IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH, NEW DELHI

T.A NO. 609 OF 2009
(WRIT PETITION (C) NO.399 OF 2000)

BHUPINDER SINGH ...APPELLANT

VERSUS

UNION OF INDIA AND OTHERS ..RESPONDENTS

FOR APPELLANT
MR. R.P SINGH, ADVOCATE

FOR RESPONDENTS
MR. AJAI BHALLA, ADVOCATE
WITH
LT. COL. NAVEEN SHARMA

CORAM

HON'BLE MR. JUSTICE S.S.KULSHRESTHA, MEMBER
HON'BLE LT. GEN. S.S.DHILLON, MEMBER

J U D G M E N T
28.09.2010

1. This petition - W.P (C) No. 399 of 2000 - has been filed by the appellant against the Summary Court Martial proceedings of 26.2.1994, wherein the Commanding Officer – Col. Surendra Pal

Singh sentenced him to undergo three months rigorous imprisonment and dismissal from service. On formation of this Tribunal, the above writ petition has been transferred for disposal. Since, in this case, the petitioner (appellant hereafter) challenged the conviction by Court Martial by filing a writ petition, which has been remitted to this Tribunal, the same has been converted into an appeal under Section 15.

2. The appellant argued that the charges that have been framed against him are very flimsy and minor because the authorities were bent on dismissing him from service. In order to appreciate the circumstances, the charges that were levelled against the appellant are as appended below:

> **FIRST CHARGE**
> **ARMY ACT SECTION 39(b)**
>
> **WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE GRANTED TO HIM.**
>
> in that he,
>
> at field having been granted leave of absence from 10 Nov 98 to 29 Nov 98 to proceed to his home, failed without sufficient cause to rejoin at Dinjan on

the expiry of the said leave till he rejoined voluntarily at 0600 hours on 02 Dec 98.

(Total period of absence 02 days).

SECOND CHARGE
ARMY ACT SECTION 63

AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE

in that he,

on 23 Nov 98 while on leave got a notice submitted along with official documents issued to him for his use through an advocate in the name of his wife to the Commanding Officer, 65 Field Regiment and others contrary to Para 364 of Regulation of the Army (Revised Edition) 1987 which enjoins that such complaints will be submitted through proper channel.

THIRD CHARGE
ARMY ACT SECTION 41(1)

DISOBEYING IN A SUCH MANNER AS TO SHOW A WILFUL DEFIANCE OF AUTHORITY, A LAWFUL COMMAND GIVEN PERSONALLY BY HIS SUPERIOR OFFICER IN THE EXECUTION OF HIS DUTY.

in that he,

at field, on 26 Dec 98 at 1730 hours having been ordered by No. 14337997M Hav (DMT) Karan Singh, his officiating Battery Havildar Major, to do sentry duty, did not do so.

FOURTH CHARGE
ARMY ACT SECTION 52(f)

SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD.

in that he,

at field, was found to be in possession of a locally made rubber stamp in the name of Commanding Officer 65 Field Regiment, with an intent to defraud for getting his brother enrolled into the Army.

3. The first charge pertains to Army Act Section 39(b), in that he overstayed leave by two days. This two days leave has also been explained by him, in that he was serving in a remote area in the North-East and while en route to join his unit, there was a bomb blast on the Railway track and the journey had to be performed by means other than train resulting in this delay of two days. He has also given the names of two other soldiers of his unit who undertook the same journey with him and were also two days late, but no disciplinary or other action was taken against them. In any case, this short over-stayal of leave was a very minor offence for which there was a justifiable reason and at best, a pay fine or a short period of detention would have more

than served the ends of justice. The second charge was under Army Act Section 63, an act prejudicial to good order and military discipline, in that while he was on leave, a legal notice was sent by his wife to his Commanding Officer, which was supposedly contrary to Regulations for the Army 364. The appellant contended that the legal notice had been sent by his wife and not by him. Therefore, he had no culpability in the commission of this so called offence. There was no evidence on record to substantiate the fact that he had indeed written this application and the respondents have only relied on his so called confessional statement for this charge. The third charge was under Army Act Section 41(1) i.e. disobeying the lawful command given by his superior officer, in that he has supposedly refused to do sentry duty when ordered to do so by Hav. Karan Singh. The appellant states that this is a mere fabrication of imagination and no such orders were given to him and neither was there any witnesses to such order or refusal to comply with this order. The only evidence that has been forwarded by the respondent is the short one sentence statement of Hav. Karan

