IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: May 25, 2018

\+ W.P.(C) 2511/1992

EX.LINK VISHAV PRIYA SINGH ..... Petitioner

Through: Ms. Ankita Patnaik, Adv.

versus

UOI ..... Respondent

Through: Ms. Barkha Babbar, Adv.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. The present petition has been filed by the petitioner with the following prayers:-

> *" In view of the above and in the interest of justice, it is, therefore, most humbly prayed that this Hon'ble Court may be pleased to issue appropriate writ, direction or order in the nature to :-*
>
> *(a) DECLARE that the Summary Court Martial held on 25.7.90 in respect of the petitioner is not legally constituted and had no jurisdiction to proceed in the matter;*
>
> *(b) CERTIORARI quashing the entire*

proceedings of the said Summary Court Martial;

(c) MANDAMUS directing the respondents to reinstate the petitioner forthwith in the service retrospectively with full pay and allowances and all consequential benefits, as if he is continuously in the service;

(d) Record be summoned;

(e) Any other or further, writ, direction or orders that may be deemed appropriate under the circumstances be also passed."

2. Some of the facts noted and as canvassed by the learned counsel for the petitioner are that the petitioner was enrolled in the Indian Army as a Sepoy on August 06, 1979. He was later transferred to 19 Mahar Regiment on April 02, 1985. It is the case of the petitioner, on September 25, 1987, he was promoted to the rank of Lance Naik. On March 26, 1990, the petitioner complained against the CO i.e the respondent No.5 to the Commander of his brigade. It is the case of the petitioner that on May 30, 1990, he was interviewed by the Commander where he highlighted two major grievances of his i.e, he was being denied leave by the CO and the CO was hell bent upon relinquishing the rank of the petitioner. The petitioner was sent for 15 days casual leave from June 01, 1990 to June 15, 1990. He was also

informed that his other grievances shall also be looked into and the CO 17 Kumaon Regiment was detailed to conduct the investigation on the basis of the complaints made by the petitioner.

3. On July 15, 1990, the petitioner received a letter from the Brigade informing him that his additional points are still under investigation. On the same day, the Investigation Officer is changed from CO 17 Kumaon Regiment to CO 18 Punjab Regiment, who, according to the petitioner is the course mate of respondent No.5. On July 16, 1990 at 9.20 am Subedar Adjudant 18 Punjab Regiment carries the letter dated July 16, 1990 and directs the petitioner to report to the CO's Office at 12 pm, wearing the uniform of a Sepoy, despite the fact that the complaint of the petitioner that the CO of his Unit was hell bent upon relinquishing the petitioner's rank, was the subject matter of the investigation, to which the petitioner informed the Subedar Adjudant that since he is a Lance Naik, he cannot wear the uniform of a Sepoy and alternatively he may be allowed to appear in civil clothes. It is the case of the petitioner that once again at 12.25 pm, he was asked by the Subedar Major to report to the CO's office at 12.30 pm in a Sepoy's uniform and since it was

already 12.30 pm, the petitioner informed that he cannot reach the office at 12.30 pm. At this, the petitioner was immediately put under close arrest.

4. It is the case of the petitioner, on July 18, 1990, a Summary of Evidence was initiated against the petitioner, on the charge of disobeying the lawful command given by a superior officer and subsequently the petitioner was tried through a Summary Court Martial and vide sentence dated July 25, 1990 he was awarded the sentence to undergo six months RI and was also dismissed from service. On November 30, 1990, as the petitioner had not been supplied with the copy of the Summary Court Martial Proceedings, he asked for the same through Jail Authorities but the same were not supplied to him. After he had completed his sentence of six months, he again vide his application dated February 14, 1991 sought the relevant documents but the same were not supplied to him. Pursuant thereto, multiple reminders were sent including a legal notice dated May 13, 1991. It is only thereafter, the documents were supplied to the petitioner i.e on July 10, 1991. It is the case of the petitioner, on August 09, 1991, the petitioner submitted his petition under Section 164(2) of the Army Act, 1950 against his

wrongful dismissal but no reply was received for the same. He accordingly, approached this Court by way of this petition. It is the case of the petitioner that during the pendency of this writ petition on May 14, 1993, the respondents vide their order dated May 14, 1993 converted the sentence of the petitioner from dismissal from service to discharge from service.

5. The case of the respondents, as set up in their pleadings is that the petitioner was enrolled in Army as Sepoy in Rajput Regiment. On March 08, 1990, the petitioner had at 1800 hrs said to Hawaldar Kamble Udhav "*You are partial and do favouritism. You have detailed me for commando practice."* According to them, the petitioner was charged under Section 63 of the Army Act i.e an act prejudicial to good order and military discipline. It is their case that the petitioner was tried summarily and was deprived of the appointment of Lance Naik on May 26, 1990 and reverted to the rank of Sepoy. It is their case that on July 10, 1990 the petitioner was absent from physical training parade and when he was called by the Company Commander, he refused to come. On July 11, 1990 when the petitioner was asked why he did not come for physical training parade, he replied that *"I have no problem but I have not been attending physical*

training parade for some days." On July 12, 1990, the petitioner was asked to put up on uniform but he refused and had put on civil clothes. It is their case that the Commander was apprised of his behavior. On July 15, 1990, the petitioner had also directly written a letter to GOC 15 Corps, therefore the Commander ordered CO 18 Punjab to carry out an investigation and attached the petitioner to 18 Punjab for all purposes. He reported to 18 Punjab on July 15, 1990 as Sepoy. On July 16, 1990, the petitioner was called to the CO's office in uniform by Naib Subedar Gurcharan Singh who was doing the duty of Subedar Adjutant. The petitioner disobeyed the lawful command given by the superior officer and refused to wear uniform. That subsequently when a letter was given to the petitioner to report to CO 18, the petitioner refused to take the letter.

