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**(2008) 08 MP CK 0052**  
**In the Madhya Pradesh High Court**

Subodh Shukla

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision :** 28-08-2008

**Acts Referred:**

Army Act, 1950 — Section 122, 27, 83, 84, 85

**Citation :** (2009) ILR (MP) 359 : (2008) 5 MPHT 299 : (2008) 4 MPLJ 562

**Hon'ble Judges :** Ravi Shankar Jha, J

**Bench :** Single Bench

**Final Decision :** Allowed

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## Judgement

R.S. Jha, J.

The petitioner has filed this petition being aggrieved by order dated 1-10-2003 by which a punishment of loss of seniority of one year in the rank has been imposed upon the petitioner. The petitioner has also challenged order dated 27-9-2004 by which his review petition has been rejected.

The brief facts leading to the filing of the petition are that the petitioner who, at the relevant time, was posted as a Major at Sagar in 36 Infantry Division Ordinance Unit and was officiating as the Second-in-Command, submitted a complaint to his higher authorities on 30-3-2001 bringing to their notice several irregularities and illegalities committed by his Commanding Officer and one Major R.S. Dudee. On receiving no response thereon he filed another statutory complaint u/s 27 of the Army Act, 1950 again bringing to the notice of the higher authorities the illegalities committed by his Commanding Officer Col. Devinder Yadav and Major R.S. Dudee. On 23-5-2001 the petitioner was called for a personal interview by the Divisional Commander, respondent No. 4, however, it is alleged that when the petitioner attended the office of the Divisional Commander, he found his Commanding Officer sitting there with him and, therefore, being disillusioned he again wrote a Demi Official letter to the Chief of Army Staff on 26-5-2001 bringing to his notice the illegalities and irregularities committed by

Col. Devinder Yadav and Major R.S. Dudee. He again sent the same complaint to the Chief of Army Staff on 7-9-2001.

It is alleged that being aggrieved by the complaints made by the petitioner against him, his Commanding Officer issued as many as six show-cause notices to him with a view to harass and intimidate the petitioner. In addition, a tentative charge-sheet was issued to the petitioner on 9-10-2001 in which six charges were levelled against him by his Commanding Officer, Col. Devinder Yadav. Subsequently, the petitioner was attached to 77, Medium Regiment and by withdrawing the previous charge-sheet a fresh charge-sheet levelling the same charges was again issued to him in May, 2002. During the intervening period another charge-sheet was issued to him on 24-3-2002 on a single charge of submitting a complaint directly to the General Officer Commanding-in-Chief, Central Command, on 9-11-2001 in violation of Paragraph 557 of the Regulations of the Army which requires that such complaints should be submitted through the proper channel only.

Thereafter, proceedings for hearing upon the charge-sheet were taken up against the petitioner in May, 2002 in respect of the six charges under Rule 22 of the Army Rules, 1954 upon which the Commanding Officer, being of the opinion that certain charges were made out against the petitioner, issued a regular charge-sheet to the petitioner on 26-9-2003 levelling four charges against him.

The first charge related to an allegation of impersonating as officiating Commanding Officer between 6th and 12th May, 2001 and despatching letters in spite of the fact that the Commanding Officer, Col. Devinder Yadav was present in the Unit during the period. The second, third and fourth charges related to the complaints made by the petitioner on 10-4-2001, 26-5-2001 and 7-9-2001, respectively, directly to the Head Quarter, Southern Command and Chief of Army Staff contrary to Paragraph 557 of the Regulations of the Army which expressly provides that correspondence with the Chief of Army Staff on official or service matters should be made only through the authorized channel. The summary of evidence as provided by Rule 23 of the Army Rules was conducted between 25-5-2002 and 1-5-2003 in which the statements of the prosecution witnesses and the petitioner's defence was considered. The opinion of the Deputy Judge, Advocate General Branch was also obtained and on that basis a summary trial u/s 84 of the Army Act and Rule 26 was held against the petitioner and thereafter the impugned order dated 1-10-2003 was passed imposing a punishment of loss of seniority in the rank of Major as if his appointment as Major bore the date 14-12-1997. The petitioner being aggrieved filed a statutory review u/s 87, which also suffered dismissal vide order dated 27-9-2004.

