
(1997) 01 CAL CK 0008
In the Calcutta High Court
Case No : C.O. No. 14196 (W) of 1995

Sri Paramjit Singh Kohli

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 31-01-1997

Acts Referred:

Army Act, 1950 — Section 63, 71, 79, 84
Army Rules, 1954 — Rule 23, 26, 26(2)
Constitution of India, 1950 — Article 14, 21, 226

Citation : (1997) 1 CALLT 395

Hon'ble Judges : Vinod Kumar Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vinod Kumar Gupta, J.—In this petitioner filed under Article 226 of the Constitution of India, the petitioner has challenged the order dated 10th August, 1992 whereby the punishment of "Severe Reprimand" was awarded to him by respondent No. 3 as also the order No. 5(38)/94/D(AS) dated 24th February, 1995 issued by the Under Secretary, Government of India, Ministry of Defence whereby the Central Government rejected the statutory complaint of the petitioner dated 14.10.93 which he had submitted to the Government against the aforesaid punishment of 10th August, 1992.

2. The petitioner is a serving Commissioned Officer in the Indian Army and is presently holding the substantive rank of Major. During the year 1990-91 the petitioner was posted at Defence Services Staff College, (DSSC), Wellington, (Nilgiris) as Mechanical Transport Officer. It appears that an unpleasant episode occurred on the evening of 19th September, 1991 involving the petitioner and another officer, namely Major N.K. Mohapatra at or near about the Officers' mess, DSSC, Wellington. It also appears that the preliminary enquiry was held in the matter by the authorities of DSSC, Wellington which ultimately culminated into the issuance of a charge-sheet against the petitioner u/s 63 of the Army Act

for committing an act prejudicial to good order and military discipline. It shall be advantageous to reproduce the charge-sheet in verbatim, which reads thus:--

CHARGE SHEET

The accused, IC 37030 Major Kohli Paramjit Singh of 511 ASC Bn attached with the Madras Regimental Centre, Wellington, an officer holding a permanent commission in the Regular Army, is charged with:--

An Act Prejudicial To Good Order And Military Discipline

ARMY ACT SECTION 63 in that he, at Wellington, on 19 Sep 91 at 2200 hours, deliberately and intentionally rushed to the Officers' mess DSSC, Wellington and engaged in heated altercation with IC 34251W Major N.K Mahapatra to the extent of using abusive language, in that, he was distinctly heard using the word "Bastard" which led to the unpleasant scene in the vicinity of a dinner party being held in the officers' mess in which the ladies and foreign student officers were present.

Place : Wellington (Jaspal Singh) Brig. Comdt. Date : 06 Jul 92 The Madras Regimental Centre.

3. The framing and the issuance of the charge-sheet was preceded by the recording of a Summary of Evidence against the petitioner in terms of Army Rules 1954 in which a large number of witnesses had appeared and made their depositions. Major N.K. Mahapatra, the person with whom the petitioner was alleged to have been involved in the heated exchange of words etc. was Prosecution Witness No. 1 in the said Summary of Evidence. The recording of the Summary of Evidence was completed in all respects before the issuance and the framing of the charge-sheet as is noticed above.

4. In terms of Section 84 of the Army Act, respondent No. 3, who is the General Officer Commanding, AJNKKG Area decided to deal with the petitioner summarily. Before the proceedings commenced before respondent No. 3 u/s 84 of the Army Act, a certificate dated 9th July, 1992 was obtained from the petitioner which purportedly amounted to the petitioner giving consent to dispense with the attendance of witnesses at his Summary Trial to be held in terms of Section 84 of the Army Act. This certificate reads as under:--

CONSENT CERTIFICATE

I, No IC 37030P Rank Major Kohli Paramjit Singh Unit 511 ASC Bn attached to MRC Wellington, do hereby consent to dispense with the attendance of witnesses at my Summary Trial by GOC ATNKK & Area under Army Act Section 84.

Place : Wellington Signature -- Date : 09 July 92 No & Rank -- IC 37030P Major Name -- Kohli Paramjit Singh. Unit + 511 ASC Bn att to MRC Wellington.

