

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

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Date of Institution: 6.2.1991/12.1.2010

Date of Decision: 20th April, 2015

MA 8352 of 2014 and TA 661 of 2010 (arising out of Cr.WP 772 of 2000)

Ex-Sepoy Surinder Singh **Petitioner(s)**
(No.4457617K) (Deceased)
Through his L.R Smt. Nirmala
Devi (Wife)

Versus

Union of India and others **Respondent(s)**

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For the Petitioner (s) : Mr. SS Johal, Advocate
For the Respondent(s) : Mr. Ram Chander, Sr. PC.

Coram: Justice Surinder Singh Thakur, Judicial Member.
Lt Gen DS Sidhu (Retd), Administrative Member.

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ORDER
20.04.2015

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This case has a chequered history and is a classical example of our system where the petitioner strived hard to get justice for a period of over three decades but before the final verdict he passed away – leaving behind his widow and four siblings.

2. The petitioner was tried, convicted and sentenced by Summary Court Martial (SCM), vide order dated 20.09.1989 (Annexure P-1), to undergo *three* months rigorous imprisonment in addition to his dismissal from service for allegedly leaving the Guard duty , during the intervening night of 12/13 August, 1989 at the residence of the

Commanding Officer (CO), for a while without order from his superior officer and using criminal force to Maj. J Chentre of Western Command Liaison Unit and hurt his face by swinging a stick. His statutory complaint/appeal was also dismissed and the above orders of his sentence and dismissal from service are under challenge before us.

3. The petitioner, herein after to be referred as deceased, died on 08.01.2001 during the proceedings, as such his wife has been substituted his legal heir vide order dated 26.05.2011 passed in MA 90 of 2001.

4. In brief, the facts germane to this petition can be stated thus:-

- (i) In the year 1989, the deceased was serving in 16th Battalion of the Sikh Light Infantry Regiment at Abohar. He was detailed as one of the night Guards at the residence of the Commanding Officer(CO).
- (ii) During the intervening night of 12/13.08.1989, the deceased was on duty.
- (iii) It was a hot summer of Punjab in the month of August. According to the deceased, around 0040 hrs he felt thirsty and went to 'MES Pump House' to quench his thirst. While returning, near the house of PW Major JJ Chentre of Western Command, Liaison Unit, the deceased noticed some movement, but before he could make out anything, he was hit by *Danda* causing bleeding injury on his forehead. He put his both hands to stop bleeding and sat

down. It was Major Chentre who had hit and kept on beating him.

- (iv) Thereafter Major Chentre shouted for his Orderly and called more men from the Officer's Mess. The deceased was taken to his unit where he was placed in the solitary confinement at Quarter Guard without any medical help or treatment.
- (v) The deceased was never marched before the CO. He was kept in the solitary confinement till the forehead injury was nearly healed.
- (vi) The incident was never reported to the Competent Authority, nor the matter was reported to the 'Formation Headquarters', for investigation and holding Staff Court of Inquiry.
- (vii) It is alleged that during that time, Unit was commanded by Colonel Moti Singh. A Summary of Evidence (SOE) was held on 18.09.1989 by Major Ajay Kumar on the orders of Major K.N. Ghosal that too after about a month of the alleged incident. No charge-sheet was ever handed over to the deceased.
- (viii) It is also alleged that neither the witnesses were examined before him nor an opportunity to cross-examine them was given.

- (ix) He further alleged that no chance to make his statement or produce his witnesses in defence was given, whereas he was made to sign some papers written in English, with which he was not conversant.
- (x) On 14.09.1989, deceased was informed about his dismissal from service and awarding of Rigorous Imprisonment for a period of *three* months by Major K.N. Ghosal only by handing over a letter dated 20.09.1989 (Annexure P-1) to him, along with a copy of the charge-sheet which was not even explained to him.
- (xi) The deceased was thereafter sent to Central Jail, Ferozepur to undergo the sentence.

5. The deceased filed writ petition bearing CWP No. 2771 of 1991 in February, 1991 in the Punjab and Haryana High Court challenging the impugned orders and claimed the following reliefs:-

- “(a) A writ of certiorari be issued quashing the conviction and sentence of dismissal and *three* months imprisonment as stated in Annexure P-1.
- (b) Respondents be directed to reinstate the petitioner in service with retrospective effect, entitling him his seniority with full pay and allowances.
- (c) The petitioner be granted pension and other retirement benefits when due”.

