IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CWP No.20380 of 2012

Date of Decision: 21.05.2014

Lt. Col. Rahul Arora …Petitioner

Versus

Armed Forces Tribunal & others …Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. G.S.Ghuman, Advocate,
for the petitioner.

Mr. Kunal Dawar, Advocate,
for respondent Nos.2 to 7.

HEMANT GUPTA, J.

Challenge in the present writ petition is to an order passed by the Armed Forces Tribunal, Regional Bench, Chandigarh at Chandimandir (for short 'the Tribunal') on 14.08.2012, whereby the transferred writ petition filed before the High Court of Andhra Pradesh was entertained as an appeal under Section 15 of the Armed Forces Tribunal Act, 2009.

The petitioner, posted as Classified ENT Specialist at Military Hospital, Secunderabad under Indian Artillery Commandant,

Golkonda, Hyderabad, was charge-sheeted on 14.09.2004 on the following three charges:-

1. Knowingly and with intent to defraud altering a document which it was his duty to produce - In that he at Hyderabad in June, 2002, while posted as ENT Specialist at MH Secunderabad, knowingly and with intent to defraud altered his remarks in the AFMSF – 7 of No.15157229Y Rect/Gnr(GD) k Siddaiah of Arty Centre, Hyderabad, a document which it was his duty to produce, from 'Unfit' to 'Review after fifteen days of treatment' and dated the ibid alteration as 31 May 2002 well knowing that on 31 May 2002 the said rect. had been declared 'Unfit' by him.

2. Absenting himself without leave – In that he at Hyderabad, absented himself without leave from the Arty. Centre, Hyderabad from 11 Apr 2004 to 19 Apr 2004.

3. Being an officer behaving in a manner unbecoming his position and the character expected of him – In that he at Hyderabad in Apr. 2004, elicited connivance of his Sahayak No.15168531X Rect.(Cook) Mousam Jena of Artillery Centre, Hyderabad, to falsely create circumstances for covering up his absence, from the premises of Artillery Centre, Hyderabad during the period as mentioned in the second charge.

In nutshell, the primary charge against the petitioner is that on 31.05.2002, he initially declared Recruit/Soldier/GD K. Saddaiah, as 'Unfit', but later altered the same to 'Review after fifteen days of treatment' and, thus, he has falsified the official document. The allegation is also of absence from duty & behaving in a manner unbecoming of his position.

In the Court Martial proceedings, many witnesses were examined including PW-1 K. Siddaiah apart from producing numerous documents such as Ex.38 containing alteration in AFMSF-7 to prove the first charge. In the Court Martial proceedings, the first and second charge were proved whereas, the third charge was not proved. On such

conclusions, the punishment of forfeiture of eight years past service for the purpose of pension and of severe reprimanded was awarded vide order dated 11.03.2005. The third charge was not found to be proved. However, the Confirming Authority found that the punishment awarded is grossly disproportionate and palpable lenient. It was also found that the finding recorded on the third charge is also required to be re-examined. It was also observed that for a mis-conduct of Section 52(f) [*sic.57(c)*], the petitioner needs to be sentenced to rigorous imprisonment in civil jail. Consequent to the said order, the General Court Martial (GCM) affirmed the finding on third charge as not proved, but ordered that the petitioner be dismissed from service. Such order was passed on 17.05.2005, which was confirmed by the Confirming Authority on 22.06.2005. Thereafter, the petitioner filed a petition under Section 164(2) of the Army Act on 01.07.2005, which was declined on 15/22.02.2008 (Annexure P-9A). It is, thereafter, the petitioner filed a writ petition before High Court of Andhra Pradesh, which was transferred to the Armed Forces Tribunal and decided as an appeal under Section 15 of the Act.

The learned Tribunal did not find any merit in the stand of the petitioner that K. Siddaiah was examined by him on 31.05.2002 and the amendment of the opinion was made on the same day and that it is a false perception that the amendment was done at a later date. The petitioner denied that the ear of K. Siddaiah was examined by him on 04.06.2002. The Tribunal examined the entire evidence in minute detail to return a finding of charges as proved against the petitioner cannot be said to be unwarranted. The Tribunal did not find any illegality in the Court Martial proceedings and consequently, dismissed the appeal. The

Tribunal considered the argument of improper constitution of the Court Martial as well, which also did not find favour with the Tribunal.

The argument of learned counsel for the petitioner is that Judge Advocate was of a rank lower than that of the petitioner, which is in violation of the provisions of Rule 40(2) of the Army Rules, 1954 (for short 'the Rules').