5. It is worthwhile to observe that the proceedings in the Summary Trial of the petitioners u/s 84 of the Army Act started on 10th August, 1992 and were

concluded on the same day. Even though the petitioner had been asked to submit his consent certificate regarding the non-attendance of the witnesses on 9th July, 1992, the proceedings in the Summary Trial started on 10th August, 1992 and concluded the same day. The petitioner pleaded, "not guilty" to the charge framed against him. On the same day on which he entered his plea of "not guilty", respondent No. 3 disposed the Summary Trial proceedings by finding him "guilty" of the charge and on conviction, by sentencing him to the punishment of "severe reprimand". No witness was examined by Respondent No. 3 during the course of proceedings in the Summary Trial nor was any other evidence taken by him before convicting the petitioner and finding him guilty of the aforesaid charge. This was despite the fact that the petitioner had pleaded "not guilty" to the charge.

6. During the course of hearing of the case, learned advocate for the respondents submitted that Respondent No. 3 relied upon the evidence recorded during the Summary of Evidence and on such reliance and consideration of the evidence, by appreciating the same, and by its application to the charge against the petitioner, he found that the petitioner "guilty" of the charge, and thus while convicting him, passed the sentence of "severe reprimand". It is worth while to note and observe that the Summary of Evidence was not recorded by respondent No. 3 nor was he associated directly or indirectly in the recording of the Summary of Evidence in any manner. Summary of Evidence in terms of Rule 23 of the Army Rules was recorded by one Colonel S.K. Nag. Admittedly respondent No. 3 had no role to play either in the recording of the Summary of Evidence or in watching the demeanour of the witnesses who appeared in this summary of evidence. The following witnesses were examined by Colonel. S.K. Nag during the summary of evidence:--

1. Major Naba Krishna Mahaptra
2. Havildar N.S. Reddy
3. Shri A. Yesudass,
4. Shri Stevens
5. Major(Miss) Deepika Pathak
6. Lt. Col S.B. Mahajan
7. Air Cmde Jagbir Singh,
8. Col J. V. Abraham
9. Brig Achu Nair.

7. In addition to the aforesaid 9 persons who were examined as Prosecution Witnesses in the summary of Evidence, the statement of the petitioner as an accused was also recorded by Col. S.K. Nag, the Officer entrusted with the job of recording the Summary of Evidence under Rule 23 of Army Rules, 1954. In fact

during the course of summary of evidence some of the above named prosecution witnesses were recalled and after the conclusion of the original summary of evidence, additional summary of evidence was also recorded by the aforesaid officer, namely Col. S.K. Nag.

8. If one looks very closely to the charge-sheet against the petitioner one finds that the gravamen of the charge against the petitioner was that he had indulged in an indicant behaviour, a behaviour unbecoming of an Army Officer. Even though this was the gravamen of the charge, essential ingredients of the charge, which may be considered as its vital foundations, may be characterised as under:--

1. That the petitioner had engaged in an altercation with Major N.K. Mahaptra.
2. That he had used abusive language.
3. That he was distinctly heard using the word "Bastard".
4. That the aforesaid behaviour of the petitioner led to an unpleasant scene in the course of a dinner party being held in the Officers' Mess in which ladies and foreign student officers were present.

9. A few important questions arise for determination, consideration and examination in this case. The first and foremost of them is the exercise of discretion by respondent No. 3 in choosing to deal with the petitioner summarily u/s 84 of the Army Act by holding his summary trial for a charge u/s 63 of the Army Act, even though u/s 71 and other related provisions of the Army Act, the petitioner was entitled to be tried, if at all, by a General Court Martial. The next question which arises for consideration is the manner in which the summary Trial by respondent No. 3 was conducted and concluded, resulting in the conviction and sentence of the petitioner and the procedure that was followed by respondent No. 3 in conducting the said trial. Related to this basic question is the other vital question as to whether it was permissible in law, irrespective of the provision contained in Rule 26 of the Army Rules, for dispensing with the attendance of witnesses and for the petitioner in giving consent for such non appearance of the witnesses and could an accused person in a criminal trial be made to agree to give such a consent and be tried for a criminal charge in the absence of any witness and found guilty of such charge, irrespective of the nature and quantum of punishment. The more important and perhaps a very substantive and basic question involved in "the case, touching upon the elementary principle of criminal jurisprudence could be as to whether, despite the manner in which the summary trial was conducted by respondent. No. 3, could be rely upon the evidence of witnesses recorded during the summary of evidence, which admittedly was not a sworn testimony of these witnesses and admittedly was not recorded by respondent No. 3 himself. Admittedly such evidence is also not admissible in any trial under any law. Last of all, the question which also merits consideration is whether despite all the aforesaid illegalities and irregularities, even in the Summary of Evidence was there any