6. The matter went on, in the High Court till 25.05.2000 but no reply was filed by the respondents despite imposing costs and repeated opportunities and imposing of costs. This CWP was later, converted

into **Criminal Writ Petition (Cr. W.P)** which was registered as **Cr. W.P. No. 772 of 2000**. Notice thereof was given to the learned Standing Counsel for the respondents. Thereafter it remained pending till 12.01.2010 in the High Court on which date it was transferred to this Tribunal. The perusal of the record reveals, that even before this Tribunal, after securing the presence of the parties/their counsel, the respondents were put to notice that despite cost(s), the reply was not filed by them. However, vide order dated 19.08.2010, the respondents were directed to make available the entire record of SCM proceedings, but informed thereafter that it was not available. Even one more opportunity was accorded on 19.10.2010 with caution to file the reply by the respondents failing which their right to file the reply would be closed. The matter was again taken up on 20.01.2011 but respondents again drew blank. Thus following orders were passed:-

“Learned counsel for the respondents submits that as per the correspondence made available, the record of Summary Court Martial Proceedings is not available.

Present is the glaring case where the punishment was imposed for (...sic...) by Summary Court Martial in the year 1989, and the writ petition was filed in early 1991 itself. So much so, that appearance was put in by the respondents on 18.04.1991, itself and since then no reply has been filed despite imposition of costs by the Hon’ble High Court, and now after practically two decades, it is attempted to be conveyed to us that the record is not available.

This is a very serious matter, to be appropriately taken care of by the concerned corner, including to take strong disciplinary action to the

extent of dismissal of the person concerned who was responsible to maintain of record and/or the person responsible for bringing about this situation about record not being made available.

Last opportunity is granted to the respondents subject to exemplary costs of Rs. 25000/- to file the reply, to make all efforts to locate the record of Summary Court Martial Proceedings, and to produce it or in the alternative, to inform the Court the final disciplinary action taken against the delinquent persons, including its outcome.

Long adjournment is given so that all the above things may be completed. The matter to come up on 11.04.2011.”

7. On 11.04.2011, the matter was taken up and Tribunal recorded the following proceedings:-

“In furtherance of the last order of 20th January, 2011, today it is informed that for loss of the original Summary Court Martial proceedings, disciplinary action was taken against the person concerned, being Ex-Hav Sat Pal Singh, who was directed to report to Legal Cell P&H and HP(I) Sub Area along with IAFF-958, Sheet Roll and complete dossier of the petitioner, and the NCO was sent to Army Headquarters along with the parawise comments on the subject. However, after handing over the same, the NCO proceeded to New Delhi Railway Station along with the above documents. However, he lost the same while purchasing ticket. Then, in Para 2 it is pleaded that the original SCM proceedings were forwarded to Major S.S. Johal, counsel for the petitioner, vide letter dated 17th March, 1991, based on the directions of Headquarters of Ministry of Defence vide letter

dated 25th January, 1991, and in Para 4 it is pleaded that on 8th September, 1992 Sub(Clk) Rameshwar Dass of the Records was directed to collect the original SCM Proceedings from Major S.S. Johal, who refused to return the same by simply stating that it is not held by him, and made endorsement on the reverse of the records' letter of 17.3.1991.

From the perusal of this application it is not established that the original Summary Court Martial Proceedings were lost by Sat Pal Singh.

Then admittedly, reply has not been filed, though learned counsel for the respondents made an attempt to make us believe that reply has been filed, but after going through the Court file, the learned counsel also feels satisfied that the reply has not been filed.

In that view of the matter, we do not find any ground to recall the order imposing costs.

The application is, therefore, dismissed.

Reply has not been filed, and further time is prayed for to file the reply.

Put up on 26th May, 2011.

This opportunity is being granted subject to payment of yet another costs of Rs. 25,000/-. Both the costs be paid on or before 26th May, 2011, failing which the *right of the hearing of respondents would stand forfeited, and the costs would be recovered in accordance with law.*"

(emphasis ours)

8. Despite making all this clear, again the reply was not filed by the respondents. Under these circumstances, the Tribunal was constrained to close the right to file reply by the respondents. In the meantime, the original petitioner Surinder Singh had died and his wife

was substituted as his legal representative/heir and on 26.05.2011, claimed the same relief sought by her husband and in addition to it she claimed consequential relief as well as family pension to her. The Tribunal passed the following orders:-

“The matter is pending since 1991, and order sheets since then shows a good long history of adjournment after adjournment, even with increasing costs. Though, the costs have been paid, but the fact remains that till date, reply has not been filed.

Under the circumstances, right to file the reply is forfeited.

Thereafter, we have heard learned counsel for the parties on CM No. 90 of 2001 for substitution of legal representative. The petitioner expired. CM is allowed. Name of the petitioner Surinder Singh is struck off from the array of the parties, and in his place, his widow Smt. Nirmala Devi is substituted as petitioner. Amended cost title be filed.

Matter to be put up for hearing on 17.08.2011.”