6. It is their case, on July 17, 1990 the Hearing of Charge proceedings were held. On conclusion of Hearing of Charge proceedings, the Commanding Officer 18 Punjab gave orders to record the Summary of Evidence on July 17, 1990. The Summary of Evidence was recorded on July 20, 1990. After conclusion of the Summary of Evidence, orders were issued for holding the Summary Court Martial. The petitioner was tried by

a Summary Court Martial for an offence under Section 41(2) of the Army Act for refusing to accept official letter dated July 16, 1990. He was also proceeded for refusing to obey the verbal orders given by the Sub. Adjutant to that effect. According to the respondents, the petitioner pleaded guilty to the charge against him and declined to make any statement. It is also their case that provisions of Army Rule 115(2) were complied with. Pursuant to the plea of guilt of the petitioner, recorded as the finding of the Court, the petitioner was awarded punishment of dismissal from service as well as six months RI. They also state that the Statutory Petition was decided by the Central Government on May 14, 1993 whereby it was decided that the punishment of dismissal from service be converted into discharge with effect from the date of dismissal.

SUBMISSIONS:-

7. It is the submission of the learned counsel for the petitioner that the Summary Court Martial Proceedings are liable to be set aside as it has been proceeded on the alleged basis of plea of guilt by the petitioner, which is totally false, as is evident from the plea of guilt statement, which is unsigned. That apart, she would state that the Leave Certificate dated May 31, 1990

issued to the petitioner mentions the rank of the petitioner as Lance Naik and not Sepoy while the respondents in their counter affidavit for the very first time stated that the petitioner was demoted to the rank of Sepoy with effect from May 26, 1990. However, no documents to substantiate the claim of the respondents that the petitioner stood demoted have been supplied by the respondents. According to her, the case of the respondents that the petitioner was remitted to the rank of Sepoy vide order dated May 26, 1990 because he refused to go for training but on the other hand when the petitioner along with four other personnel from his company reported for training, the instructor told them he wants only volunteers and no nominated members for the training and therefore the petitioner and the other four personnel being nominated members were returned back but only the petitioner was marched up to the CO, who was biased against the petitioner. She would submit, the petitioner was never supplied with the copy of the order dated May 26, 1990 remitting him back to the rank of Sepoy nor the same has been produced by the respondents at any point of time. She would also state that even otherwise, the respondents who have taken the plea that a Court of Enquiry was conducted to look into the complaints made

by the petitioner against the CO in which it was found that the allegations raised by the petitioner were false but no documents vis-à-vis the said Court of Enquiry have been produced by the respondents, which shows that the same is an afterthought. That apart, the learned counsel for the petitioner would submit that the entire basis of awarding the sentence of dismissal from service to the petitioner is his alleged past conduct, which has not been substantiated by any document produced by the respondents. According to her, on the other hand a perusal of the Summary of Evidence will show that the respondents themselves recorded the petitioner's past record to be good. In the alternative, she has also stated that the punishment of discharge from service is totally disproportionate and is liable to be set aside. She states that in the following batch of matters, which have been remitted back to this Court by the Supreme Court, this Court had already passed orders:-

a) W.P.(C) No. 17622/2004 Sep/Clk S.K. Nari v. Union of India and Ors decided on September 22, 2017;

b) W.P.(C) No. 18185/2004 Sep/Clk Balwinder Singh v. Union of India and Ors decided on September 22, 2017.

8. She would rely upon the following judgments of the

Supreme Court in support of her submissions:-

(i) Gayatri Sarkar v. Union of India W.P.(C) 3063/2014 decided on January 22, 2016;

(ii) Ranjit Thakur v. Union of India and Ors (1987) 4 SCC 611;

(iii) Dharambir Singh v. Union of India and Ors W.P.(C) 3585/2003 decided on August 26, 2015.

9. On the other hand, Ms. Barkha Babbar, learned counsel for the respondents would state that after the coming into force of the Armed Forces Tribunal Act 2007, this Court does not have the jurisdiction to hear the matter. She would state, Section 3(o) of the AFT Act deals with service matters in relation to persons subject to the Army Act, and mentions all matters relating to the conditions of their service which are included and which have to be heard by the AFT. It also mention matters which shall not be included in it and at (iv) it mentions that it shall not include Summary Court Martial except where the punishment is of dismissal or imprisonment for more than three months. She states, in the present case, the SCM had awarded the punishment of six months RI and dismissal from service. Therefore, the present writ petition cannot be entertained by this Court and is

liable to be transferred to the AFT. She would state, the conversion of the punishment of dismissal into discharge by the Central Government is not illegal and is within the powers of the Central Government. The petitioner had submitted a petition under Section 164(2) of the Army Act 1950 against the findings and sentence awarded by the SCM. The Government of India after due consideration of the petition had directed that the punishment of dismissal awarded to the petitioner be converted into discharge with effect from the date of dismissal. She states, the power conferred by Section 164(2) is very wide and no limitations can be read into it to curtail the scope of the power. According to her, Section 164(2) is a beneficial provision and is totally independent and cannot be fettered with provisions of the Army Rules, which is also clear from Army Headquarters letter dated July 17, 1999. She would further state, on converting the dismissal of the petitioner into discharge the petitioner is entitled to terminal benefits i.e AFPP Fund, AGI Maturity Benefits, Final Settlement of Accounts and DCRG which have already been paid to him. In case the petitioner had 15 years qualifying service to his credit, he would have been eligible for service pension also.