Singh (PW 3), wherein he had stated that "**he asked the appellant to do sentry duty to which he refused**". The appellant reiterated that no such order was ever given to him and neither was any documentary evidence produced in support of this charge. The fourth charge was preferred under Army Act Section 52(f) i.e. an offence with intend to defraud, in that he was supposedly found in possession of a locally made rubber stamp in the name of his Commanding Officer. The appellant strongly contested this charge by stating that no such rubber stamp had ever been made by him and neither has any evidence been forwarded to support this charge. In fact, L/Nk. Sulthan Beya (PW 6) has clearly stated that this so called rubber stamp along with the money order form, on which impression of the said rubber stamp was imposed, was handed over to him in November 1996 when his predecessor, L/Nk Gurade Vishnu proceeded on posting. This rubber stamp, which was handed over to the witness in November 1996 was being exhibited on 3.1.1999 against the appellant! This clearly proved that all these charges were being done with an attempt to somehow or other

frame him in some disciplinary matter and dismiss him from service. If this so called rubber stamp and money order were in existence prior to November 1996, why was no disciplinary action taken against him at that point of time and why have the authorities waited for almost 2½ years before even carrying out the initial investigation? Learned counsel for the appellant further stated that not only was this rubber stamp exhibited after 2½ years, but how the authorities concluded that this rubber stamp was supposedly made to ensure the enrolment of his brother in the Army defied logic.

4. The appellant went on to reinforce his argument with regard to the vindictive attitude of his Commanding Officer by stating that during the initial hearing of the charge under Army Rule 22 not only has the complete record being fudged because he has refused to sign the proceedings, but they have even extracted a so called statement from the appellant which has been signed by the Commanding Officer which is totally and grossly illegal because no such statement is required to be given by the appellant at the initial hearing. This so called statement

was extracted from him on 31.12.1998 wherein he has presumably admitted to not only being guilty of four charges, but to five charges. It was incomprehensible that while on one hand the appellant is refusing even to sign the proceedings, on the other hand his Commanding Officer is recording his so called confession and admission of guilt to five charges. This so called self incriminating statement extracted from the appellant proves the bias of the authorities towards him. In fact, this bias continued even during the summary of evidence because the appellant refused to sign the proceedings of the summary of evidence. These illegalities have continued even during the SCM, wherein the Commanding Officer, on his own, has recorded the appellant's plea as 'guilty' for all four charges, whereas he had in actual fact pleaded 'not guilty'. The appellant has not signed the original record of the SCM has he signed the plea of guilty so appearing during such proceedings. It was only much later that his signatures were obtained on a blank piece of paper, wherein the mandatory certificate under Army Rule 115(2) was typed and annexed to the proceedings. The appellant stated

that the SCM suffers from various infirmities and is biased and prejudiced. It was also contended that for these trumpet up and fabricated charges, he has been awarded a grossly disproportionate and harsh sentence of three months rigorous imprisonment and dismissal from service.

5. The above facts were responded to by learned counsel for the respondents by stating that the appellant was a habitual shirker, who was never willing to do his share of work in the unit. As an example, for the two years preceding his dismissal, i.e. 1997-98, it was shown that the appellant had been on leave for 348 days, had been admitted in hospital on five occasions with a combined hospitalisation of 53 days and had been absent without leave for 168 days. When tabulated, it almost comes to an absence of 569 days in a period of two years. This, by itself, indicates the attitude and professionalism of a soldier, especially while working in a difficult field area.

6. Counsel went on to state that the plea now being taken by the appellant with regard to the first charge i.e. Railway track had been blown up and that was the reason for his

reporting late to the unit has not been pleaded by him either at the hearing under Army Rule 22 or at the summary of evidence and neither at the SCM. This is a false and new ground which he was now interjecting in order to gain the sympathy of the Court. Furthermore, no documentary evidence has been produced by the appellant to substantiate his statement and, therefore, it deserves to be rejected. The second charge of sending a legal notice to his Commanding Officer on very frivolous grounds, i.e. that the appellant should have been given casual leave and not advance of leave for next year and that the appellant had spent almost Rs.20,000/- on his medical treatment, therefore, the Army should reimburse him this amount. While the legal notice may have been sent by the appellant's wife, there was no way that she could have done it on her own without him giving her the complete facts of the case. It, therefore, tantamounted to the fact that he had got this false, malicious and mischievous petition filed against his Commanding Officer for no reason whatsoever, which is actually the essence of the charge framed against him. With regard to the third charge, it was urged that there was no

