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COURT NO. 2, ARMED FORCES TRIBUNAL,

PRINCIPAL BENCH, NEW DELHI

T.A. No.527 of 2009

W.P.(C) No.2616 of 2008 Delhi High Court

IN THE MATTER OF:

Ex. Rect. Rajender **.....Petitioner**

VERSUS

Union of India & Ors. **.....Respondents**

Dated: 19.09.2012

Present: Mr. S.R. Kalkal, counsel for the petitioner
Mr. Anil Gautam, counsel for the Respondents.

1. This is a petition filed by the petitioner before the Hon'ble High Court of Delhi as a writ petition on 20.03.2008, which has come to be transferred to this Tribunal on its establishment and has been taken up for hearing.

2. The petitioner seeks to challenge the proceedings of Summary Court Martial dated 03.04.2006 and the order dated 02.01.2008 (Annexure P-7).

3. The factual averments are that according to the petitioner, he was enrolled as combatant soldier on 19.02.2005 after pre-enrolment verification from police station, Ambedkar Nagar, Delhi, for which certificate Annexure P-1 has been produced. Thereafter, the petitioner joined and completed his basic military training at Artillery Centre at

Nasik Road Camp. Then, he was granted recruit leave. In the meantime, the police verification in respect of the petitioner was submitted by one Sh. V.S. Ahluwalia, A.C.P. of Delhi Police, stating that the petitioner "*is not residing at the given address*", which according to the petitioner was given without visiting the house of the petitioner. Based on this, according to the petitioner the respondents decided to discharge the petitioner by administrative action, however, instead he was marched before the Commanding Officer for hearing of charge under Rule 22 of Army Rules, 1954 and his signatures were obtained on Appendix A to A.O. 24/94 (a form prescribed), and the Commanding Officer passed the order to record summary of evidence. Copy of the summary of evidence provided to petitioner has been produced as Annexure P-4. Thereafter, the Summary Court Martial was held on 03.04.2006, without issuing any warning order to prepare his defence at least 96 hours before commencement of the trial and he was not advised to, or give chances, to engage a defence counsel or defend his case during trial. The petitioner was found guilty and was punished with the sentence "*to be dismissed from service*": The proceedings have been produced as Annexure P-6. The petitioner submitted Post Confirmation Petition under Section 164(2) of the Army Act, which has been rejected vide Annexure P-7, while in identical matter other person named Rect. Parmod Kumar, who was also tried for similar allegation and was inflicted similar punishment, was reinstated by Chief of Army Staff vide order Annex. P/8 being dated 14.07.2007. Thus, a ground of

discrimination is also sought to be made out. The petitioner has also produced certain documents like passport etc. to establish his place of residence as verified in pre-recruitment verification to be correct.

4. Respondents have filed a reply contending, inter alia, that the verification roll duly affixed with latest photographs of the petitioner was sent to police authority, as per prescribed manner for verification of character and antecedents after enrolment was made, and the verification roll was received back from the police authority with the remarks duly signed by ACP V.S. Ahluwalia that the individual was not residing at the given address, thus, the verification of the petitioner was found adverse and unsatisfactory, and consequently, the Court Martial was held, and was found guilty. Various other pleadings have been taken, including that the charge-sheet and summary of evidence was given to the petitioner on 25.03.2006, vide receipt produced as Annexure R-2, and thus, Rule 34 was not violated. Regarding para 13 of the petition, containing ground of discrimination, it was only pleaded that the facts of the referred case are different, and being not identical, the petitioner is not entitled to any relief.

5. The petitioner also filed rejoinder on 06.11.2008, reiterating his version. Petitioner also filed an additional affidavit vide application dated 22.07.2010 and produced additional documents. On this application, vide order dated 26.07.2010 the petitioner was directed to produce the original of the documents. Then on 03.08.2010 since it

appeared to the Court that there are certain overwriting on number of entries in the ration card, seeking expert opinion was felt necessary and the matter was accordingly proceeded ahead, inasmuch, as vide order dated 09.11.2010 the documents were referred to Central Forensic Laboratory. A report dated 03.01.2011 has been received therefrom certifying that "*Video Spectral Comprator -5000 & Microscopic examination reveals the overwriting at number of places in questioned writings marked Q-1 and Q-2. The original writings when deciphered and read as the existing writings resulting there is no change in the basic contents of existing writings as well as the original writings.*"

6. With this resume of pleadings and documents, we have heard learned counsel for the parties at length.

7. It was submitted by learned counsel for the petitioner that it was the JAG Branch, who directed the Court Martial to be convened, instead of the original proposal of taking administrative action, while according to Section 116 it is only the Commanding Officer, who could order Court Martial to be convened, and thus, very convening of the Court Martial is bad. Then violation of Rule 22 of the Army Rules and violation of Rules 33 & 34 of the Army Rules was also pressed into service. The document Annexure P-8 was also pressed into service to show discrimination.