Learned counsel for the petitioner points out that in the convening order (Annexure P-1) dated 04.10.2002, a copy of which has been again obtained on 28.09.2012, (Annexure P-11 and 12) shows that no reasons have been recorded as to why a person, who is junior in rank is appointed as Judge Advocate. It is also pointed out that Annexure P-2, the order communicated in respect of constitution of the General Court Martial, again does not contain any endorsement as to why Major Rajiv Dutta has been appointed as Judge Advocate i.e. a person lower in rank than the petitioner. The petitioner relies upon the judgment of Supreme Court reported as Union of India & another Vs. Charanjit Singh Gill & others, AIR 2000 SC 3425. On the basis of such judgment, it is argued that the appointment of a Judge Advocate, lower in rank is violative of the Rules and, thus, the entire proceedings stand vitiated.

On the other hand, Mr. Dawar argued that order (Annexure P-1) is not the convening order. In fact, the convening order is Ex.2 in the file of General Court Martial and Annexure R-1 produced in the present petition. In the said document, the reasons for appointing a junior as the Judge Advocate are mentioned, which are to the following effect:-

> "In my opinion having due regard to exigencies of public service an officer of equal or superior rank to the accused is not available to act as Judge Advocate."

We find that the present writ petition is to be allowed on the short ground that a junior has been appointed as Judge Advocate. Such action is contrary to judgment of the Supreme Court in Charanjit Singh Gill's case (supra).

We have heard learned counsel for the parties in respect of correctness and/or truthfulness of the communication Annexure P-1 and Annexure R-1. But we have no hesitation to return a finding that the convening order Annexure R-1 has been altered after the same was dispatched and received by Headquarters Artillery Centre, Hyderabad.

The argument of Mr. Dawar that Annexure P-1 has been produced from the records of the Headquarters Artillery Centre, which is not connected with the convening of Court Martial, therefore, such document produced from the records of such authority, is not a valid document, is not tenable. It is argued that the Court Martial proceedings were to be conducted by Area Headquarters of Andhra, Tamil Nadu, Karnataka and Kerala, therefore, the document received by such command alone would be relevant.

The document Annexure P-1 is from the records of Headquarters of Artillery Centre. The first page of the said document and that of Annexure R-1 is identically worded, but in second page, the words '*In my opinion having due regard to exigencies of public service an officer of equal or superior rank to the accused is not available to act as Judge Advocate*' are additional. Once a document has been put in the course of transmission by the General Officer Commanding, Andhra, Tamil Nadu, Karnataka and Kerala Area, the same could not be changed/ altered or modified except after recording that there was mistake, which is sought

to be corrected. Once a document has been dispatched by the person signing the same, the communication is complete and any alteration in the document is unauthorized. It may be noticed that Annexure P-1 is inter-departmental communication, but the fact remains that it was put in the course of transmission and was out of control of the issuing authority, therefore, such order could not be altered in any manner by the issuing authority. Thus, the integrity of the document i.e. the convening order has been violated, when endorsement is introduced in another convening order, the copy of which has been attached as Annexure R-1. Ironically, the petitioner has been charged for the same offence i.e. altering the integrity of a document.

Learned counsel for the petitioner argued that Annexure P-2, the communication addressed by the Headquarters Artillery Centre, is the basis of the convening order, Annexure P-1. Even in the said communication, there is no reference as to why a junior officer is being appointed as Judge Advocate.

Mr. Dawar, learned counsel for respondent Nos. 2 to 7 controverted the said argument and asserted that such communication is not required to contain any endorsement as to why a junior is being appointed as Judge Advocate. The reasons are required to be recorded only in the convening order.

The fact remains that Annexure P-2 is the communication addressed to the petitioner on 07.10.2004. Such communication is from the Headquarters Artillery Centre, Hyderabad, which is in tune with the convening order produced by the petitioner as Annexure P-1 i.e. without containing any reasons as to why a junior was appointed as Judge

Advocate. In fact, such document proves that the convening order, Annexure P-1, is the basis to issue communication dated 7.4.2004, Annexure P.2.