The petitioner being aggrieved by the order imposing the aforesaid punishment and rejection of his review has filed this petition alleging that the entire action initiated against him is vitiated by malafides on the part of his Commanding Officer, Col. Devinder Yadav and is a result of the complaints filed by him before the superior authorities bringing to their notice the illegalities and irregularities

committed by him alongwith one Major R.S. Dudee. The petitioner further submits that he was constrained to make complaints to the higher authorities as his request for taking action made to the immediately superior officers fell on deaf ears and because he was disillusioned when he found the Commanding Officer sitting in the office of the Divisional Commander where he was called for personal interview on 23-5-2001. The petitioner has also challenged the summary of evidence and summary trial proceedings on the ground that the respondents have not followed the procedure as prescribed law as a result of which he has been deprived of proper opportunity to defend himself inasmuch as the documents sought by him were not supplied to him and witnesses requested by him to be summoned in his defence were not called and without giving him any opportunity to adduce proper evidence in his defence the impugned order has been passed by the respondent-authorities contrary to the provisions of Rules 22,23 and 26 of the Army Rules.

Additionally, the petitioner has also contended that in a parallel enquiry initiated against the petitioner by issuance of the charge-sheet on 24-3-2002 in respect of the petitioner's complaint to the General Officer, Commander-in-Chief, Central Command dated 9-11-2001 on the allegation that it was contrary to Paragraph 557 of the Regulations of the Army as it was not routed through the proper channel, the petitioner having pleaded guilty and having given an undertaking to the effect that he would not repeat such mistake which was done inadvertently, the charge-sheet was dismissed vide order dated 27-3-2002 and, therefore, once the charge of a similar nature regarding filing of a complaint directly to the superior officers without going through the proper channel had been dropped on acceptance of the petitioners apology, the petitioner could not have been punished for the same charges namely, charge Nos. 2,3 and 4 by the impugned order dated 1-10-2003.

The petitioner also assails the impugned order on the ground that the authorities have passed the impugned orders without assigning any reason for holding the petitioner guilty of the charges and without recording a finding on the basis of the evidence on record. It is submitted that in the absence of such a reasoned order or a finding based on the evidence on record the impugned order being contrary to the principle of natural justice deserves to be quashed. Apart from the above, the petitioner has also prayed for a direction to the respondents to take action against Col. Devinder Yadav, respondent No. 6 who was his Commanding Officer at the relevant time, for having illegally detained and arrested the petitioner and for physically and mentally harassing him on account of the petitioner having filed complaints against him and on that count the petitioner has also claimed compensation.

It is emphatically stated by the petitioner and not denied by the respondents that the aforesaid action has been taken up by the respondents against the petitioner in spite of the fact that the complaints filed by him against his Commanding Officers, Col. Devinder Yadav and against Major R.S. Dudee, were found to be

true on examination and, therefore, disciplinary action was taken against Col. Devinder Yadav as well as Major R.S. Dudee, who, in fact, has been cashiered from the army as a result thereof.

The respondents have filed a return and have stated that the army is a disciplined force and requires strict adherence to the procedure prescribed by the Act and the Rules by officers of the army. It is submitted that Paragraph 557 of the Regulations of the Army as published in the revised edition in the year 1987 enjoins that under no circumstances would any correspondence be addressed to the Chief of Army Staff by any officer in respect of any official or service matter except through the authorized channel but the petitioner, in gross violation of the aforesaid Army Regulations and in a blatant display of indiscipline made as many as four complaints directly to his higher officers, i.e., to the General Officer Commanding-in-Chief, Central Command, head quarters, Southern Command and the Chief of Army Staff. That apart, the petitioner got carried away with his personal vendetta against his Commanding Officer and by impersonating himself as a Commanding Officer between 6th and 12th of May, 2001 signed a letter on 6-5-2001 by designating himself as officiating Commanding Officer and got the letters dispatched in spite of the fact that his Commanding Officer, Col. Devinder Yadav was present in the Unit during the aforesaid period.

It is submitted by the learned Counsel for the respondents that the petitioner has not denied the fact that he had written the complaints to the superior officers and, therefore, in view of this admission of the petitioner no fault can be found with the finding recorded by the concerned authorities in respect of charge Nos. 2, 3 and 4. In respect of Charge No. 1 it is submitted by the respondents that there is evidence on record to indicate that the petitioner projected himself to be officiating Commanding Officer and personally went and got the aforesaid correspondence dispatched on 12-5-2001 though Col. Devinder Yadav was very much present in the Unit. In the aforesaid circumstances, it is submitted that the contention of the petitioner being misplaced and misconceived deserves to be rejected and the petitioner deserves to be dismissed.