necessity to produce any witnesses to the fact that Hav. Karan Singh had ordered the appellant to carry out sentry duty and the testimony of Hav. Karan Singh, however short it be, was more than adequate to prove this charge. The fourth charge, with regard to rubber stamp, which was found in the possession of the appellant, was proved by the fact that the appellant himself in a letter to his father had stated that he is getting this rubber stamp made in order to assist the enrolment of the appellant's brother. It was also urged that the appellant was being sentenced for four charges which was more than sufficient ground for him to be awarded the punishment that he got.

7. It was strongly contended by counsel for the respondents that while the appellant's signatures do not appear on the proceeding of the initial hearing under AR 22, he was very much present during such hearing which was held on 31.12.1998 and his presence has been certified by three witnesses i.e. Capt. Jasbir Singh, Sub. Om Prakash and L/Hav. Dalbir Singh. It was also argued that this hearing was an initial fact finding inquiry wherein the essential pre-requisite was that the proceedings be

conducted in his presence, which was ensured. His not signing the proceedings has not prejudiced his defence or vitiated the proceedings or harmed him in any manner. In any case, there was no way in which his Commanding Officer could force him to sign and in the absence of such signatures, they have done the next best action by getting two independent witnesses to certify his presence. With regard to the summary of evidence, it was argued that it was the presence of the appellant that was a legal requisite and not his signing such proceedings as they could not force him to sign. Accordingly, his presence has been established by Maj. U.R Raj, the officer recording the summary of evidence. Therefore, the mere non-signing of the summary of evidence does not suffer from any legal infirmity because the independent witness, Capt. Jasbir Singh, who was present throughout the proceedings, has certified to the fact that the appellant was present during the recording of the summary of evidence. It was vehemently argued that the essential requisites of ensuring the appellant's presence throughout the proceedings, permitting him full liberty to cross examine witnesses, call

defence witnesses and make a statement should he so choose to do, had been ensured. Therefore, the summary of evidence was legally valid, even in the absence of the appellant's signatures.

8. It was also argued by counsel for the respondents that since there were four charges, the space for arraignment in the SCM proceedings was inadequate to type out the certificate as required under Army Rule 115(2) and it was for this only reason that the certificate has been annexed to the proceedings. While admitting this lapse in the recording of the proceedings, it was strongly urged that this technicality should not be the sole reason for setting aside the court-martial proceedings.

9. The main contention of the appellant was that he did not participate in the proceedings held under Army Rule 22 and neither has he signed the summary of evidence. Therefore, in these circumstances, for the Commanding Officer to proceed against him in the court martial on a plea of guilty was unjustified. All along, the appellant has urged that he is innocent and is not guilty of the charges so framed. Therefore, in accordance with

Army Rule 116(4), the SCM should have converted his plea "guilty" to "not guilty" and proceeded accordingly.

10. We have perused the original records. The record of the proceedings show that the plea of guilt has been signed by the appellant on an overleaf annexed to the proceedings and it has not been recorded on the original proceeding. It, therefore, appears that the appellant was not informed about the general effect of the plea of guilt or about the difference in procedure which is involved in the plea of guilt. Therefore, the finding based on the alleged plea of guilt would have no meaning at all. This view finds force from the decision of the Delhi High Court in **LNK Gurdev Singh** v. **Union of India** (W.P (C) No. 776 of 1995 dated 1.2.2008), which was followed by this Tribunal in **Ex. Nk. Subhash Chand** v. **Union of India and others** (T.A No. 723 of 2009 dated 27.4.2010). The observations made by Delhi High Court in **LNK Gurdev Singh's case** (supra) are extracted below:

> "Though the petitioner has allegedly admitted the charge by pleading guilty, his signatures nowhere appear on the purported plea of guilt. When an accused person pleads guilty, it would be necessary to obtain his signatures to lend authenticity to such proceedings.

This basic requirement was not even adhered to, the absence whereof lends credence to the allegation of the petitioner that he was not even present at the time of recording of the summary court martial proceedings and he never pleaded guilty.