We find that the arguments of the learned counsel for the respondent Nos.2 to 7 are not tenable. Rule 34(3) of the Rules contemplates that the Officer shall deliver to the accused a list of the names, rank and corps (if any) of the officers, who are to form the Court, and where officers in waiting are named, also of those officers in court-martial other than summary court-martial. The relevant provisions of the Act and the Rules are as under:

Army Act, 1950

"**129. Judge-advocate** – Every general court-martial shall, and every district or summary general court-martial may, be attended by a Judge-advocate, who shall be either an officer belonging to the department of the Judge-Advocate General, or if no such officer is available, an officer approved of by the Judge-Advocate General or any of his deputies."

Army Rules, 1954

"**33. Rights of accused to prepare defence** – xx xx

(7) As soon as practicable after an accused has been remanded for trial by a general or district court-martial, and in any case not less than ninety-six hours or on active service twenty-four hours before his trial, an officer shall given to him free of charge a copy of the summary of evidence, an abstract of the evidence, and explain to him his rights under these rules as to preparing his defence and being assisted or represented at the trial, and shall ask him to state in writing whether or not he wishes to have an officer assigned by the convening officer to represent him at the trial, if a suitable officer should be available. The convening officer shall be informed whether or not the accused so elects.

34. Warning of accused for trial — (1) The accused before he is arraigned shall be informed by an officer of every charge for which he is to be tried and also that, on his giving the names of witnesses or whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken

accordingly. The interval between his being so informed and his arraignment shall not be less than ninety-six hours or where the accused person is on active service less than twenty-four hours.

(2) The officer at the time of so informing the accused shall give him a copy of the charge-sheet and shall if necessary, read and explain to him the charges brought against him. If the accused desires to have it in a language, which he understands, a translation thereof shall also be given to him.

(3) The officer shall also deliver to the accused a list of the names, rank and corps (if any), of the officers who are to form the court, and where officers in waiting are named, also of those officers in courts-martial other than summary courts-martial.

(4) If it appears to the court that the accused is liable to be prejudiced at his trial by any non-compliance with this rule, the court shall take steps and, if necessary, adjourn to avoid the accused being so prejudiced.

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40. Composition of General Court-martial — (1) A general court-martial shall be composed, as far as seems to the convening officer practicable, of officers of different corps or departments, and in no case exclusive of officers of the corps or department to which the accused belongs.

(2) The members of a court-martial for the trial of an officer shall be of a rank not lower than that of the officer unless, in the opinion of the convening officer, officers of such rank are not (having due regard to the exigencies of the public service) available. Such opinion shall be recorded in the convening order.

(3) In no case shall an officer below the rank of captain be a member of court-martial for the trial of a field officer.

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102. Disqualification of judge-advocate — An officer, who is disqualified for sitting on a court-martial, shall be disqualified for acting as a judge-advocate at that court-martial.

103. Invalidity in the appointment of judge-advocate — A court-martial shall not be invalid merely by reasons of any invalidity in the appointment of the judge-advocate officiating thereat, in whatever manner appointed, if a fit person has been appointed and the subsequent approval of the Judge-Advocate- General or Deputy Judge-Advocate General obtained, but this rule shall not relieve from responsibility the person who made the invalid appointment."

A perusal of extracts of the relevant Rules shows that an accused is entitled to a copy of the summary of evidence, an abstract of the evidence and the right available to him is to prepare his defence in terms of Sub Rule (7) of Rule 33. Sub Rule (3) of Rule 34 provides for delivery to the accused a list of the names, rank and corps (if any), of the officers, who are to form the court and where officers in waiting are named, also of those officer in courts martial other than summary courts-martial. The Judge Advocate is a necessary component of the Court Martial, which is mandated by Section 129 of the Act. In the present case, though the name of the Judge Advocate has been disclosed in the communication Annexure P-2, but the reasons of nominating a Judge Advocate of a lower rank have not been communicated to the petitioner. Once the name of Judge Advocate is disclosed, the circumstances as to why he is being nominated were also required to be communicated, so as to comply with the mandate of sub-rule (2) Rule 40. An accused in a Court Martial is entitled to procedural safeguards to defend him.