10. Learned counsel for the respondents takes a plea that the

petitioner was a habitual offender. On March 1, 1990, the petitioner was detailed by the Officiating Company Havaldar/Major Udhav Kamble to take part in commando competition practice for the impending inter-battalion events, which the petitioner refused, replying in an insubordinate manner to his superior and alleging partiality on his part in detailing him on commando training. The Company Commander reported the matter to the then Commanding Officer for using insubordinate language against Havaldar Udhav Kamble and the petitioner was charged for an offence under Section 63 of the Army Act. Instead of answering to the charge, the petitioner alleged favouritism and discrimination. He also stated that he would not accept the Commanding Officer's punishment and that Ex. Rajput Regiment personnel were being discriminated against in the unit. He also wanted to see the Brigade Commander i.e respondent No.3. The petitioner's interview was arranged. Inspite of that, he chose to write directly to the Brigade Commander in contravention of instructions contained in para 522 of the *"Regulations for the Army"*. However, respondent No.3 finding the allegations baseless, directed that the Commanding Officer could proceed with the disciplinary action

against the petitioner. She stated, on May 26, 1990 the petitioner was remanded to the Commanding Officer for the same offence. That a Summary Trial was held and on being found guilty, the petitioner was awarded the punishment of deprivation of the appointment of Lance Naik on May 26, 1990. According to her, Lance Naik is an appointment and not a rank. In this regard, she referred to Rule 29, Note 3. She would state, the petitioner was granted 15 days casual leave with effect from June 01, 1990 to June 15, 1990. The mention of the rank of Lance Naik in his leave certificate is merely due to clerical error, and oversight. The petitioner was not holding the appointment of Lance Naik on that day as is evident from the Attachment Order dated July 15, 1990.

11. Insofar as the Summary Court Martial is concerned, it is her submission, on July 16, 1990 the petitioner was called to the Office of the Commanding Officer, 18 Punjab in uniform by Subedar Gurcharan Singh who was then performing the duties of Subedar Adjutant. She stated, the petitioner disobeyed the lawful command given by the superior officer and refused to wear the uniform. On July 17, 1990, the petitioner was brought before the Commanding Officer in the Orderly Room in civil dress as he

refused to wear uniform. The Hearing of Charge proceedings under Army Rule 22 were conducted. On conclusion of the Hearing of Charge proceedings the Commanding Officer 18 Punjab gave orders for recording the Summary of Evidence on July 17, 1990. On July 20, 1990, the Summary of Evidence was recorded. On July 25, 1990, the petitioner was tried by the Summary Court Martial for an offence under Section 41(2) Army Act. She would state, the offence occurred while he was on active service and the petitioner had on July 16, 1990 when he was asked to accept an official letter dated July 16, 1990 requiring his presence in the CO's Office for investigation in uniform refused to do so. He also did not obey the verbal orders given by the Sub Adjutant to this effect. The petitioner had pleaded guilty to the charge against him and had declined to make any statement. The procedure under Army Rule 115(2) was complied with and the plea of guilty of the petitioner was recorded as the finding of the Court. The petitioner was awarded the punishment of six months RI and dismissal from service. Though the signatures of the petitioner were not there on the plea of guilty in the SCM proceedings there was no requirement for the same in 1990 when the SCM was held. She would rely upon

the judgment in the cases of ***Ex. Ct. Kalu Ram v. Union of India decided on August 16, 2012*** and ***110 (2004) DLT 268 D.B. Chokha Ram v. Union of India & Anr.***

12. According to her, the punishment awarded to the petitioner is proportionate to the offence committed by him. It is her submission that the petitioner was on active service when the petitioner had committed an offence under Section 41(2) of the Army Act, which provides that if such an offence is committed while the person is on active service, he is liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as mentioned in the Act and if the person commits this offence while not on active service he is liable to suffer imprisonment for a term which may extend to five years or such less punishment as mentioned in the Act. The scale of punishment awardable by Court Martial is given in Section 71 of the Army Act. She would state, the petitioner was only awarded the punishment of dismissal from service and RI for six months. The Apex Court has held in several cases that the High Court under Article 226 or 227 should not interfere with the punishment so imposed merely on compassionate grounds such as it being disproportionately harsh except in ex facie cases of perversity or

irrationality. She seeks the dismissal of the writ petition. She would rely upon the following judgments in support of her contention:-

(i) (2001) 9 SCC 592 Union of India & Ors v. R.K. Sharma;

(ii) (2011) 10 SCC 244 Commandant 22nd Bn, CRPF v. Surender Kumar.

13. Having heard the learned counsel for the parties, the first and the foremost issue that needs to be decided is whether the present petition is not maintainable in this Court in view of Section 3(o) of the AFT Act, as it is the submission of Ms. Babbar that the issue herein relates to a service matter that too concerning persons subject to Army Act where the punishment is of dismissal or imprisonment for more than three months. In that regard, the answer to the said issue lies in her own submission, inasmuch as she had stated that the matters, which shall not have the jurisdiction of AFT, are those relating to Summary Court Martial except where punishment is of dismissal or imprisonment for more than three months. In the case in hand, even though initially it was a case of dismissal with imprisonment of six months, the dismissal was reduced to discharge. Even otherwise,

initially the writ petition was disposed of by this court on an issue whether the SCM need to be held by the CO of the unit or any other unit on January 25, 2008. The said order was subject matter of an Appeal before the Supreme Court, which decided the issue vide order dated July 05, 2016 in favour of the respondents but at the same time remanded the matter back to this Court for consideration on merits. The Supreme court having remanded the matter back to this court, this Court shall have the competence to decide the matter on merits. Hence, this plea of Ms. Babbar is rejected.