material which could connect the petitioner with the commissioning of the offence for which he was charged and did any part of the evidence in the summary of evidence point out to either the gravamen of the charge or any of the ingredients forming the basic fabric of the charge itself. In other words, even if the summary trial held by respondent No. 3 is assumed to be correct, legal and valid and regular, is it not a case of "no evidence", since nothing appears even in the summary of evidence which could connect the accused-petitioner with the commission of offence charged, if all that has been said in the summary of evidence may be taken as wholly true and correct.

10. Let us now examine each of the aforesaid questions in their true perspective and proper application. Chapter VII of the Army Act deals with the subject of punishments. Section 71, the first and foremost provision contained in this chapter provides that the punishment may be inflicted in respect of offences committed by a person subject to the Army Act and convicted by a Court Martial according to what is prescribed in that section, say death sentence, imprisonment for life and so on and so forth. The opening part of the section thus may be re-produced as under:--

Section 71. Punishment awardable by courts-martial.--Punishment may be inflicted in respect of offences committed by person subject to this Act and convicted by court-martial, according to the scale following, that is to say:--

a) Death;

b) (Imprisonment for life):

..... d) cashiering, in the case of officers,

..... i)
severe reprimand or reprimand, in the case of officers, Junior commissioned officers, warrant officers and non-commissioned officers;

.....

11. Section 71 is followed by various other provisions regarding the types of sentences and the procedure in awarding such sentences upon persons subject to the Army Act, Section 79 however, even though forming a part of chapter VII of the Act appears to be an exception to the general rule contained in Section 71, in that it provides that punishments may also be inflicted in respect of offences committed by persons subject to the Army Act without the intervention of the Court Martial. In other words, it means that, even though u/s 71 a person who is accused of committing an offence and is subject to the Army Act and is liable to be tried by and punished for such commission of such offences by a Court Martial, u/s 79 such punishment can be inflicted upon him by an authority or the person, other than a Court Martial as well. For our purposes, Section 84 is the relevant provision which prescribes such person as the competent authority who has been empowered to inflict such a punishment upon an officer subject to the Army Act who is charged with an offence under the Act. For facility of reference,

Sections 79 and 84 are reproduced as under:--

79. Punishments otherwise than by Court-Martial. Punishments may also be inflicted in respect of offences committed by persons subject to this Act without the intervention of a Court-Martial and in the manner stated in Sections 80,83,84 and 85.

84. Punishment of officers, junior commissioned officers and warrant officers by area commanders and others. An officer having power not less than an area commander or an equivalent commander or an officer empowered to convene a general Court-Martial or such other officer as is, with the consent of the Central Government, specified by the Chief of the Army Staff may, in the prescribed manner proceed against an officer below the rank of lieutenant-colonel, a junior commissioned officer or a warrant officer, who is charged with an offence under this Act, and award one or more of the following punishments, that is to say,

(a) forfeiture of seniority, or in the case of any of them whose promotion depends upon length of service, forfeiture of service for the purpose of promotion for a period not exceeding twelve months, but subject to the right of the accused previous to the award to elect to be tried by a court-martial;

(b) severe reprimand or reprimand;

(c) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good.

12. Since the validity, legality or the constitutional vires of Sections 79 and 84 have not been questioned by the petitioner in this petition and because this is not an issue before me in this case, I refrain from expressing any comments about the constitutional validity of these two provisions. However it is worthwhile to note and observe that either in the Army Act or in the Army Rules framed thereunder, no provision exists which prescribes any parameters, criteria, guidelines or conditions under which an officer charged within an offence under the Army Act has to be dealt with, either by a Court Martial, which is the general rule as is evident from a perusal of Section 71, or by a single individual, as is provided u/s 79 read with Section 84. In what cases, on what considerations, under that circumstances and in what situations/ conditions such a person is to be tried either by Court Martial or by a single individual are factors which are totally absent both in the Army Act and the Army Rules. How and in what manner the discretion has to be exercised, whether objectively or subjectively and on what considerations is also not to be found in the Army Act or the Army Rules.

