

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL BENCH
AT CHANDIMANDIR**

TA 45 of 2012 (Arising out of SWP No 629 of 2011)

AC Tiwari **Petitioner**
vs
Union of India and others **Respondents**

For the Petitioner : Mr Arun Singla, Advocate
For the Respondent(s) : Mr Mohit Garg, CGC with
Lt Col JG Minhas, OIC Legal Cell AFT

**Coram: Justice Vinod Kumar Ahuja, Judicial Member
Lt Gen (Retd) NS Brar, Administrative Member**

**ORDER
30. 01. 2014**

This writ petition filed in the Hon'ble High Court of Jammu and Kashmir at Srinagar is taken up on transfer to this Tribunal as an appeal against the finding and sentence of Summary General Court Martial (SGCM) under Section 15 of the Armed Forces Tribunal Act, 2007.

The petitioner while being the Commanding Officer of 14 Wireless Experimental Unit (WEU) was tried by SGCM from 07.11.1999 to 29.11.1999 on the following charges

- (a) First Charge: Army Act Section 52 (b)
DISHONESTLY MISAPPROPRIATING PROPERTY BELONGING
TO THE GOVERNMENT

In that he,
at Field, during October 1998, as Commanding Officer, 14 Wireless Experimental Unit,
Dishonestly misappropriated nine trucks of coal Dust, the property of the government, costing
Rs. 73,143/- (Rupees Seventy three thousands one hundred forty three only).

- (b) Second Charge : Army Act Section 52 (b)
DISHONESTLY MISAPPROPRIATING PROPERTY BELONGING
TO THE GOVERNMENT

In that he,
at Field, during October 1998, as Commanding Officer, 14 Wireless Experimental Unit,
Dishonestly misappropriated 50 bags of Atta and 20 bags of Rice, the property of the
Government, costing Rs. 68,145.50 (Rupees Sixty eight thousand one hundred forty five and
paise fifty only).

- (c) Third Charge : Army Act Section 52 (b)
DISHONESTLY MISAPPROPRIATING PROPERTY BELONGING
TO THE GOVERNMENT

In that he,
at Field, between October 1998 and November 1998, as Commanding Officer, 14 Wireless
Experimental Unit, dishonestly misappropriated 40.00 Tens of Coal, the property of the

Government, costing Rs. 1,26,597.78 (Rupees One Lakh twenty six thousand five hundred ninety seven and paise seventy six only).

The SGCM found the petitioner guilty of the first charge with the variation that words and figures “nine trucks of coal dust, the property of the Government, costing Rs.73,143/- (Rupees Seventy three thousand one hundred forty three only)” shall read as “four trucks of coal dust, the property of the Government, costing Rs.36,120/- (Rupees Thirty six thousand one hundred twenty only).” He was found guilty of the Second Charge and guilty of the third charge with the variation that figures and words “Rs.1,26,597.76 (Rupees One lakh twenty six thousand five hundred ninety seven and paise seventy six only)” shall read as “Rs.1,15,109.76 (Rupees One lakh fifteen thousand one hundred nine and paise seventy six only.”

The petitioner was sentenced to be dismissed from service; and to be put under stoppage of pay and allowances until he has made good the sum of Rs.69,000/- (Rupees sixty nine thousand only) in respect of part payment of the misappropriated property. The petitioner submitted a petition on 23.12.1999 dated 23 December 1999 which was rejected since it lacked substance. The Confirming Officer, General Officer-in-Chief, Northern Command on 24.03.2000 confirmed the findings and sentence of dismissal awarded by the court but set aside the portion of the sentence relating to “To be put under stoppage of pay and allowances until he has made good the sum of Rs.69,000/- (Rupees Sixty nine thousand only) in respect of part payment of the misappropriated property,” being inoperative and ineffectual. The sentence was promulgated on 03.04.2000.

The petitioner challenges the findings and sentence on the grounds that he took over command of the unit in 1997 and had an unblemished record till that date. The unit Headquarter was located at Srinagar and five detachments were deployed at various places. The petitioner was required to visit all detachments frequently which he did. As the task involved a lot of paper work he had to post his officers with the detachments and leave the administration to the junior staff. The misappropriation and sale of government property of coal and rations is said to be the work of his subordinate staff and the petitioner had no role or gain to be made in such sales. When the sale came to his notice he had the amount recovered from the individuals and ordered this to be taken on record by showing them as sale proceeds of newspapers and empty bottles. It is further contended that the sale involved civilians and therefore the territorial police had exclusive jurisdiction over the matter and the Army authorities were not authorised to investigate and proceed in the matter.