14. On the issue whether the Summary Court Martial proceedings followed by the punishment of imprisonment of six months and discharge from service of the petitioner is justified. The issue needs to be seen from the perspective, what was the charge, which was framed against the petitioner and whether the procedure followed is in accordance with the Army Act/the Rules and there is evidence, which has come on record to prove the same. In this regard, it may be stated here that the summary of evidence was recorded on July 20, 1990. Three witnesses were produced by the respondents. Their statements read as under:-

"SUMMARY OF EVIDENCE IN RESPECT OF NO. 2976576/N SEPOY VISHAV PRIYA SINGH OF 19 MAHAR, ATTACHED WITH 19 PUNJAB ORDERED BY IC-19973L, LT. COL. H.S. NEGI, COMMANDING OFFICER 18 PUNJAB, RECORDED BY IC-31768W MAJOR ANIL KUMAR, 18 PUNJAB ON 18 TO 20 JUL 90 AT C/O 56 APO

Witness No.1

1. No. 2458411K Naib Subedar Parmodh Singh having been duly warned states: -

2. I am performing the duties of NSA of the bn. On 16 Jul 90 at about 0900 h, I was called by IC-42062F Maj B.K. Pati, Adjt in his office. I reached his office at 0905 hr where Adjt told me that No.2976576N Sepoy Vishav Priya Singh, 19 MAHAR attached with 18 PUNJAB is required to be present in CO's Office in uniform for investigation at 161230h. Accordingly I went myself to Sep. Vishav Priya Singh, 19 MAHAR personally and conveyed to him the Adjt's orders at 160920 hr. AT that time Sep Vishav Priya Singh was in his room with No. 9507523 Hav. Kuldip Kumar (AEC), who is also sharing room with him. On hearing the orders given by Adjt. through me, Sep. Vishav Priya Singh told me that he will not wear uniform of a Sepoy since he is a L/Nk or he will come in civil dress to CO's office. I tried to convince him but he did not agree to wear Sepoy uniform. Accordingly, I went to Adjt and informed him about it.

CROSS EXAMINATION OF THE WITNESS BY THE ACCUSED

3. The accused No.2976576N Sep. Vishav Priya Singh declines to cross examine the witness.

4. The above statement has been read over to the individual in the language he understands and he signs it as correct.

Sd/- x-x-x-x-x-x-x
(No. 2458411 K Nb Sub)
Parmodh Singh

Witness No.2

5. NO. JC-167139Y Nb Sub Gurcharan Singh, 18 PUNJAB having been duly warned states:-

6. I am performing the duties of Sub Adjt. 18 PUNJAB. On 16 Jul 90 at about 1215 h I was called by 42062F Maj B.K. Pati, who is doing the duties of Adjt in this office. I was ordered by the Adjt to deliver the letter No. 1304/2976576/AG dt 16 Jul 90 to No. 2976576N Sep. Vishav Priya Singh of 19 MAHAR attached with 19 MAHAR attached with 18 PUNJAB and to obtain the receipt duly signed by him. Accordingly, I went to Sep. Vishav Priya Singh at about 161225 h and found him sitting on his bed in civil dress. No. 9507523X Hav. Kuldip Kumar, AEC was also present there when I ordered Sep. Vishav Priya Singh to accept the letter and sign the receipt. However, Sep. Vishav Priya Singh read the letter but refused to accept the letter or sign the receipt. I tried to convince him but he said, that he will not permitted to wear L Nk rank, then he will remain in civil dress. I once again told him that he is required to be present in CO's office for investigation in uniform at 161230 h. However Sep. Vishav Priya Singh did not change his stand. Therefore, I went to Adjt at 1235 h and informed him about it.

CROSS EXAMINATION OF THE WITNESS BY THE ACCUSED

7. The accused No.2976576N Sep. Vishav Priya Singh declines to cross examine the witness.

8. The above statement has been read over to the individual in the language he understands and he signs it as correct.

Sd/- x-x-x-x-x-x-x
(JC-167139Y Nb Sub)
Gurcharan Singh

Witness No.3

9. IC—42062F Maj. B.K. Pati having been duly cautioned states:

10. I am performing the duties of Adjt., 18 PUNJAB. On 15 Jul 90 at about 1630 hr, I received the movement order of No. 2976576N Sep Vishav Priya Singh, 19 MAHAR for attachment with 18 PUNJAB (Copy of movement order attached at Exhibit 'A'). By 151640 H Sep Vishav Priya Singh was attached with 18 PUNJAB after CO's permission. He was asked to share room with education Hav near unit library.

11. As per the CO's orders Sep Vishav Priya Singh, 19 MAHAR was required to be present in CO's office for investigations on 16 July at 1230 hrs. Therefore, I passed orders to Naib Subedar Adjt 245811K Nb Sub Parmodh Singh to go personally and convey the same. At about 1100 h Naib Sub Parmodh Singh came back and told me that Sep Vishav Priya Singh, 19 MAHAR attached with 18 PUNJAB has refused to wear the uniform of a Sepoy and was wearing civil dress. He also told me that Sep Vishav Priya Singh says that he will not wear uniform of a Sepoy since he is a L Nk, however he will come for investigations in civil dress. I therefore immediately informed CO who ordered me to make out a written letter and take his receipt stating that he is required at 1230 h in uniform for investigation.