13. Whether the discretion can be exercised arbitrarily, by misuse or abuse of the discretionary power, or in a given situation upon the existence of a particular consideration, are factors which are very vital and important for the proper implementation of the exercise of this power as contemplated u/s 79 of the Act. In the present case, nothing at all was suggested to the court either in the

affidavit-in-opposition of the respondents or during the course of arguments as to why was the petitioner dealt with abnormally by taking the recourse to his summary trial in terms of Section 84 read with Section 79 of the Act, rather than by affording him an opportunity of being tried by a General Court Martial. A careful perusal of the original record also did not indicate the existence, even the mention, of any such reason or circumstance. Undoubtedly a General Court Martial is a full-fledged court of law duly constituted under the Army Act, comprising of members of the jury, guided in law by a Judge Advocate. In a General Court Martial the application of the provisions of the Evidence Act is mandatory and every accused person has a statutory right of defending himself strictly in accordance with the provisions of law. Every verdict of a General Court Martial is guided by the application and existence of evidence, legally admissible and properly taken on oath, and it is only after observing all principles of natural justice and strict requirements of law, a verdict is pronounced by a General Court Martial, almost in identical terms as is done by a criminal court of ordinary jurisdiction under the Code of Criminal Procedure for trying persons, other than those subject to Army Act for commission of offences under normal laws of the land. The principles of equality and equal application of laws and protection, as enshrined in article 14 of the Constitution of India is applicable to persons subject to the Army Act also. If therefore an officer serving in the Army, on the allegation of having committed an offence is entitled to a free and fair trial, in accordance with the procedure strictly prescribed under the codified law, as provided u/s 71 of the Army Act, why should he be deprived of such enjoyment of a guaranteed right by subjecting him to a summary trial at the hands of a single individual, in the total absence of any procedural safeguards or any observance of the requirements of law relating to the recording or production of evidence, the defence of the accused and, so on and so forth. In other words, two persons both subject to Army Act, both accused of having committed similar offences, being thus identically placed, cannot be discriminated against each other, by placing one for trial before a General Court Martial u/s 71 of the Act and by subjecting the other to a summary trial at the hands of a single individual. As observed at the outset, I am not "determining the validity or vires of Sections 79 or 84, because this is not the issue presently before me, but the issue that concerns me is the manner in which the power has been exercised. This is not a case where I wish to give any positive finding as to whether the power can be used at all or not, because the occasion has not arisen for returning such a finding. The case before us is with regard to a total absence of any explanation as to why this power was at all exercised and as why a departure was made from the general rule of putting the accused to trial before a General Court Martial. The case before us also appears to be one relating to discrimination being practiced against the petitioner and he being singled out for hostile and discriminatory treatment. Even if it is assumed that the power vested in the Army Authorities, there should have been reasons, both cogent, and plausible as well as objective and rational for the use of this extraordinary power of trying an accused summarily. These respondents ought to have explained to

the court as to why was the petitioner tried summarily for an offence under the Army Act when the normal trial, on regular basis by a General Court Martial was available to the accused, in the absence of any reasons or circumstances to the contrary. Either way, one can say that even the very summary trial of the accused was bad in law. This is only one part of the story.

