thereafter, his wife Krishna Biswas started raising alarm calling 'thief' and on hearing that, some of her neighbours came out. Thereafter, a false allegation of outraging the modesty of Krishna Biswas was made. On

the basis of the said complaint, investigation was to be made as per the Rules, but the provisions contained in Sections 22 to 25 of the Army Rules were flouted by the concerned officer. The statement of the prosecutrix was not recorded in the summary of evidence and even the right to cross examine her was denied to the petitioner. Her statement, written in Bengali, was handed over by her husband Sankar Biswas to Maj. Amarjit Singh, who got it translated in the recording of summary of evidence, which is not in compliance with Rule 23 of the Army Rules. The petitioner was not afforded the opportunity of being defended himself with the help of a qualified officer and was also not allowed to engage a suitable defence counsel. Further, the convening authority failed to properly apply its mind to the evidence recorded in the summary of evidence and ordered to convene GCM proceedings in a casual manner. It is stated that testimony of the witnesses examined on behalf of the prosecution is not worth credence and as they were all tutored witnesses, it is not safe to place reliance on such evidence. Non examination of the material witness, Krishna Biswas, at the recording of summary evidence itself would vitiate the entire proceedings as being arbitrary and unfair. The GCM, without taking into consideration the unblemished service career of the petitioner, awarded extreme penalty.

3. The petition has been resisted on behalf of the respondents contending, inter alia, that there was sufficient evidence on record to fasten culpability on the part of the accused-petitioner. The victim, Krishna Biswas, had explained the incident in clear and unequivocal terms and there was ample opportunity to the accused-petitioner to cross examine her. There is no reason to discard her testimony. There was no reason for the victim to get the petitioner involved in the matter unnecessarily. Further, with regard to the procedural aspect, it is contended that the provisions of Sections 22 and 23 were strictly adhered to. The witnesses were examined in the presence of the accused-petitioner and the petitioner had opportunity to cross examine them. In view of the provisions contained in Rule 22(5), written statement of Krishna Biswas in Bengali was taken on record and got it translated. Her absence at the time of recording of the summary of evidence did not affect the merits of the case since her statement was recorded subsequently in the course of trial. Non affixing certificate under Rule 23(5) of the Army Rules would not affect the merits of the case. While arriving at the conclusion, the GCM had evaluated the entire evidence and came to the irresistible conclusion about the guilt of the accused-petitioner.

4. In order to appreciate the respective case of the parties, it will be useful to make a brief narration of the facts. On the night intervening 15th/16th July 1992 at 0300 hours, while the prosecutrix, wife of Sankar Biswas, was breast feeding her daughter, she had noticed some shadow and having thought it might be a cat, she made the sound 'hai, hai' to scare the cat. But, suddenly, as there was sufficient light in her quarter, she saw a man standing near her cot putting under wear. She cried. When she asked why he had come inside, she was told by him that he was duty man and that he came for checking. Immediately he pressed her mouth and neck and forcibly lifted her peticoat. She kicked him with her leg and threw him from the cot. Then she lifted her daughter and went out shouting "Bhainji, bachao bachao". Then he asked her to give the key of the door, which she refused. He kicked the door with his leg and went out and started wearing dangri. On hearing her cries, certain neighbours, including Anita, came and caught hold of him and tied to a pole with a rope. Krishna Biswas narrated the incident to her husband.

5. In the ^{General} Summary Court Martial proceedings, the prosecution examined PW 1 (No.14527842 N Hav/Draftsman B. Bose of 633 EME Bn.),

who prepared the site plan, where the incident took place; PW 2 (the prosecutrix), gave narration of the entire incident that the accused pressed her mouth and neck, mounted on her and forcibly lifted her peticoat, that she kicked him with her leg and threw him from the cot and that on hearing her cry, the neighbours came there and caught hold of the accused and tied him to a pole; PW 3 (Panmati Devi, W/o. Nb/Sub Virender Singh of 234 Engr. Regt), who is stated to have come out of her tent on hearing the panic sound of Krishna Biswas. When she asked the reason, Krishna Biswas told her that someone gagged her mouth and lifted her peticoat. She saw the accused below the tree. He appeared as if he was in a process of wearing something. Immediately she caught him and handed over to other persons who reached there later; PW 4 (No.14541531L Nk/VM(MV) M Shiv Raj of 633 EME Bn.), who reached at the spot and found Smt.Virender Singh holding the thief, who was identified as accused before the Court. The accused asked him to let him go as he had come to take money from Naik Biswas. People gathered there tied the accused to a pole with rope; PW 5 (JC 217450 X Nb/Sub Clks (Cont) A.B Bandekar of 633 BME Bn.), who woke up on hearing that somebody knocking at the door. When he opened the door, he saw Krishna Biswas and some other neighbours. Krishna Biswas told him

that someone had entered into her house and pressed her neck. When he came out of the house, he saw that the accused was tied with a rope. He told Sankar Biswas about the incident; and PW6 (No.14531082P Sep Madan of 5075 ASC Coy (Composite), who came out of his house hearing the sound and was told by Krishna Biswas that the accused tried to outrage her modesty. PWs 7 and 8 also gave identical statement. Prosecution further examined Naik S. Biswas of 633 EME Bn. who stated that on the night intervening 15/16 July 1992 he was on duty in his Coy from 1300 hrs. to 1800 hrs. and from 1930 hrs. At about 0500 hrs. on 16.7.1992, he received a telephone call from Sub. Bandekar informing that somebody had entered into his house and that he should reach home. He saw Sub. Maj. Ram Prasad holding Sub. Jagvir Singh, who is the accused herein. His wife, who was crying, narrated the entire incident to him.