8. We have considered the submissions and have gone through the material.

9. So far as the first submissions about JAG Office directing Court Martial to be convened is concerned, as an abstract legal proposition, of course, JAG Branch could not direct the Court Martial to be convened but then here a look at the documents produced by the petitioner and relied upon, being Annexure P-5 does show that the JAG Branch has only advised to take action against the persons named in the letter. What type of action is required to be taken, was not advised by the JAG Branch, much less, was the Court Martial to be convened by the JAG Branch. In that view of the matter, this objection is not sustainable.

10. So far as the violation of Rule 34 is concerned, in para 10 of the petition it is alleged that the petitioner was not issued any warning orders to prepare his defence at least 96 hours before commencement of Summary Court Martial. This para 10 has been replied by pleading that the charge sheet and summary of evidence was delivered to the petitioner on 25.03.2006. On reading this para, learned counsel for the petitioner submitted orally, that actually all the papers were given to him after the Court Martial was over, at the same time.

11. We may at once observe that the petitioner has filed a rejoinder and this is not the stand while replying para 10 of the reply,

and this aspect rests only in the realm of making oral submission during course of arguments by learned counsel. We do not find any ground to disbelieve Annexure R-2. If computed from that document, the Court Martial was held after more than 96 hours and, therefore, this objection also cannot be sustained.

12. So far as alleged violation of Rule 22 is concerned, in view of the view we are taking in the forthcoming paragraphs, we do not stand advised to detain ourselves on this argument.

13. We have gone through the entire evidence produced during summary of evidence, forming the basis of the petitioner being found guilty. Since the matter is being heard, and is rather required to be heard by this Tribunal under Section 15, as an appeal, we think it appropriate to re-appreciate the evidence on its own merits.

14. Doing that, what we find is, that prosecution witness No.1, Hav. Clk. K.N. Singh, has only proved the documents, being enrolment form, and the paper received from the police authority, about the petitioner being not residing at the address. Similar is the position of PW-2, Sub. (AIG) Satyabir Singh, inasmuch, as he again does not say anything on his personal knowledge about the petitioner not residing at the given address. PW-3 BHM (GD) D. Loganathan is not better. The petitioner gave his statement, and maintained, that he had always been stressing and maintaining, that he is the resident of that place, and told

the Bty. Hav. Major that his verification roll may be send again with full address to find the truth. In his statement he gave house number and the mohalla of the village, where he claimed to be residing in the same village. Admittedly, the Summary Court Martial did not record the statement of any of the police personnel, who may have made investigation, or gone on the spot to verify the facts, as reported the document Exh.-1, (exhibited before Summary Court Martial).

15. When the correctness of the factual aspect was in controversy, and the service of the petitioner was at a stake, the matter could not have been, rather was not required to be proceeded by allowing it to rest in the realm of presumption of regularity of official act contemplated by Section 114 of the Evidence Act. First hand evidence about investigation having been conducted was required to be collected during Summary Court Martial.

16. May be that we would not have insisted upon such strict proof, but here is a case where the things are more telling, inasmuch, as the petitioner has produced the ration card, which of the year 1997 being of his father as head of the family, and showing the petitioner to be one of the members of the family, aged 12 years, and the genuineness of this ration card has been testified, rather not negated by the Forensic Science Laboratory. This being a piece of evidence in existence, before the controversy arose, is clearly admissible under Section 32 of the Evidence Act. In that view of the matter, in any case, the respondents

would have stood better advised, to have got the address re-verified, before inflicting the punishment of dismissal from service.

17. This coupled with the fact that vide Annexure P-8 another person similarly situate, who subsequently produced verification, may be at the time of post confirmation petition itself, but obviously after Summary Court Martial, had been reinstated in service, it would be too harsh to deny the same relief to the petitioner on the face of the ration card produced by the petitioner.

18. Consequently, re-appreciating the material produced in the Summary Court Martial, we do not find the finding of guilty to be sustainable and, accordingly, the same is set aside, and the petitioner is, consequently, ordered to be reinstated.

19. So far as the consequential benefits are concerned, in the circumstances of the case actual financial benefits would not be payable to the petitioner, on the principle of "no work no pay" so also in view of the fact, that the petitioner could also very well lead evidence in his defence, including producing this ration card before the Court Martial, and ought we know, that Court Martial would have accepted the ration card, and the matter would not have delayed so long. Thus, the petition cannot be allowed to take advantage of financial benefit for all this period of time.

20. The petition is, accordingly, allowed as above. The petitioner will get actual emoluments from the date he is actually reinstated. He may report to his Arty. Training Centre, Nasik Road on 03.12.2012.

21. The original ration card detained with the Principal Registrar be returned to the petitioner.

M.L. NAIDU
(Administrative Member)

N.P. GUPTA
(Judicial Member)

Dated: 19.09.2012
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