12. At 1215 h, I called JC-167139Y Nb Sub Gurcharan Singh who is performing the duties of Sub Adjt to deliver the 18 PUNJAB letter No. 1304/2976576/AG dt 16 Jul 90 and obtain receipt

from Sep Vishav Priya Singh. On 16 Jul at about 1240 h Nb Sub Gurcharan Singh came back to my office and told me that No. 2976576N Sep Vishav Priya Singh, 19 MAHAR has refused to obey his orders. He also has refused to accept the letter No. 1304/2976576/AG dt 16 Jul 90, and sign the receipt. (Letter No. 1304/2976576/AG dt 16 Jul 90 and unsigned receipt of the letter are attached at Exhibit 'B').

13. In view of the disobedience of orders as per the CO's direction No. 29756576N Sep Vishav Priya Singh was placed under close arrest. On 17 July 90 Sep Vishav Priya Singh was marched up to CO's orderly room at 1205 h in civil dress (Offence Report IAFD-901 attached as Exhibit C). Accordingly, IC-19973L Lt. Col HS Negi, CO 18 PUNJAB ordered summary of evidence to be recorded.

<u>CROSS EXAMINATION OF THE WITNESS BY THE ACCUSED</u>

14. The accused 29764576N Sep Vishav Priya Singh declines to cross examine the witness.

15. The above statement has been read by the individual and he signs it as correct.

16. The case for the prosecution is closed and the accused No.2976576N Sep Vishav Priya Singh, 19 MAHAR attached with 18 PUNJAB has been cautioned under AR 23(3) "Do you wish to make a statement? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence".

17. The accused 29764576N Sep Vishav Priya Singh declines to make any statement.

18. The accused 29764576N Sep Vishav Priya Singh also declines to call any witness.

19. The accused 29764576N Sep Vishav Priya Singh remained in civil dress for recording of S of E.

20. The above statement has been read over to the accused in the language he understand and he refuses to signs it.

Sd/-x-x-x-x-x-x-x-x-x-x-x-x-x-x-
(2976576N Sep Vishav Priya Singh)

Sd/-x-x-x-x-x-x-x-x-x-x-x-x-x-x-
(RC-423N Lt Prithi Chand)
Independent Witness

21. The accused No. 2976576N Sep Vishav Priya Singh, 19 MAHAR attached with 18 PUNJAB, refused to sign the above statement and SOS on 20 July 90 at 1230 h.

22. The accused No. 2976576N Sep Vishav Priya Singh having declined to add any evidence, the S of E is concluded.

23. Certified that the provisions of AR 23(1), (2), (3), (4) have been complied with.

24. Certified that S of E consisting (8) eight manuscript pages alongwith Exhibit A, B, C have been recorded by me in presence and hearing of the accused and the Independent Witness."

15. Based on the summary of evidence, the following charge was framed against the petitioner:-

"CHARGE SHEET

The accused No. 2976576N Sepoy Vishav Priya Singh of 19 MAHAR, attached with 18 PUNJAB, is charged with: -

Army Act Section 41 (2) ***"DISOBEYING A LAWFUL COMMAND GIVEN BY SUPERIOR OFFICER"***

In that he,

While on active service at 1230 hours on 16 Jul 90, when Subedar Adjutant, JC-167139Y Naib Subedar Gucharan Singh of 18 PUNJAB asked him to accept official letter No. 1304/2976576/AG dated 16 Jul 90, requiring his presence in CO's officer for investigation in uniform, refused to do so. Besides, verbal orders given by the Subedar Adjutant to this effect also NOT obeyed."

16. The Summary Court Martial proceedings were held on July 25, 1990. It is the case of the respondents that the petitioner had pleaded guilty of the charge framed against him. Much reliance has been placed by the respondents on the plea of guilty by the petitioner. It is the case of the petitioner as contended by his counsel that no signatures of the petitioner were taken on the plea of guilty and hence the said statement could not have been read against him. In this regard, it may be stated here that the Rules governing the plea of guilty in the Army are Rules 115 and 116, which reads as under:-

115. General plea of "Guilty" or "Not Guilty".

(1) "Guilty" or "Not Guilty" (or if he refuses to plead, or does not plead intelligible either one or the other, a plea of "Not Guilty")—shall be recorded on each charge.

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is recorded, the court shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence (if any) or otherwise that the accused ought to plead not guilty.

(2A) Where an accused pleads "Guilty", such plea and the factum of compliance of sub-rule (2) of this rule, shall be recorded by the court in the following manner: —

"Before recording the plea of "Guilty" of the accused the court explained to the accused the meaning of the charge (s) to which he had pleaded "Guilty" and ascertained that the accused had understood the nature of the charge (s) to which he had pleaded "Guilty". The court also informed the accused the general effect of the plea and the difference in procedure, which will be followed consequent to the said plea. The court having satisfied itself that the accused understands the charge (s) and the effect of his plea of "Guilty", accepts and records the same. The provisions of rule 115(2) are thus complied with.

(3) Where an accused person pleads guilty to the first of two or

more charges laid in the alternative, the court may, after sub-rule (2) of this rule has been complied with and before the accused is arraigned on the alternative charge or charges, withdraw such alternative charge or charges without requiring the accused to plead thereto, and a record to that effect shall be made upon the proceedings of the court."

116. Procedure after plea of "Guilty".

(1) Upon the record of the plea of "Guilty",. if there are other charges in the same charge-sheet to which the plea is "Not Guilty", the trial shall first proceed with respect to the latter charges, and, after the finding of these charges, shall proceed with the charges on which a plea of "Guilty" has been entered; but if they are alternative charges, the court may either proceed with respect to all the charges as if the accused had not pleaded "Guilty" to any charge, or may, instead of trying him, record a finding upon any one of the alternative charges to which he has pleaded "Guilty" and a finding of "Not Guilty" upon all the other alternative charges.