14. The other part about summary trial conducted by respondent No. 3 is with regard to its validity, fairness and legality. As has been noted earlier the trial started on 10th August, 1992 and was concluded the same day. I perused very carefully the affidavit-in-opposition and the original record of the summary trial proceedings and found that the entire record consists of one single sheet of paper which basically comprises of a few questions asked to the accused petitioner. One of them was whether he pleaded "guilty" or "not guilty" to be charge, to which the petitioner has been shown to have un-equivocally replying as "not guilty". A non-speaking and unreasoned single line conviction order has been recorded on this sheet of paper finding the petitioner "guilty" of the charge. No reasons whatsoever have been given in support of this finding. Not that the law Martiar enjoins giving any reasons but the context in which I am referring to the absence of reasons is dealt with as below. I am saying so because no evidence whatever was led during this summary trial. No evidence, repeat no evidence. The petitioner was convicted without there being any evidence whatsoever in support of the charge. It is the admitted case of the respondents that respondents No. 3 convicted the petitioner on the basis of the evidence which was produced during the recording of summary of evidence earlier at some stage of the enquires/ investigation of the case (not by respondent No. 3). The fact that respondent No. 3 relied upon the evidence recorded in the summary of evidence in convicting the accused has also not been mentioned in the order finding him guilty. In the annals of criminal Jurisprudence one rarely comes across a case where, despite a plea of "not guilty" offered by an accused, he is convicted by a so-called court in the total absence of any evidence recorded by the court and without even indicating as to on what basis the so-called court arrived at this finding of "guilty". No trial could be worse than this. Nothing could be considered to be more fair to an accused person, totally contrary to even the basic principles of natural justice. This trial indeed was a sham, it was wholly farcical. The accused in the trial was not afforded his basic right of defending himself of the charge. Coming to the summary of evidence itself, which the respondent No. 1 thought was taken into consideration as evidence relied upon by the respondents No. 3 while convicting the writ-petitioner, one finds that even in the summary of evidence itself, there did not exit any material which could directly or indirectly connect the writ-petitioner in the commission of the offence. It is a well settled principle of law that in the exercise of extraordinary writ jurisdiction, this court does not appreciate or reappreciate the evidence, which is the basis of a finding recorded by a forum or a tribunal, including a Court Martial, as in the present case. If a Court Martial or for that matter, any other court has arrived at a finding on the basis of some evidence produced before it during the

course of trial, the sufficiency or otherwise of evidence forming the basis of such finding is a matter purely for the consideration of that court and this court does not substitute its opinion with that of the trial court in the exercise of its writ-jurisdiction. However where there is "no evidence" before the trial court and this court is called upon to interfere in such a finding, which is based on "no evidence", at all", such finding being perverse in law has to be set aside. Such is the case here. I have very carefully gone through each and every line of the summary of evidence containing the statements/depositions of all the prosecution witnesses and I found to my surprise and horror, that not a single witness attributed by element or ingredient of the charge against the petitioner in any manner. In other words none of the witnesses examined in the summary of evidence deposed against the petitioner, none of them stated any fact which could connect the petitioner with the commission of offence for which he was charged. More surprisingly, the only person who could speak against the petitioner and his evidence was of utmost importance was Major N. K. Mahapatra himself. He did not say anything in his long deposition which could constitute to be evidence against the petitioner in so far as the charge against him was concerned. Not a word with regard to the gravamen of charge. On the contrary almost all the witnesses stated in UNISON such facts which totally demolished the prosecution case against the petitioner. For instance, as noticed at the outset, the gravamen of the charge was the creation of unpleasant situation/scene in the Officers' Mess, where ladies and foreign student officers were present, because of the behaviour of the petitioner. None of the witnesses stated about any such un-pleasant situation or scene, at or near the Officers' Mess, what to speak of the ladies or the foreign students being either there or being in any way interfered with, or being put to any annoyance or inconvenience. In fact according to most important witness, the senior most officer present in station, Air-Commander Jagbir Singh, no one in the officers' Mess or in the party had even noticed anything or heard anything about any such incident.

15. Learned Advocate for the respondents however urged that a prosecution witnesses, in the summary of evidence, namely Shri A. Jesudass, PW-3 has said in his testimony that he had heard the petitioner using the word "you bastard". Let me reproduce the relevant extracts of his testimony as recorded in the summary of evidence. It read as under:--

"Prosecution

Witness No. 3

35. Shri A. yesudass, working as Regimental Masalchi in DSSC Officers' Mess states:--

36. On 19 Sept 91, I was on duty at the Officers' Mess. A party hosted by the foreign officers in the ladies room was in progress. At about 2100h or so, I was picking up the used plates from inside the pantry and taking to the Masalchi washing room which is close to the raised platform. After cleaning the plates, I

was taking the washed plates to the pantry. During performance of this duty, I saw Maj NK Mahapatra and Maj PS Kohli standing on the raised platform and conversing with each other. I did not follow the conversation but heard the word "You Bastard" used by Maj PS Kohli."

