RESERVED
Court No. 1

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

O.A. No. 316 of 2012

Wednesday, this the 23rd day of January, 2019

Hon'ble Mr. Justice SVS Rathore, Member (J)
Hon'ble Air Marshal BBP Sinha, Member (A)

Ex- Havildar/ Clerk (General Duty) Krishna Kant Pandey (6382284-H) of 633 (I) Tank Transporter Platoon ASC, C/o 56 APO, son of late Brij Bhushan Pandey, now resident of Village and Post Arsara, District Mainpuri, U.P.- 206303

…. Applicant

Ld. Counsel for the: Shri R. Chandra, Advocate.
Petitioner/ Appellant

Versus

1. Union of India through, the Secretary, Ministry of Defence, New Delhi.
2. Chief of the Army Staff, Integrated Headquarter of the Ministry of Defence (Army), South Block, New Delhi-110011.
3. General Officer Commanding-in-Chief, Northern Command, C/o 56 APO.
4. General Officer Commanding, HQ 29 Infantry Division, C/o 56 APO.
5. Officer-in-Charge ASC Records (South), Bangalore, Pincode- 560007.

....Respondents

Ld. Counsel for the: Shri D.K. Pandey, Advocate**.**
Respondents.

ORDER

"(Per Hon'ble Mr Justice SVS Rathore, Member (J)"

1. By means of instant O.A. the applicant has made the following prayers:-

> (a) Issue/pass an order of direction to the respondents to quash/set aside the arbitrary, illegal and without jurisdiction Summary Court Martial proceedings (Annexure No.A-1(i)) held on 13.09.1999 by Commanding Officer, 19 Battalion of the Kumaon Regiment because of his legal incompetence to conduct the said trial.
>
> (b) Issue/pass an order or direction to the respondents to quash/set aside the order dated 10.02.2011 (Annexure No.A-1(ii)) passed by Central Government because of the ingrained illegality and non application of mind by respondent no.1.
>
> (c) Issue/pass an order or direction to the respondents to treat the applicant continuously in the rank of Havildar since 01.01.1992 and to promote him as Naib Subedar with effect from 2006 till 31.03.2009 when the applicant had taken premature discharge from service.
>
> (d) Issue/pass an order or direction to the respondents to give him all consequential service and monetary benefits including promotion to the rank of Naib Subedar as per the existing provisions of law.
>
> (e) Issue/pass an order or direction to the respondents to grant suitable compensation for the colossal amount of misery, agony and humiliation caused to him and his family.
>
> (f) Issue/pass any other order or direction as this Hon'ble Tribunal may deem fit in the circumstances of the case.
>
> (g) Allow this application with costs."

2. Thus, the applicant has virtually challenged the punishment awarded to him by the Summary Court Martial on 13.09.1999 and has prayed for other consequential benefits. Therefore, the first

question to be determined in this case is whether the Summary Court Martial, hereinafter referred to as SCM has followed the procedure prescribed under law and if so whether there was sufficient evidence to inflict the punishment on the applicant. Hence, if the first question is determined in favour of the applicant only then the prayer for his promotion as Naib Subedar can be entertained.

3. Admittedly at present the applicant is receiving the pension of Havildar. In brief the facts of the case giving rise to the instant case as per pleadings of applicant are that the applicant Ex-Hav Clerk (General Duty) was enrolled in the Army on 25.08.1986. Later on he was promoted to the rank of Naik and thereafter on 01.01.1992 as Havildar. On 07.05.1998 he was posted to 633(I) Tank Transporter Platoon ASC as Havildar Clerk (General Duty). During the course of his duty the applicant found that Major S.K. Bhardwaj, the then Officer Commanding 633 Independent Tank Transporter Platoon ASC was indulging in various financial irregularities. This complaint against Major S.K. Bhardwaj was forwarded on 28.08.1998 to him only through a dispatch rider, namely, Sepoy R Jayakumar. Maj Bhardwaj refused to accept the same. The applicant met Major Bhardwaj and asked him to get him an interview of GOC 29 Infantry Division. However, no action was taken by him. Maj Bhardwaj also put pressure on the applicant to withdraw the said letter and in that process he also gave a draft letter in his own hand to the applicant. The applicant

refused to yield to any pressure, consequent to that the applicant was falsely implicated in a case under Army Act under Section 40(a) for which he was tried by SCM. It is pertinent to mention here that the charges were framed against the applicant on 07.09.1999, therefore, the petition if any as mentioned by the applicant dated 30.01.2000 was filed subsequent to the charge sheet. The applicant was tried by the SCM for the following charges:-

" CHARGE SHEET

The accused No 638228411 Hav (Subs)/ Clerk (GD) KK Pandey of 633 (I) Tank Transport Platoon attached to 19 Kumaon, is charged with:-

Army Act Section 40(a) **USING CRIMINAL FORCE TO HIS SUPERIOR OFFICER**

in that he,

at Samba, on 10 Dec 98, hit with his hand on the shoulder of IC-44851M Maj SK Bhardwaj, the officer Commanding, 633 (I) Tank Transport Platoon.