(2) After the record of the plea of "Guilty" on a charge (if the trial does not proceed on any other charges), the court shall read the summary of evidence, and annex it to the proceedings or if there is no such summary, shall take and record sufficient evidence to enable it to determine the sentence, and the reviewing officer to know all the circumstances connected with the offence. The evidence shall be taken in like manner as is directed by these rules in case of a plea of "Not Guilty".

(3) After such evidence has been taken, or the summary of evidence has been read, as the case may be, the accused may address the court in reference to the charge and in mitigation of punishment and may call witnesses as to his character.

(4) If from the statement of the accused, or from the summary of evidence, or otherwise, it appears to the court that the accused did not understand the effect of his plea of "Guilty", the court shall alter the record and enter a plea of "Not Guilty", and proceed with the trial accordingly.

(5) If a plea of "Guilty" is recorded and the trial proceeds with respect to other charges in the same charge-sheet, the proceedings under sub-rules (2) and (3) shall take place when the findings on the other charges in the same charge-sheet are recorded.

(6) When the accused states anything in mitigation of punishment which in the opinion of the court requires to be proved, and would, if proved, effect the amount of punishment, the court may permit the accused to call witnesses to prove the same.

(7) In any case where the court is empowered by section 139 to find the accused guilty of an offence other than that charged, or guilty of committing an offence in circumstances involving a less degree of punishment, or where it could, after hearing the evidence, have made a special finding of guilty subject to exceptions of variations in accordance with sub-rule (3) of rule 121, it may, if it is satisfied of the justice of such course accept and record a plea of guilty of such other offence, or of the offence as having been committed in circumstances involving such less

degree of punishment, or of the offence charged subject to such exceptions or variations.

17. Having noted the Rules, the plea of guilty as recorded in the case in hand during the proceedings dated July 25, 1990 reads as under:-

"Proceedings of a Summary Court Martial held at Udhampur (J&K) on Wednesday the 25th of July 1990 by IC-19973L Lt. Col. H.S. Negi Commanding the 18th Battalion the Punjab Regiment for the trial of all such accused persons as he may have brought before him.

PRESENT

IC-19973L Lt. Col. H.S. Negi (Hindu-Rajput)

Commanding the 18th Battalion the Rajput Regiment.

ATTENDING THE TRIALS

IC-29959M Maj R.K. Bhola, 18th Bn the Punjab Regiment.

IC-111865F Sub Jagdish Chand, 18th Bn the Punjab Regiment.

FRIEND OF THE ACCUSED

IC-48655k 2/Lt. Sushil Kumar, 18th Bn the Punjab Regiment.

INTERPRETER

IC-19973L Lt. Col. H.S. Negi, 18th Bn the Punjab Regiment.

The officers and Junior Commissioner Officers assemble at the 18 PUNJAB and the trial commences 1000 hrs.

The accused No. 2976576N Sepoy Vishav Priya Singh, 19th Bn the Mahar Regt. attached with 18th Bn the Punjab Regiment is brought (if a non-commissioned officer) into the Court. IC-19973L Lt. Col. H.S. Negi is duly sworn as the Court.

Sd/- x-x-x-x-x
Lt. Col.
The Court

---

is duly sworn as the Court interpreter

Sd/- x-x-x-x-x
Lt. Col.
The Court

All witnesses are directed to withdraw from the Court.

Instructions :-

Enter rank and name of the officer holding the trial. Through out these proceedings he is referred to the Court. See Army Rule 106.

If the Commanding Officer of the accused (i.e., the Court) acts as interpreter he must take the Interpreter's oath in addition to the oath prescribed for the Court.

The charge sheet is read (translated) and explained to the accused marked "B-2" by the Court and attached to proceedings.

Instructions : - Transaction of superior authority for trial by Summary Court Martial
should be entered with the date and signature of the officer at the foot of the charge sheet, when sanction is necessary
(See AA Section 120(2).

18. The question and the answer, which was asked and which was alleged to have been answered by the petitioner are as under:-

"ARRAIGNMENT

Question to Accused	*By the Court – How say you 2976576N Sepoy Vishav Priya Singh of 19th Bn the Mahar Regt. att with 19 PUNJAB. You guilty or not guilty of the charge preferred against you?*
Answer -	*Guilty"*

19. It is a conceded position that the signatures of the petitioner were not taken on the plea of guilty. Be that as it may, the issue whether the signatures of the accused Officer having not been taken would vitiate the proceedings. The position of law is well settled and there are judgments, which have been rendered by this Court on this aspect. One judgment where a Coordinate Bench of this Court had summed up the law is ***Anil Kumar v. Union of India and Ors W.P.(C) No. 2681/2000 decided on August 06, 2012,*** wherein the Coordinate Bench dealing with the provisions of the BSF Rules, which are para-materia to the Army Rules, as referred above has in paras 22 and 23 held as under:-

> *"22. It is true that as per the BSF Rules 1969 which were in force when the trial took place there is no requirement of obtaining the signatures of the accused upon the accused pleading guilty. But, prudence*

demands that the signature of an accused, who pleads guilty to a charge, should be obtained when the guilt is admitted. However, we hasten to add that a procedural default cannot be equated as a substantive default and merely because a plea of guilt does not bear the signatures of the accused is no ground to conclude in favour of the accused. The correct approach has to be, to apply the judicial mind and look at the surrounding circumstances enwombing the arraignment.