6. The accused-petitioner was charged for offence under Section 354 of the Indian Penal Code read with Section 69 of the Army Act for committing a civil offence of using criminal force to a woman with intent to outrage her modesty by using criminal force.

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7. Learned counsel for the petitioner made thrust on two points viz. (i) the entire proceeding is vitiated for non-fulfilment of the statutory provisions contained in Rules 22 and 23 of the Army Rules and (ii) there is no evidence to substantiate the allegations made against the accused-petitioner.

8. As regards the first point, counsel for the petitioner has contended that Army Rule 22 clearly demonstrates the mandatory applicability of the provisions in the case of persons opt the Army Act other than officers. The material witness, Krishna Biswas and the woman, who caught hold of the accused-petitioner, were not examined and, therefore, from the very beginning, the procedure adopted was illegal and on that basis, the order of the Commanding Officer for recording of the summary evidence and framing of the charge was improper. It is stated that the procedure prescribed under Rules 22, 23 and 24 of the Army Rules is at a stage anterior to trial by the Court Martial. It is the decision of the Court Martial which would result in deprivation of liberty and not order directing charge to be heard or summary of evidence be recorded or that Court Martial can be assuming that certain irregularities emanating from non-compliance of Rules

22, 23 and 24 would not vitiate the order convening Court Martial, reliance may be placed in the case of **Maj. E.G Barsay vs. State of Bombay** (AIR 1961 SC 1762), in which a question arose whether the investigation by an officer who failed to comply with the proviso to Section 5A of the Prevention of Corruption Act, 1947 was vitiated and the trial upon such investigation would be bad. The High Court held that the two conditions not being complied with by the investigating officer, but after considering the entire evidence, observed that the alleged irregularity would not justify the conclusion that non-observance of the conditions prescribed in the proviso to Section 5A of the Prevention of Corruption Act had resulted in failure of justice. The Supreme Court also agreed with it. The investigation stage and the irregularity would not vitiate the trial of the accused also.

9. The principle of law on the point of Sections 22 and 23 has already been stated in **Union of India and others v. Maj. A. Hussain** (AIR 1998 SC 577) to the effect that the procedural irregularity would not vitiate the trial and in no way materially affect the recording of the proceedings under Rules 22 and 23 of the Army Rules.

10. As regards the recording of summary of evidence, it is contended that the prosecutrix had not appeared as a witness and if her husband managed to have obtained her statement in Bengali, which could not be read in evidence for the reason that there was no certificate under Rule 23(5) of the Army Rules, which was mandatory. That part of the statement is not considered to be one as contemplated in Rule 23(5) of the Army Rules. We see no good reason to hold that the certificate should be in the specified form. The purpose is to see that the formalities are complied with by the recording officer. We fail to appreciate how any departure from the form or the word can adversely affect the object of the provision, merely because the certificate was not in the prescribed form. The apex Court in **Lt. Col. Prithi Pal Singh Bedi v. Union of India and others** (1982(3) SCC 140) held the procedural defects, lest those were vital and substantial would not affect the trial. More so, there was no flagrant violation of any procedure or provision causing prejudice to the accused.

11. It would be appropriate to take note of the fact that the accused himself pleaded not guilty. Krishna Biswas was produced by the prosecution at the time of trial. No prejudice was caused to the accused. As regards the

framing of charge against the accused, the summary of evidence was sufficient to indicate involvement of the accused and no difference is made out even if the statement of Krishna Biswas was taken during the course of recording summary of evidence without the certificate under Rule 23(5).

12. It is next contended by counsel for the petitioner that the evidence in the case is not sufficient to prove culpability of the accused-petitioner. It is to be noted that Krishna Biswas is a victim of molestation and, therefore, her statement should have weightage. She categorically stated what had happened on the night intervening 15th/16th of July 1992. There is nothing to believe that she had reason to implicate the accused unnecessarily. It would be unusual to think that in a conservative society a woman would be used as a tool to wreck vengeance, as the defence case has been set up. From her testimony, it is clear that the accused used criminal force on her intending to outrage her modesty. The culpable intention of the accused, which is the crux of the matter, is clear from her statement itself. The act of pushing and pulling her petticoat coupled with the intention to have sex would lead to the conclusion that the accused entered into her house only with the motive to outrage her modesty. There is no explanation

from the side of the accused-petitioner as to why a married lady and her neighbours join hands to implicate him falsely. Normally a lady would be hesitant to expose herself to shame and ignominy in the society. Her testimony cannot be discarded.

13. Presence of the accused-petitioner is evident from the statement of PW 3. She stated that she had come out of the house on hearing the alarm made by Krishna Biswas. She deposed to have been told by Krishna Biswas that someone gagged her mouth and lifted her peticoat. She also deposed to have seen a person below the tree who was in the process of wearing some apparel. Immediately she caught him. She stated that when some people gathered there, she handed over that person to them and went back to her tent. The presence of the accused-petitioner is not in dispute. The petitioner himself had admitted having gone there to get refund of the amount, which would also lend support to the prosecution version about his presence at the relevant time. We find no reason to discard the testimony of this witness.

NO

14. It is clear from the statement of Sankar Biswas that he was on duty at the relevant time. He also stated that he received message that someone had entered into his house. When he reached at the spot, he saw the accused-appellant. The entire incident was narrated to him by his wife, Krishna Biswas. He denied of having borrowed money from the accused-petitioner.

15. In these circumstances, we unhesitatingly come to the conclusion that the conviction of the accused-petitioner under Section 354 of the Penal Code and Section 69 of the Army Act was well based as the prosecution had successfully proved the charges against him. The appeal is hereby dismissed.

(S.S DHILLON)

MEMBER

(S.S KULSHRESHTHA)

MEMBER

PRONOUNCED IN OPEN COURT
ON 18th DECEMBER 2009.