(PK Kayastha)
Colonel
Commanding Officer
19 KUMAON Regiment "

Place : Samba
Date: 07 Sep 99

4. It is submitted that the attachment of the applicant to 19 Kumaon Battalion was totally illegal. The applicant pleaded not guilty to the charge levelled against him. The evidence was recorded and the applicant was also given an opportunity for giving his own statement and also to produce evidence in his defence. After the SCM the applicant was held guilty and was punished with rigorous imprisonment for one month and to be reduced to the ranks. At the time when the punishment was awarded to the applicant he was having 13 years and 19 days of

service to his credit. It is informed by the learned counsel for the applicant that after the said punishment the applicant had continued in service for a total period of 22 years and he was promoted to the post of Havildar also. Thus, the grievance of the applicant is that the SCM proceeding was the outcome of bias of Maj S.K. Bhardwaj and, therefore, the same must be set aside.

5. Learned counsel for the applicant has argued that in the charge, no time of incident was mentioned and therefore the charge sheet was vague and the trial due to this mistake must vitiate. It has also been argued that there were four other witnesses who were under the command of Maj Bhardwaj though they have deposed against the applicant but their evidence ought to have been discarded as being present at the site of incident they have not tried to save Maj Bhardwaj from the alleged assault. It has also been argued that as per the evidence on record the victim has suffered dislocation, however, there is no medical evidence to support the said dislocation. It has also been argued that the victim remained in Military Hospital for about two hours, however, no injury report has been filed. It has also been argued that attachment order of the applicant was not legal and therefore it renders the entire SCM illegal.

6. On behalf of the respondents it has been argued that the applicant was duly attached to the Unit conducting the SCM and there is no illegality in the conduct of SCM by the Commanding Officer of the Unit where the applicant was attached. This is

nowhere the case of the applicant that the attachment order was passed by such an officer who was not entitled to attach the applicant.

7. It has also been argued that it is a case of direct evidence. There was no dislocation of bone. Maj S.K. Bhardwaj was examined by the Nurshing Assistant who apprised Maj S.K. Jha, the Doctor on duty that there was no obvious injury and he was given Brufane tablets and advised to take heat treatment. It has also been argued that the applicant has given detailed statement wherein he has admitted time of incident and therefore no prejudice could have been caused to the applicant by the simple fact that the time of incident was not mentioned in the charge sheet. It has also been argued that all the procedural irregularities do not vitiate the trial. It has also been argued that even if the witnesses who were present there have not reacted adequately at the time of assault against Maj S.K. Bhardwaj even then it would not make their evidence unreliable only on the ground that they have not reacted adequately in preventing the alleged assault as stated by the applicant.

8. In the instant case it is no where the case of the applicant that the authority which has attached the applicant to the Unit, where he was tried by the SCM had no authority to attach the applicant. Therefore, the attachment order itself is not under challenge. Whether the Commanding Officer of the Unit where a person has been attached can proceed with SCM, this point has

been considered by the Hon'ble Apex Court in **Union of India and others vs. Vishav Priya Singh**, Civil Appeal No.8360 of 2010 decided on 05.07.2016. In para-33 Hon'ble Apex Court has observed as under:-

> "33. In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions."

9. The next point is regarding non-mentioning of the time of incident in the charge sheet. It is true that the time of incident has not been mentioned in the charge sheet but law is settled on the point that a defect, error or mistake in the charge sheet would not vitiate the trial unless and until accused is prejudiced in his defence by the said mistake. In the instant case the time of incident has come during of evidence. The applicant has cross examined all the witnesses. Apart from it the applicant has himself given details of the incident in his statement. However the perusal of the record shows that no question on the point of time of incident was put to any witnesses. Thus, the applicant has not committed any mistake in any manner on the point of time of incident. So no prejudice can be presumed to have been caused to the applicant in his defence by such omission of time in charge sheet. At this stage we would like to reproduce Section 464 of Criminal Procedure Code, which reads as under:-

> "464. **Effect of omission to frame, or absence of, or error in, charge**.-
>
> (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
>
> (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-
>
> (a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;
>
> (b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
>
> Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

The aforesaid section virtually shows the intention of law. Thus this section itself is complete reply to the argument regarding non-mentioning of the time in the charge sheet.