23. What would the surrounding circumstances be? The Record of Evidence would be a good measure of the surrounding circumstances. If at the Record of Evidence the accused has cross-examined the witnesses and has projected a defence and in harmony with the defence has made a statement, and with respect to the defence has brought out material evidence, it would not stand to logic or reason that such an accused would plead guilty at a trial. But, where during Record of Evidence, if it is a case akin to a person being caught with his pants down i.e. it is an open and shut case, and the accused does not cross examine the witnesses and does not make a statement in defence, but simply pleads for forgiveness, it would be an instance where the accused, having no defence, would be pleading guilty and simultaneously pleading for mercy at the trial. We note that various decisions by Division Benches of this Court have been taking conflicting views with respect to absence of signatures of an accused beneath the plea of guilt at a Summary Security Force Court trial. In the decision reported as 2008 (152) DLT 611 Subhas Chander v. UOI the view taken was that a plea of guilt which is not signed by the accused would vitiate the punishment. The decision reported as 2004 (110) DLT 268 Choka Ram v. UOI holds to the converse."

20. From the above, it is clear that mere not taking signatures of the Officer would not vitiate the proceedings. The Coordiante

Bench in the case of ***Anil Kumar (supra)*** has held, the surrounding circumstances would become relevant. This include, the record of evidence where evidence has come against the petitioner. In the case in hand, during the summary of evidence, three witnesses were produced by the respondents, who were not cross examined by the petitioner. Rather, the petitioner has signed the proceedings as correct. But whether on the basis of that summary of evidence, assuming the statements of the witnesses are correct, the charge framed against the petitioner shall be sustainable. A reading of the charge, as noted above, would reveal, the petitioner has disobeyed the lawful command given by the Superior officer. The facts leading to the framing of the charge are that while the petitioner was in active service at 1230 hrs on July 16, 1990 when Naib Subedar Gurcharan Singh asked him to accept an official letter dated July 16, 1990 requiring his presence in the CO's Office for investigation in uniform, which he refused to do so. Even, verbal orders given by the Subedar Adjutant to this effect were also not obeyed. The statement of the witnesses have already been reproduced above. From the statements, it is seen that Adjutant required the petitioner to be present in the CO's office for the investigation,

that too wearing a uniform of a Sepoy. The wearing of uniform of a Sepoy was objected to by the petitioner as, according to him, he was a Lance Naik. It is also revealed that the petitioner has not refused to come for investigation but he said that he would only come in civilian dress. No doubt, it has come on record that the petitioner has refused to accept the letter dated July 16, 1990 and sign the receipt but the petitioner's justification that he shall not come in the investigation in the dress of a Sepoy, cannot be faulted. The justification given by the respondents in this regard, that the petitioner was awarded a punishment of deprivation of the appointment of Lance Naik on May 26, 1990 is unfounded as there is no evidence placed on record to show such an order of deprivation was communicated to the petitioner. Further, the justification of the respondents is, Lance Naik is an appointment and not a Rank by placing reliance on Rule 29 Note 3 would not hold good.

21. Even a deprivation of an appointment has to be by following the principles of natural justice. It is not the case of the respondents that the order of deprivation of appointment was served on the petitioner and he did not challenge the same. In other words, the petitioner continued to hold the appointment of

Lance Naik and not of a Sepoy. This justifies the insistence of the petitioner that he will only wear the uniform of a Lance Naik when the Officer had come to the petitioner on July 16, 1990 for conveying the orders of the Adjudant for appearance before the CO for investigation. But that can't be a ground to refuse the receipt of official letter dated July 16, 1990, which was tendered. He after receiving the same could have justified his position of not appearing before the CO. But at the same time, on that charge, the petitioner could not have been imposed a penalty of imprisonment of six months followed by dismissal. It appears precisely for this reason, the respondents have converted the penalty of dismissal to discharge. Whether the penalty of discharge is proportionate to the charge framed against the petitioner, that he refused to receive the letter dated July 16, 1990. The answer to the said question has to be in the negative, more so, in view of the position of law as enunciated by the Supreme Court in the case of ***Ranjit Thakur (supra)*** on which reliance was placed by the counsel for the petitioner. The said case also relates to Army wherein the appellant Ranjit Thakur joined the Armed Services on September 7, 1972. He had not commended himself well to respondent no.4, the Commanding

Officer. On March 29, 1985, appellant Ranjit Thakur was serving out a sentence of 28 days' rigorous imprisonment imposed on him for violating the norms for presenting the representations to higher officers. He had sent the representation complaining ill treatment at the hands of the respondent no.4 directly to the higher officers. The appellant was punished for that by respondent no.4. He was held in the Quarter-guard Cell in handcuffs to serve the sentence of rigorous imprisonment. While serving so, the appellant stated to have committed another offence for which further punishment was imposed on him. The charge in that case was of disobeying the lawful command given by his superior Officer inasmuch as he did not eat his food despite order to do that. A summary court-martial assembled the very next day. Some witnesses were examined. The appellant stated to have pleaded guilty. The sentence of RI for one year was imposed in pursuance of which appellant was removed immediately to civil prison at Tejpur to serve out the sentence. The representation of the appellant to the confirming authority under Section 164 of the Act was rejected by the General officer Commanding. The High Court dismissed the writ petition. The Supreme Court while setting aside the impugned action of the

respondents has in Para 24 and 25 held as under:

> ***"24.*** *The submission that a disregard of an order to eat food does not by itself amount to a disobedience to a lawful command for purposes of section 41 has to be examined in the context of the imperatives of the high and rigorous discipline to be maintained in the Armed Forces. Every aspect of life of a soldier is regulated by discipline. Rejection of food might, under circumstances, amount to an indirect expression of remonstrance and resentment against the higher authority. To say that, a mere refusal to eat food is an innocent, neutral act might be an over-simplification of the matter. Mere in-action need not always necessarily be neutral. Serious acts of calumny could be done in silence. A disregard of a direction to accept food might assume the complexion of disrespect to, and even defiance of authority. But an unduly harsh and cruel reaction to the expression of the injured feelings may be counter-productive and even by itself be subversive of discipline. Appellant was perhaps expressing his anguish at, what he considered, an unjust and disproportionate punishment for airing his grievances before his superior officers. However, it is not necessary in this case to decide contention (c) in view of our finding on the other contentions.*
>
> ***25****. Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the Court even as to sentence is an outrageous defiance of B logic, then the*

sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review. In Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 Weekly Law Reports 1174 (HL) Lord Deplock said:

> *"... Judicial Review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground l would call 'illegality'. the second irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."*

22. From the aforesaid judgment of the Supreme Court, it is clear that the Supreme Court held that judicial review generally speaking, is not directed against a decision, but is directed against the decision making process. The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence so as to shock the

conscience and amount in itself to conclusive evidence of bias.

23. In the case in hand, the charge against the petitioner is that he has refused to receive the letter dated July 16, 1990. The refusal of the petitioner, as referred above, was in a given background, which was bonafide and not a serious act of insubordination, at least in the given facts. No doubt, being an armed forces personnel, discipline is expected from such personnel but at the same time those exercising command need to be sensitive to their needs to the extent service exigency permit. The punishment of imprisonment of six months followed by discharge from service would be unjust, unduly harsh and disproportionate. Moreover, there is a plea of bias against CO of his regiment. Further, it is the case of the petitioner that the CO Punjab, the investigating officer was the course mate of his CO.

24. The reliance placed by the learned counsel for the respondents on the judgment of the Supreme Court in the cases of ***Ex. Ct. Kalu Ram (supra)*** and ***Chokha Ram (supra)*** are concerned, in ***Chokha Ram (supra),*** the Coordinate Bench of this Court while considering the provisions of the Border Security Force Rules, 1969, has inter-alia held that not obtaining the signatures of the Charged Officer on the plea of guilt cannot be

held vitiated, when in that case, in the course of record of evidence the petitioner therein had already made a statement admitting his guilt. The said judgment would not have a bearing insofar as the conclusion of this Court above as the same is a non-issue.

25. Insofar as the judgment in the case of ***Ex. Ct. Kalu Ram (supra)*** is concerned, in the said judgment also the Coordinate Bench of this Court has held that it cannot be universally laid down that the plea of guilt taken by the Charged Officer would stand vitiated in every case where the document containing the plea of guilty of the Charged Officer does not bear the signature of the Charged Officer. It held, it depends upon the facts of each case.

26. Insofar as the judgments referred to by Ms. Barkha Babbar in the cases of ***R.K. Sharma (supra)*** and ***Surender Kumar (supra)*** are concerned, in ***R.K. Sharma (supra)*** the Supreme Court has held that the High Court under Article 226 or 227 and Supreme Court under Article 32 should not interfere with the punishment so imposed merely on compassionate grounds such as it being disproportionately harsh; except in ex facie cases of perversity or irrationality. In the said case, the

charges against the respondent was that he disobeyed the command received from Headquarters to visit the forward posts immediately to check alertness and report OK, by instead sending a JCO there and making false entries in drawing ration for personal consumption of Rs.930.37 from Quartermaster without paying for the same. The said judgment is distinguishable inasmuch as the charges in the case of ***R.K. Sharma (supra)*** are of very severe nature. It was in that background, the penalty of dismissal imposed by the appellant therein was interfered with by the High Court, which was held to be not justified and the matter was remanded back to the respondent for awarding a lessor punishment. In the said case, the judgment of ***Ranjit Thakur (supra)*** was distinguished on the ground that the facts disclose a bias on the part of the Commanding Officer, inasmuch as the appellant therein had fallen out of favour of the Commanding Officer because he had complained against the Commanding Officer, which is the case herein also, as noted above. The said judgment is distinguishable.

27. Similarly in the case of ***Surender Kumar (supra),*** the charge against the respondent was that while working as Constable in CRPF, he was detailed with vehicle no.25 to carry

patrolling party on Chandel Palel Road but he left the vehicle unattended and absented himself without permission of his superior officer and reported on his own after 20 minutes. It was alleged in the complaint that while he was on duty, he consumed illicit alcohol and in an inebriated state of mind misbehaved with his superior officer H.N. Singh, snatched his AK-47 rifle and pointed the barrel of the rifle to him and on the intervention of Lachhi Ram, Assistant Commandant, the barrel of the rifle was pointed upward and an untoward incident was avoided. It was in that background, the Supreme Court has held that the scope of judicial review is warranted not only when the punishment is disproportionate but is shockingly disproportionate and in an extreme case where on the face of it, there is perversity or irrationality. The case in hand is distinguishable as the charges framed against Surender Kumar are of very serious nature as compared to the charge against the petitioner herein. Moreover, there are allegations of bias against the Commanding Officer made by the petitioner. The case of ***Ranjit Thakur (supra)*** is applicable in all force.

28. In view of the above discussion, the writ petition succeeds. Order of imprisonment and discharge are set aside and

the punishment is substituted by stoppage of two increments with cumulative effect coinciding with the date of increments, following the date when the punishment of discharge was imposed. The petitioner shall be entitled to consequential benefits as Lance Naik, including retiral benefits. The order shall be complied within a period of three months from today.

29. The petition is disposed of. No costs.

V. KAMESWAR RAO, J

G.S. SISTANI, J

MAY 25, 2018/*ak/jg*