16. This is the only piece of evidence, even according to the learned advocate for the respondents which finds place in the Summary of Evidence and which even according to the learned advocate for the respondents, was sufficient for the respondent No. 3 to hold the petitioner guilty of the charge framed against him. Now if one carefully looks at the statement of Shri A. Yesudass, one finds that all that he had said is that he heard the petitioner using the words "you bastard". In what context these words were used, why they were said and to whom were they addressed, has not been disclosed by the witness in his statement. Even if this isolated piece of evidence is taken to be correct and true on its face value, all that it establishes is that the petitioner was heard by a Jawan using the words "you bastard". Now compare this piece of evidence with the gravamen of the charge and its essential and vital ingredients. The gravamen of the charge clearly stipulates that the petitioner was responsible for creating a vitiated atmosphere in the Officers' Mess by indulging in an act un-becoming of an army officer, and being prejudicial to good order and military discipline, at a place where ladies and foreign students were present, and by his act of commission or omission, deliberately and purposely done, he created a condition and situation which led to annoyance and inconvenience.

17. Looking from whatever angle, the fact remains that the prosecution had failed to produce any evidence linking the petitioner with the commission of the offence for which he was charged. To sum up, primarily the evidence were required to be produced during the Summary Trial itself, even though I am not pronouncing on the validity of the holding of the Summary Trial as such. Whether the holding of the summary trial as such, without taking recourse to Section 71 of the Army Act was good or bad, is an altogether different matter. The fact remains that even if the Summary Trial was presumed to have been held legally and validly, it did not absolve the respondents of their obligation to prove the charge against the petitioner by production of evidence connecting the petitioner with the commissioning of the offence, since the petitioner had pleaded, "not guilty" to the charge. It is the admitted case of the respondents that no evidence was adduced during the course of the summary trial and that respondent No. 3, constituting the one man court holding the summary trial had found the petitioner "guilty" of the charge without there being any evidence or any other material, adduced or produced or recorded during this summary trial itself. It is the admitted case of the respondents that the respondent No. 3. while convicting the petitioner relied upon the evidence recorded during the summary of Evidence. Even if, for the sake of argument, it is presumed that a person could be convicted by a court without there being any evidence recorded by that court during the trial in that court, only on the basis of some evidence recorded earlier at some earlier stage before some other forum, one finds that even in the

summary of Evidence there was no evidence linking the petitioner with the commission of the offence. Therefore, again, to sum up, the least that can be said is that it was a case of "no evidence" "no evidence at all".

18. It is a settled proposition of law in criminal Jurisprudence that no person can be convicted of an offence, on a charge being framed against him, unless there is enough material before the court which establishes beyond reasonable doubt the guilt of the accused. It has uniformly been accepted that such material is in the form of legally admissible evidence in accordance with the provisions of the Evidence Act, as is the case with all trials of persons subject to the Army Act. The Army Act does not contain any provision whereby, under any eventuality or contingency, the evidence taken in a summary of evidence per se either becomes admissible in any proceedings or can be tendered by way of substantive evidence before a court conducting a trial, including a summary trial. If the legislature intended that due to some eventuality or contingency, the evidence produced in the summary of evidence can be relied upon or be admitted in evidence in a trial, it could have made such a provision in the Army Act. In the absence of an enabling provision, it was not at all permissible for respondent No. 3 to even look at the evidence recorded in the summary of Evidence, what to speak of relying upon it for convicting the accused-petitioner. To that extent therefore I have no hesitation in saying and holding that respondent No. 3 acted in a highly improper manner by convicting the petitioner by placing his reliance upon the evidence which came to recorded in the summary of Evidence.