10. During the SCM the applicant has pleaded not guilty, therefore, SCM recorded the statement of Maj S.K. Bhardwaj, who is the victim of the incident. He was duly cross examined by the applicant. P.W.2 Naib Subedar S.K. Mandal is also an eye witness to this incident. He has also been cross examined by the applicant. P.W.3 is Hav R.N. Jaiswal. P.W.4 is Hav Vijay Kumar Sharma. This witness has not seen the entire incident but he has heard the voice of "Pakro, Pakro" and thereafter he went towards

the applicant who was running towards Tent. He went inside the Tent and told him that he is being called. However, the applicant did not come. Thereafter he came back and went to the Military Hospital. This witness was the Driver of Maj S.K. Bhardwaj. This witness has not been cross examined by the applicant. P.W.5 is Hav Ram Sarup. This witness was also cross examined. When a question was put to this witness in cross examination whether he had heard Maj S.K. Bhardwaj abusing the applicant, then his reply to this question was in negative. A question was also put to this witness where you were standing and what was your reaction when you saw the applicant hitting Maj S.K. Bhardwaj. The said question was replied by him as under:-

> "I was standing closely. I did not do anything. I did not expect that the Clerk will hit the OC. Later when the OC said that the accused should be placed under arrest, I went towards the Tent where the accused had run."

11. Thereafter the accused/applicant was given an opportunity to give his statement in defence. He has given a detailed statement. However, no other evidence documentary or oral was produced by the applicant in his defence to support his statement. Thus the statement of applicant is not supported by any evidence, oral or documentary.

12. At the time when the punishment was inflicted on the applicant he was of the age of 32 years, 06 months and 03 days and he had a service of 13 years and 19 days to his credit and was working in the substantive rank of Havildar. The punishment

“to be reduced to the ranks and to suffer rigorous imprisonment for one month in military custody was inflicted on him. Admittedly thereafter the applicant continued in service and he has completed 22 years of service and thereafter he was discharged and is getting service pension of Havildar. The claim of the applicant is that the said punishment awarded by SCM should be set aside and as a consequence thereof he should be promoted to the next rank and other consequential benefits be also provided to him.

13. The learned counsel for the applicant could not bring to our notice any mandatory provision of law which the SCM has violated. Law is settled on the point that only such procedural mistakes are material which prejudice the applicant in his defence or which are mandatory in nature. On this point we would like to cite the pronouncement of Hon’ble Apex Court that what value should be attached to a procedural illegality or irregularity. The Hon’ble Apex Court in the case of **Bhagwan Swaroop and others vs. Mool Chand and others** (1983) 2 SCC 132 has held as under:-

> “12. It is no doubt true that a Code of Procedure 'is designed to facilitate justice and further its ends and it is not a penal enactment for punishment and penalty and not a thing designed to trip people up'. Procedural laws are no doubt devised and enacted for the purposes of advancing justice. Procedural laws, however, are also laws and are enacted to be obeyed and implemented. The laws of procedure by themselves do not create any impediment or obstruction in the matter of doing justice to the parties. On the other hand, the main purpose and object of enacting procedural laws is to see that justice is done to the parties.

In the absence of procedural laws regulating procedure as to dealing with any dispute between the parties, the cause of justice suffers and justice will be in a state of 'confusion and quandary. Difficulties arise when parties are at default hi complying with the laws of procedure. As procedure is aptly described to be the hand-maid of justice, the Court may in appropriate cases ignore or excuse a mere irregularity in the observance of the procedural law in the larger interest of justice. It is, however, always to be borne in mind that procedural laws' are as valid as any other law and are enacted to be observed and have not been enacted merely to be brushed aside by the Court Justice means justice to the parties in any particular case and justice according to law. If procedural laws are properly observed, as they should be observed, no problem arises for the Court for considering whether any lapse in the observance of the procedural law needs to be excused or overlooked. As I have already observed depending on the facts and circumstances of a particular case in the larger interests of administration of justice the Court may and the Court in fact does, excuse or overlook a mere irregularity or a trivial breach in the observance of any procedural law for doing real and substantial justice to the parties and the Court passes proper orders which will serve the interests of justice best.