9. Again the respondents came with the plea that the original record of the SCM was handed over to the petitioner’s counsel, as such original record was not available with them and the steps were taken to reconstruct the record. But as usual the counsel for the petitioner denied the fact of the handing over of original record to him, thus vide order dated 31.08.2012 passed by the Tribunal, the respondents were required to show any document which confirms the receipt of the record by the petitioner’s counsel but they failed to do so. Even no steps were taken by the respondents to reconstruct the record. The bench taking this matter, also noticed that despite imposing heavy

costs twice, things did not improve and again saddled the respondents with further cost of Rs. 10,000/-.

10. The record further reveals that vide order dated 15.10.2012, the respondents were directed to place on record the certified copy of the SCM proceedings along with an affidavit as the counsel had informed that certified copies were available with the respondents. It was then on 08.07.2013, the respondents placed copies and the matter was listed for arguments but the bench noticed the said copies were illegible as such directed to file the legible copies. On 24.02.2014 the bench again reminded the respondents about the long pendency of the case. Later the respondents placed on record photo copies of the SCM proceedings along with an application and the bench taking this matter was not satisfied with this, feeling that the order of the Tribunal was not complied with by the respondents thus ordered that an affidavit annexing the copies of the certified copies of the SCM proceedings of responsible officer be filed within six weeks.

11. Surprisingly, when the original SCM proceedings were lost, from where the respondents were able to get the Photostat copies of the same documents which they have placed on record along with the application. If these were available the respondents could have reconstructed the record even when the opportunity was accorded to them ,why did it take 14 years to produce it before the Court/Tribunal? Nothing is explained in the application (MA 7766 of 2014) dated 26.02.2014.

12. Since the respondents did not file any written statement/reply to the contentions raised by the petitioner disputing the legality of SCM and holding him guilty for over *three* decades as stated above, their right to file the reply stood forfeited and have lost their right of hearing because of their act and conduct.

13. We have heard the learned counsel for the petitioner and learned counsel for the respondents was allowed to make only the legal submissions.

14. Mr SS Johal, learned counsel for the petitioner highlighted the points taken in the petition disputing the very constitution of SCM whereas Mr Ram Chander, Sr. PC argued that the SCM was duly constituted by the competent authority and SCM complied with all the mandatory rules. No prejudice was caused to the petitioner.

15. On having heard the learned counsel for the parties and after going through the record as also the documents of the respondents, we find that the contention raised by the petitioner is well founded on factual and legal aspect of the case, to which the respondents could not repel.

16. The record reveals that the deceased was made to face following two charges:-

“(i) Leaving the Guard without order from his superior officer at field between 0025 and 0100 hours on night 12-13 August, 1989 when on sentry duty at officers quarters quit his guard without orders from his superior officer (Under Section 36(b) of the Army Act.

- (ii) **Using criminal force to his superior officer at 0035 hours on night 12/13 August, 1989 swung a stick at the face of IC-34792 K Major JJ Chentre of Western Command Liaison Unit and hurt his face.”**

17. The charge-sheet was framed by Major K.N. Ghosal, Officiating Commanding Officer of 16th Battalion The Sikh Light Infantry, on 18.09.1989 whereas the incident had taken place during the intervening night of 12/13 August, 1989. There is no medical certificate of Maj JJ Chentre, who is alleged to have been hurt on his face. There is also nothing on record to show under what authority, the Officiating Commanding Officer had initiated the charges on 18.9.1989 (page 106) against the deceased and proceeded with the matter and recorded the statements on the same day itself. Further we are also shocked to note from Appendix ‘A’ to ‘AO’ (At page 103) Record of proceeding before Commanding Officer under Army Rule 22, which shows that the charge(s) against the accused were read out and explained to him prior to its framing on 10.09.1989 and the first column of the proceedings reveals that the date on which the charge(s) were heard orally by his Commanding Officer is 11.09.1989. All these dates are absolutely irreconcilable. The examination of witnesses could not have been done before framing of the charge(s). Further Annexure ‘B’ is at Page 105 of the Paper Book which is also a charge-sheet issued by the Officiating Commanding Officer does not disclose under what provisions of the Act, the deceased was charge-sheeted. The documents of respondents reveal that the deceased was kept under close arrest in the Quarter Guard, immediately after the alleged

incident without any medical assistance even Maj, Chentre also did not get himself medically examined for the injury, alleged to have been sustained. Had it been so, it could have lent a corroboration to his version, as indicated in the document Annexure 'B' Offence Report (Page 105).It is also not understood as to why no action was taken against the deceased till 10.09.1989 when the Commanding Officer was available and Why it was left at the whims of officiating Commanding Officer who was not even empowered to take such an action? These are very vital unanswered questions which involves the human, legal and constitutional rights that go to the roots of the case.

18. The next shocking fact is that no legal assistance appears to have been provided to the deceased and no opportunity to adduce the evidence in defence was accorded to him, are yet another factors to impel us to hold the impugned order and subsequent order of rejection of appeal wrong and illegal. The personal liberty of the deceased could not have been jeopardised except according to the procedure established by law as envisaged under Article 21 of the Constitution of India.