19. Learned Advocate appearing for the respondents when confronted with the situation of there being no evidence having been recorded in the summary trial, relied upon Rule 26 of the Army Rules in support of his contention that because of the consent certificate having been tendered by the petitioner on 9th July, 1992, there was no requirement of recording any evidence in the summary trial. I have already reproduced the consent certificate earlier in this judgment. Let me now reproduce Sub-rule(2) of the Rule 26 of the Army Rules, 1954, which reads as under:--

".....
..... 2. Use of different forms. Form 1 in appendix IV part I is to be used when the accused has given his consent in writing to dispense with attendance of witnesses at the trial. Form 2 in appendix IV part I is to be used when the accused does not consent to dispense with attendance of witnesses at his summary trial.

.....
....."

20. A bare look at Sub-rule(2) clearly suggests that even if an accused has consented to dispense with the attendance of the witnesses, it does not absolve the prosecution of leading evidence to prove the charge against the accused. Again since the vires of Sub-rule (2) is not under challenge before me in this

petition, I refrain from expressing any opinion about the constitutionality of Sub-rule(2) but, suffice it to say that Sub-rule(2) does not contemplate any situation where a person charged of a criminal offence by a court can be convicted of such charge, despite his plea of "not guilty", without such court recording any evidence in proof of the charge. The requirement of law, based on the basic principles of natural Justice and the wording of Sub-rule(2) have to be harmoniously constructed in such manner as to only find that Sub-rule(2) does not dispense with the requirement of proof, i.e., evidence in the trial itself, as such. In some situation, it may amount to dispensing with the actual or physical appearance of the witnesses in presence of the accused, or whatever else it may mean but surely and certainly it does not amount to permitting or allowing a court to convict an accused without there being any evidence whatsoever in the trial. Plea of "not guilty" and the consent certificate dispensing with the attendance of the witnesses are both contradictions in terms and run counter to each other. A person pleading "not guilty" is not supposed to also say that he does not want any evidence to be recorded. Such a person surely wants to be tried and how else can you try a person of a criminal charge, except by proving it through evidence, which is legally admissible and tenable.

21. A more basic question is about the right of an accused flowing from Article 21 of the Constitution of India. Can a situation be brought about whereby an accused person is made to give a consent certificate for dispensing with the production of evidence altogether in a criminal trial, even if it is done voluntarily ? The answer has to be in the negative. Any such situation or the rendering of any such certificate is a patent illegality. Any trial which thus proceeds on such consent certificate and any conviction recorded in any such trial is vitiated so gravely that it is an absolute illegality in all respects.

22. Based on the aforesaid discussion therefore, I have no hesitation in holding that the charge against the petitioner was neither proved, nor established, nor made out. The conviction of the petitioner therefore was absolutely illegal and wholly unconstitutional. The punishment of "severe reprimand" therefore was also patently unconstitutional and contrary to law. The petitioner's conviction and punishment therefore are quashed and set aside.

23. Now coming to the question of petitioner's promotion, the petitioner is undoubtedly entitled to be considered for promotion to the higher rank of Lt. Colonel by a duly constituted selection board. Such consideration of the petitioner for promotion to the higher rank of Lt. Colonel has to be on the basis of his service record, excluding the aforesaid conviction and the punishment of severe reprimand". The petitioner is entitled to be considered minus his conviction and punishment of "severe reprimand which have been quashed and set aside. If therefore the petitioner was at any time considered for promotion to the rank of Lt Colonel by any selection board and such consideration was based on his service record, which included his conviction and sentence of "severe reprimand" awarded by respondent No. 3, such consideration was bad in law and

is hereby declared to be non-est in the eyes of law. On that ground, therefore such consideration, if having been accorded is also quashed and set aside. The respondents therefore are held to be under an obligation for according fresh consideration to the petitioner in the light of the observations contained herein and the directions issued.

24. Writ application is accordingly allowed. The conviction and the sentence awarded by respondents No. 3 is quashed and set aside. By issuance of a writ of mandamus, the respondents are directed to accord effective consideration to the petitioner for his promotion to the rank of Lt. Colonel, on the basis of his service record without taking to consideration the quashed conviction and sentence. No order as to costs.

Mentioned

On the prayer of the learned advocates appearing for the parties, let the xerox certified copy of the Judgment and order be given to the learned advocates appearing for the parties as expeditiously as possible.