In Charanjit Singh Gill's case (supra), the Supreme Court noticed the importance of functioning of the Judge Advocate and observed as under:

> "14. It is true that Judge-Advocate theoretically performs no function as a judge but it is equally true that he is an effective officer of the court conducting the case against the accused under the Act. It is his duty to inform the court of any defect or irregularity in the charge and in the constitution of the court or in the proceedings. The quality of the advise tendered by the Judge-Advocate is very crucial in a trial conducted under the Act. With the role assigned to him a Judge-Advocate is in a position to sway the minds of the members of the court-martial as his advise or verdict cannot be taken lightly by the person composing the court who are admittedly not law knowing

> persons. It is to be remembered that the court-martials are not part of the judicial system in the country and are not permanent courts.
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> 18. The purpose and object of prescribing the conditions of eligibility and qualification along with desirability of having members of the court martial of the rank not lower than the officer facing the trial is obvious. The law makers and the rule framers appear to have in mind the respect and dignity of the officer facing the trial till guilt is proved against him by not exposing him to humiliation of being subjected to trial by officers of lower in rank. The importance of the judge-advocate as noticed earlier being of a paramount nature requires that he should be such person who inspires confidence and does not subject the officer facing the trial to humiliation because the accused is also entitled to the opinion and services of the judge-advocate. Availing of the services or seeking advise from a person junior in rank may apparently be not possible ultimately resulting in failure of justice."

The Supreme Court also found that if an Officer, who is disqualified to be part of Court Martial including a Judge Advocate, is appointed as such, it will render the proceedings of Court Martial as invalid. It was observed as under:

> "16. In view of what has been noticed hereinabove, it is apparent that if a 'fit person' is not appointed as a judge-advocate, the proceedings of the court martial cannot be held to be valid and its finding legally arrived at. Such an invalidity in appointing an 'unfit' person as a judge-advocate is not curable under Rule 103 of the Rules. If a fit person possessing requisite qualifications and otherwise eligible to form part of the general court martial is appointed as a judge-advocate and ultimately some invalidity is found in his appointment, the proceedings of the court martial cannot be declared invalid. A "fit person" mentioned in Rule 103 is referable to Rules 39 and 40. It is contended by Shri Rawal, learned ASG that a person fit to be appointed as judge-advocate is such officer who does not suffer from any ineligibility or disqualification in terms of Rule 39 alone. It is further contended that Rule 40 does not refer to disqualifications. We cannot agree with this general proposition made on behalf of the appellant inasmuch as Sub-rule (2) of Rule 40 specifically provides that members of a court-martial for trial of an officer should be of a

> rank not lower than that of the officer facing the trial unless such officer is not available regarding which specific opinion is required to be recorded in the convening order. Rule 102 unambiguously provides that "an officer who is disqualified for sitting on a court martial shall be disqualified for acting as a judge-advocate in a court martial". A combined reading of Rules 39, 40 and 102 suggest that an officer who is disqualified to be a part of court martial is also disqualified from acting and sitting as a judge-advocate at the court martial. It follows, therefore, that if an officer lower in rank than the officer facing the trial cannot become a part of the court martial, the officer of such rank would be disqualified for acting as a judge-advocate at the trial before a GCM. Accepting a plea to the contrary, would be invalidating the legal bar imposed upon the composition of the court in sub-rule (2) of Rule 40. (…..emphasis supplied)"
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> 23. ……After examining various provisions of the Act, the Rules and Regulations framed thereunder and perusing the proceedings of the court-martial conducted against the respondent No.1, we are of the opinion that the judge-advocate though not forming a part of the court, yet being an integral part of it is required to possess all such qualifications and be free from the disqualifications which relate to the appointment of an officer to the court-martial. In other words a judge-advocate appointed with the court-martial should not be an officer of a rank lower than that the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public service) available and the opinion regarding non-availability is specifically recorded in the convening order. As in the instant case, judge-advocate was lower in rank to the accused officer and no satisfaction/opinion in terms of sub- rule (2) of Rule 40 was recorded, the Division Bench of the High Court was justified in passing the impugned judgment, giving the authorities liberty to initiate fresh court-martial proceedings, if any, if they are so advised in accordance with law and also in the light of the judgment delivered by the High Court."

In view of the aforesaid judgment, the non recording of the reasons of appointing an officer junior in rank as a Judge Advocate in the convening order, Annexure P-1, and the lack of communication of

reasons in respect of the constitution of Court Martial, Annexure P-2, invalidates the Court Martial proceedings.

As a result thereof, the order dated 17.05.2005 passed in Court Martial proceedings; order dated 22.06.2005 confirming the punishment and the order dated 14.08.2012 passed by the Armed Forces Tribunal are set aside. Consequently, the writ petition stands allowed.

However, the respondents are at liberty to proceed against the petitioner afresh after complying with the provisions of the Act and the Rules.

(HEMANT GUPTA)
JUDGE

21.05.2014 **(FATEH DEEP SINGH)**
vimal/ds **JUDGE**