19. Further we also find from the photo copy of the noting sheet produced by the petitioner (page 37) which has not been disputed and the letter dated 29.08.1989 (Page 39) that the Record Officer had sent a letter to **14 SIKH LI** on **29.08.89** that only the CO was empowered to Deprive the Paid acting Rank of an NCO vide Army Act Section 80(e) but he cannot reduce an NCO to ranks without going through the process of Court Martial. The deceased was Paid acting Nk, his

deprivation of Paid acting rank would have been in order had he been punished so. Since the punishment awarded is reduced to ranks which is not specified in Section 80 of the Army Act, the same has thus become illegal as per Section 87 (Note 1(a) (iii) of Army Act and needs revision by the superior authority under the provisions of Para 442 of Regulations for Army 1987 and Army Order 109/80 thus there was a recommendation to review the illegal punishment.

20. Even the record of SCM copies whereof were produced by the respondents does not reveal the names of Presiding Officer and the Members were read over to the deceased accused and was even asked whether he had any objection to being tried by any officer sitting on the court which is non-compliance of Section 130 of the Army Act. The conducting of the SCM by an officer, not competent and empowered, in the manner aforesaid speaks of volumes of bias.

21. In **Ranjit Thakur V/s Union of India and others (1987) 4 SCC 611**, the Apex Court observed in following paragraphs as under:-

“11. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the court-martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. The oft-quoted words of Frankfurter, J. in *Vitarelli v. Seaton* are again worth recalling:

....if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed..... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

12. “The history of liberty” said the same learned judge “has largely been the history of observance of procedural safeguards.”

13. We are afraid, the non-compliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings. Indeed it has been so held by this Court in *Prithi Pal Singh v. Union of India* where Desai, J. referring to the purpose of Section 130 observed: (SCC pp.167-68, SCC (Cri) p. 667, para 32)

Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection..... This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection..... The provision conferring a right on the accused to object to a member of the court-martial sitting as a member and participating in the trial ensures that a charge of bias can be made and investigated against individual members composing the court-martial. This is pre-eminently a rational provision which goes a long way to ensure a fair trial.

14. What emerges, therefore, is that in the present case, there is a non-compliance with the mandate of Section 130 with the attendant consequence that the

proceedings of the summary court-martial are rendered infirm in law. This disposes of the first limb of the contention (a).”

22. As already stated above, in the case on hand the record of the proceedings does not indicate whether the deceased was asked whether he objects to be tried by any officer sitting at the court-martial. The Supreme Court in the above cited case held that it imparts a basic infirmity to the proceedings and militates against and detracts from the concept of a fair trial, therefore, non-compliance with the mandate of Section 130 goes to the root of jurisdiction and without more vitiates the proceedings.

23. As noted above, from the facts there has been a procedural lapse at every stage and breach of Constitutional right, not only during the SCM but also while disposing of the appeal by the higher authorities, which was conveyed by a cryptic message Annexure P-12 dated 26.11.90, only informing the deceased about rejection of his appeal.

24. Not only this, we also find the fragrant disregard of mandatory and obligatory provisions of law as contained in Army Rules 22 to 24 and 34 which deals and lays down the mandatory procedure for conducting SCM in addition to Section 130 of the Act, vitiating trial.

25. In nutshell, we are of the view that the deceased was the victim of material procedural lapses and bias, vitiating the SCM and he was virtually condemned unheard. Therefore, for the above stated reasons,

we set aside the conviction and sentence as also the order of rejection of his appeal being wrong and illegal.

26. Consequently, the petition is allowed, the impugned order annexure P1 dated 20, Sept; 1989 holding the deceased guilty and the order of punishment and subsequent rejection if any of his appeal, both are set aside. Since the deceased had served for 10 years and 6 months in the Army and he would have normally served up to 15 years i.e. for about 4 years and 6 months more, thus, the respondents are hereby directed :-

- (i) to reinstate the petitioner (since dead), notionally, in service with retrospective effect entitling him full pay and allowances till date of his normal retirement and shall calculate his pension to his wife which becomes payable as per rules from the date of his retirement till his death;
- (ii) After the death of her husband on 08-01-2001, his wife Nirmala Devi is entitled to full family pension; AND
- (iii) All the above benefits of the deceased be calculated and paid/released to his wife named above who is legal heir of the deceased within a period of *four* months from to-day, with interest at the rate of 9% from the date of each component aforesaid fell due, till its final payment/ release.

27. The petition stands accordingly disposed of, with costs quantified at Rs. 50,000/- to be paid to the petitioner, by the respondents.

ANNOUNCED: 20th day of April; 2015.

(Justice Surinder Singh Thakur)

(Lt Gen DS Sidhu (Retd))

20.04.2015

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Whether the judgment for reference to be put up on website – Yes/No