The petitioner had filed Writ Petition No 2201 of 1999 which was withdrawn to await the confirmation of the finding and sentence. This writ petition was filed after the confirmation and promulgation of the finding and sentence. The findings and sentence were confirmed on 24.03.2000 and the sentence upheld.

While arguing the matter the learned counsel for the petitioner did not advance any argument or challenge related to the evidence leading to the findings and sentence by the SGCM. He however placed strong reliance on the judgments of the Hon'ble Bombay High Court in the case of **Ex Lt Col Sunil Issar vs Union of India and others (WP No 5293 of 2000** decided on **20.04.2009**) and the judgment of the Hon'ble Supreme Court in **Civil Appeal No 3144 of 2012** decided on **15.03.2012** in the same case with respect to the appointment of the Judge Advocate General (JAG) being junior in rank to the petitioner. The learned counsel for the respondents on the other hand strongly contended that these judgments cannot help the petitioner as no such plea was taken during the SGCM and in the

writ petition. In accordance with these judgments, the writ petition could also not be amended subsequently on this count. It was also contended that the sentence was confirmed and promulgated before the coming into effect of these judgements ie it predated these judgments.

We heard the learned counsel for the parties and perused the original record of the proceedings made available. This being an appeal under Section 15 of the Armed Forces Tribunal Act, 2007, the evidence on record has been reappraised.

With respect to the first charge, the evidence of PW 6 and 11 reveals that four truck loads of coal dust were sold to PW 14 in Oct 1998 on the orders of the petitioner and Rs 32,000/0 received as sale proceeds. PW 3 and 12 had also seen the trucks and entries to that effect were recorded in the In / Out Register. Then evidence of PW 3, 5 and 12 shows five truck loads were sold in Nov 1998 again on the orders of the petitioner. However, as the charge was related to the month of Oct 1998 only, the court did not convict the petitioner for the sale in Nov 1998.

With respect to the second charge the evidence of PW 12 and 14 shows that on 26.10.1998, 50 bags of atta and 20 bags of rice were sold to PW 14 on the orders of the petitioner.

In so far as the third charge is concerned, the evidence on record of PW 9 and PW 12 shows that 43.933 tons of coal was drawn from the FSD, Srinagar on 30.10.1988 and 07.11.1998 in four civil trucks. This was sold by PW 12 on the orders of the petitioner and the proceeds handed over to the petitioner and his wife.

The petitioner himself appeared as DW1 and produced one witness in his defence. Nothing was shown to rebut or contradict the evidence against him.

We find nothing substantial in the arguments of the petitioner in so far as the evidence related to the charges is concerned. The petitioner was tried by SGCM under the Army Act which had the jurisdiction to try the petitioner. The trial was valid.

We now proceed to examine the aspect related to the appointment of the JAG at the trial. At the outset there is no dispute that the JAG appointed was of the rank of Major which was junior to the petitioner who was a Lieutenant Colonel.

In the case of **Ex Lt Col Sunil Issar vs Union of India and others (supra)**, the Hon'ble Bombay High Court had held the court martial proceedings to be vitiated on account of the JAG being junior in rank to the accused. The Hon'ble High Court had relied upon the judgment of the Apex Court in the case of **Union of India vs Charanjeet Singh Gill and others (Judgment today 2000(5) SC 135)**. Para 6 of the judgment of the Hon'ble High Court reads as under

6. The learned counsel for the Respondent submits that this judgment would not be applicable to the facts of the present case because the Court-martial was concluded on 6.1.2000 and the judgment of the Supreme Court was pronounced on 24.4.2000. Such an argument was made before the Supreme Court. In this case also, the Army had been following the practice of appointing the Judge-Advocates who were in certain cases junior to the officers who were facing trial. But the Supreme Court while applying the de-facto doctrine came to the conclusion that the cases which were already concluded on the date when the Supreme Court passed the judgment, could not be reopened. Therefore, the learned counsel for the Respondent submits that the present case would fall in those cases where the de-facto doctrine would apply. This argument cannot be accepted as this argument was also answered by the Supreme Court. In para 25 of the judgment of the Supreme Court, Supreme Court stated that proceedings of any Court-martial if already