13. Excuse of lapses in compliance with the laws of procedure, as a matter of course, with the avowed object of doing substantial justice to the parties may in many many cases lead to miscarriage of justice."

14. In another case of **Mahadev Govind Gharge vs. LAO**

(2011) 6 SCC 321 Hon'ble Apex Court has observed as under:-

"35. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The Court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances.

36. To put it simply, the procedural law must act as a linchpin to keep the wheel of expeditious and effective determination of dispute moving in its place. The procedural

> checks must achieve its end object of just, fair and expeditious justice to parties without seriously prejudicing the rights of any of them."

15. Since in the instant case the applicant has utterly failed to satisfy the Tribunal as to how his defence was prejudiced by such mistake in the charge, therefore we are of the considered view, particularly, when the applicant had given his detailed statement explaining the incident in his own manner, we do not find that non mentioning of the time in the charge had in any manner prejudiced the applicant in his defence.

16. The next argument of the learned counsel of the applicant is that there were other eye witnesses present but they have not tried to save Maj S.K. Bhardwaj from the alleged assault by the applicant. We do not find any substance in this submission. The reply of P.W.5 to the question put by the applicant is complete answer to this argument. Because these witnesses were the members of the Armed Forces, which is a highly disciplined Force, therefore, they will not concoct a false story of assault by the applicant to his own Officer Commanding. The manner in which the incident is alleged to have taken place shows that a very little time must have been consumed in completing the entire incident of assault by the applicant. There is no straitjacket formula that each person must react in a particular manner in the given circumstances. Such reaction defers from person to person. Therefore, we do not find any substance in this submission of learned counsel for the applicant. All the witnesses have fully

corroborated the incident as they have seen the assault on their Officer Commanding. The Officer Commanding has also given statement against the applicant.

17. The last argument of the learned counsel for the applicant is that no medical evidence was recorded during SCM while Maj S.K. Bhardwaj has stated that he had suffered dislocation. The incident has been explained by the victim Maj S.K. Bhardwaj. During SCM he has given the statement that when he told the applicant to put up the official mail, he raised his voice, using abusive language “Bhen Chod” and advanced towards him and hit him on his left shoulder and pulled his hand badly and ran away. A question was put to this witness whether he went to the Doctor and got himself examined and what medicines or prescription was given. In reply to this question this witness has replied as under:-

> “I went to the MI Room of 171 MH. I was examined by the nursing assistant who apprised Maj SK Jha, the doctor that there was no obvious injury. I was given Brufane tablets and advised to take heat treatment.”

18. This statement of the witness shows that no mark of injury was found therefore brufen tablet was advised to him and was advised to take heat treatment. If the applicant had any query to make regarding medical examination of the victim in the Military Hospital or wanted to know any other information in this regard, it was open to the applicant to have called the Doctor or Nursing Assistant in his defence during SCM. Since no medical examination was prepared, therefore, non examination of Doctor

or non production of any medical report would not adversely affect the case of the prosecution. The argument of the learned counsel for the applicant that all these witnesses are giving false statements against the applicant have absolutely no substance for the reason why all the four Army personnel will give evidence against the applicant. It is nowhere the case of the applicant that any other person was present there at the time of incident. The applicant has not made any effort to adduce evidence in his defence of any other person in support of his case that no such incident had ever taken place as claimed by the applicant.

19. Therefore, in view of the discussions made above, we find no irregularity in the SCM. Evidence of Maj Bhardwaj is fully corroborated by the evidence of eye witnesses. There is nothing on record to discredit their evidence. So far as ground bias of Maj Bhardwaj is concerned we also do not find any substance in it for the reason that had there been any such bias then the same must have reflected in the punishment awarded to the applicant. Keeping in view the highest degree of discipline in the Army, we are of the view that a lenient approach has been taken by the respondents while awarding punishment. The applicant was permitted to continue in service and promoted in the substantive rank of Havildar. Therefore we do not find any illegality or irregularity in the punishment. Since the punishment has been upheld, therefore, the applicant is not entitled to his consequential relief of promotion to his next rank.

20. In view of the above the O.A. lacks merit, the same deserves to be dismissed and is hereby **dismissed**.

No order as to costs.

(Air Marshal BBP Sinha)
Member (A)

(Justice SVS Rathore)
Member (J)

Dated: January 21, 2019
JPT