In our recent judgment pronounced on 17.01.2008 in LPA no.254/2001 entitled The Chief of Army Staff & Ors. Vs. Ex.14257273 K.Sigmn Trilochan Behera, we have concluded that such court martial proceedings would be of no consequence and would not stand the judicial scrutiny. In forming this opinion, we had referred to the judgment of the Jammu & Kashmir High court in the case of Prithpal Singh Vs. Union of India & Ors., 1984 (3) SLR 675 (J&K). We had also take note of the instructions issued by the respondents themselves in the year 1984, based on the aforesaid judgment of the Jammu & Kashmir High Court, mandating that signatures of the accused pleading guilty of charge be obtained and if there is an infraction of this procedural requirement, it would violate the mandatory procedural safeguard provided in Rule 115(2) of the Army Rules and would also be violative of Article 14 of the Constitution of India.

Faced with this, an innovative justification was sought to be given by the respondents, namely, the said guidelines were issued by Northern Command whereas the petitioner was tried by the unit in Eastern Command. We feel that the law of the land has uniform application across the country and there cannot be one law for a particular command and different law for another command under the Army. We may note that

even this Court has taken similar view in Lachhman (Ex Rect) vs. Union of India & Ors., 2003 II AD (Delhi) 103 wherein it was held as under:-

> "The record of the proceedings shows that the plea of guilty has not been entered into by the accused nor has it been recorded as per Rule 115 in as much neither it has been recorded as finding of court nor was the accused informed about the general effect of plea of guilt nor about the difference in procedure which is involved in plea of guilt nor did he advise the petitioner to withdraw the plea if it appeared from the summary of evidence that the accused ought to plead not guilty nor is the factum of compliance of sub-rule (2) has been recorded by the Commanding Officer in the manner prescribed in sub rule 2(A). Thus the stand of the respondents that the petitioner had entered into the plea of guilt stands on highly feeble foundation."

Same view was taken by the Allahabad High Court in Uma Shanker Pathak Vs. Union of India & Ors., 1989 (3) SLR 405. The Jammu & Kashmir High Court has reiterated its opinion in a recent judgment in Sukanta Mitra vs. Union of India & Ors. 2007 (2) 197 (J&K), wherein the Court held as follows:

> "This apart the fact remains that the appellant has been convicted and sentenced on the basis of his plea of guilt. The plea of guilt recorded by the Court does not bear the signatures of the appellant. The question arising for consideration, therefore, is whether obtaining of signatures was necessary. In a case Union of

India and Ors. Vs. Ex-Havildar Clerk Prithpal Singh and Ors. KLJ 1991 page 513, a Division Bench of this Court has observed:

> "The other point which has been made basis for quashing the sentence awarded to respondent-accused relates to clause (2) of rule 115. Under this mandatory provision the court is required to ascertain, before it records plea of guilt of the accused, as to whether the accused undertakes the nature of the charge to which he has pleased guilty and shall inform him of the general effect of that plea and in particular of the meaning of charge to which he has pleaded guilty. The Court is further required under this provision of law to advise the accused to withdraw that plea if it appears from summary of evidence or otherwise that the accused ought to plead not guilty. How to follow this procedure is the main crux of the question involved in this case. Rule 125 provides that the court shall date and sign the sentence and such signatures shall authenticate of the same. We may take it that the signature of the accused are not required even after recording plea of guilt but as a matter of caution same should have been taken."

11. The legal position remains that the plea of guilt is necessarily required to be signed by the appellant to give

authenticity to it. In this case, the signatures of the appellant do not appear on the plea of guilt on the original record. The signatures of the appellant and the Commanding Officer on the mandatory cautionary certificate under Army Rule 115(2), which is pasted onto the original record, do not inspire adequate confidence on its authenticity. This is all the more relevant in this particular case as the appellant has not even signed the proceedings under Army Rule 22 nor has he signed the summary of evidence. Therefore, it would only have been appropriate that the SCM be conducted as if the appellant had pleaded *"*Not Guilty*"*. It is, therefore, to be presumed that the appellant did not plead guilty and the SCM proceedings should have been conducted on such premise.

12. We therefore direct that the impugned Summary Court Martial be set aside. The appellant will be deemed to be in service till he attains minimum pensionable service, after which he will be entitled to pension and other benefits in accordance

with Rules. No order on backwages. Petition is disposed of accordingly.

S.S.DHILLON
(MEMBER)

S.S.KULSHRESTHA
(MEMBER)