challenged on this ground and or pending adjudication in any Court in the country, would however, be not governed by the principles of de-facto doctrine. No pending petition shall however, be permitted to be amended to incorporate the plea regarding ineligibility and disqualification of the Judge-Advocate on the ground of appointment being contrary to the mandatory Rule 40 (2) of the Army Rules. Therefore, we are of the view that the bar created under the Supreme Court judgment would not apply to the case of the Petitioner as he filed Writ Petition after 6.1.2000 which was withdrawn with liberty to approach the Chief of the Army Staff. The Chief of the Army Staff disposed of the appeal and thereafter, this Writ Petition was filed. For these reasons and following the aforesaid judgment of the Supreme Court, we feel that this petition deserves to be allowed.

The Hon'ble Supreme Court while dismissing the appeal observed at Para 12 and 13 as under

12. In so far as the appointment of a junior Advocate Judge to assist the General Court Martial in General Court Martial proceedings held against a senior officer cannot be disputed. In view of the observations made by this Court in Gill's case a junior Judge Advocate, lower in rank to the accused officer could not have been appointed to assist the General Court Martial proceedings. Therefore, the proceedings are vitiated and consequently the order of dismissal passed pursuant to such an inquiry proceeding cannot be sustained. This aspect of the matter, we do not think could be re-agitated and re-argued by the learned counsel appearing for the Union of India. The other submission of Mr. Balasubramanian, learned counsel appearing for the Union of India is, since the Court Martial proceedings had attained finality prior to the judgment of this Court in Gill's case, namely, before 24.04.2000, as observed by this Court, the same cannot be reopened on the basis of the judgment in S. Gill's case. To appreciate the stand of Mr. Balasubramanian, it is useful to refer to paragraph 27 of the judgment in S. Gill's case.

"27. In view of this position of law the judgments rendered by the Court Martial which have attained finality cannot be permitted to be reopened on the basis of law laid down in this judgment. The proceedings of any Court Martial, if already challenged on this ground and are pending adjudication in any court in the country would, however, be not governed by the principles of "**de facto doctrine.**" No pending petition shall, however, be permitted to be amended to incorporate the plea regarding the ineligibility and disqualification of a Judge Advocate on the ground of appointment being contrary to the mandate of Rule 40 (2). This would also not debar the Central Government or the appropriate authority from passing fresh orders regarding appointment of the fit persons as Judge Advocate in pending Courts Martial, if so required."

13. The Court, after holding that in a General Court Martial proceeding, an officer who is lower in rank than the accused officer cannot be appointed to assist as a Judge Advocate, the Court has given effect to the judgment prospectively by observing, that, if the General Court Martial proceedings have attained finality, the same cannot be reopened. The Court has further observed, if for any reason, those proceedings have been challenged in a Court and that is pending for adjudication, if the ground which found favour in S. Gill's case is not taken, the accused officer/delinquent officer cannot be permitted to raise that ground by way of an amendment of the proceedings.

In the case of the petitioner, the appointment of the JAG was not challenged in the writ petition which was filed in 2001. However, an additional affidavit was filed by the petitioner before the Hon'ble Jammu and Kashmir High Court on 01.03.2006 stating that in the light of the Apex Court judgment reported in SCC 2000(v) the SGCM was vitiated due to the JAG being junior to him. The affidavit was taken on record vide order dated 15.03.2006, however, no amendment application was moved nor any amendment effected in the writ petition. Even otherwise we find that the judgment of the Apex Court in **Charanjeet Singh Gill's case (supra)** specifically rules out any amendments to writ petitions on this count at a subsequent date. The finding and sentence of the petitioner had also been confirmed and had attained finality on 24.03.2000 ie before the judgment of the Apex Court.

Having considered the evidence on record, we find the charges against the petitioner well proved, and negating the plea of the petitioner in respect of the appointment of the JAG, we find no force or merit in the petition which is accordingly dismissed.

The original record of the proceedings is returned to the learned counsel for the respondents.

[Justice Vinod Kumar Ahuja]

[Lt Gen (Retd) N.S.Brar]

30.01.2014

Whether the judgment for reference is to be put on internet? Yes/No