On a perusal of the documentary evidence on record it is apparent that the petitioner had made complaints before his superior officers. The first one was dated 10-4-2001 and was addressed directly to the Head Quarter, Southern Command, the second one is dated 26-5-2001, addressed to the Chief of Army Staff, the third one is dated 7-9-2001 and was also addressed to the Chief of Army Staff and the fourth one is dated 9-11-2001, addressed to the General Officer Commanding-in-Chief, Central Command. It is also clear from a perusal of the documents that while charges in relation to the first three complaints made by the petitioner were made subject-matter of the final charge-sheet dated 26-9-2003 issued to the petitioner after recording the summary of evidence, a separate charge-sheet in respect of the last complaint made by the petitioner, dated 9-11-2001 was issued to the petitioner on 24-3-2001.

During hearing of the petition, the respondents have produced the record of the

proceedings in respect of the charge-sheet dated 24-3-2001 relating to the complaint sent by the petitioner on 9-41-2001. A perusal thereof indicates that the petitioner admitted filing of complaints and tendered his unconditional apology for the same and also gave an undertaking that he would not repeat the mistake in future. It is also apparent that he pleaded that he be given one last chance to improve and become a good Army Officer and the concerned authority, recording the aforesaid statement of the petitioner, dropped the charges by order dated 27-3-2002. From a perusal of the record it is also clear that the petitioner in his written submissions filed against the second charge-sheet has specifically raised this issue before the authorities that as the charge against the petitioner of directly corresponding with the superior authorities in contravention of Paragraph 557 of the Regulations having been considered and dropped by the authorities by order dated 27-3-2002 the petitioner cannot be charged with or punished for the same offences subsequently.

A perusal of the record of summary of evidence as well as the summary trial, which has been produced for scrutiny of this Court by the respondents, also indicates that while the prosecution witnesses were examined and were permitted to be cross-examined by the petitioner and he was also given an opportunity to submit his oral and written statements in defence, the defence witnesses requested by the petitioner to be summoned in his defence and the documents sought by him in his defence were denied to him. The proceedings dated 1-5-2003 of the summary evidence clearly establish the fact that the accused, i.e., the petitioner had submitted a list of defence witnesses which he desired to examine in his defence but the concerned officer disallowed his request by recording an opinion that none of the witnesses had any relevance to the case. It is also recorded in the proceedings that the request made by the accused for examining the defence witnesses was disallowed and the summary of evidence was closed. The same recital finds place in the summary trial proceedings wherein while ultimately recording the conclusions in the format prescribed by Form 2, Appendix IV, the authority has stated that the list of witnesses submitted by the accused in his defence was found irrelevant to the four charges and accordingly his request for examining defence witnesses was not acceded to.

From a reading of the provisions of Rule 22 of the Army Rules, 1954, which prescribes the procedure to be adopted while hearing of charges against a person on whom a charge-sheet has been served, it is clear that the authority, while hearing the delinquent officer on the tentative charges, is required to hear the evidence of the prosecution witnesses as well as the defence witnesses and thereafter if it is of the opinion that further proceedings in respect of the charge need be taken up it would proceed to record the summary of evidence under Rule 23 whereunder the statements of the prosecution witnesses as well as the defence witnesses are required to be taken down in writing. Rule 23(3) provides that after recording of evidence of each witness the accused would be asked whether he wishes to make any statement and whatever he states would be

taken down in writing as his evidence. The Sub-rule further provides that the accused can then call his witnesses and their statements would be recorded and added to the record. On the basis of the summary of evidence charges would be framed against the petitioner and depending upon the gravity of the charges further proceedings are taken up against the officer.

In the instant case, after recording of summary of evidence the case was referred to the Judge Advocate General Branch for its comments which have been filed by the respondents as Annexure R-11 along with the record. From a perusal of conclusion recorded by the Deputy Judge Advocate General in Paragraphs 33 and 34 of the comments, it is clear that the Judge Advocate General has given an opinion that four charges should be levelled against the petitioner relating to good order and military discipline which are not serious enough warranting adjudication by Court martial and while giving his opinion that the proper procedure for the petitioner's case would be a summary trial u/s 84, in Paragraph 34 the Deputy Judge Advocate General has specifically stated that the summary trial proceedings would be conducted as per Form 2, Appendix IV of the Army Rules with a further note that the authority should hear the prosecution witnesses as contained in the summary of evidence.

Rule 23 and Rule 26 of the Army Rules which are of special relevance to the present petition are in the following terms:

23. Procedure for taking down the summary of evidence.- (1) Where the case is adjourned for the purpose of having the evidence reduce to writing, at the adjourned hearing evidence of the witnesses who were present and gave evidence before the Commanding Officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the Commanding Officer or such officer as he directs.

(2) The accused may put in cross-examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnesses as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked: "Do you wish to make any 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. Any statement thereupon made by the accused shall be taken down and read to him, but he will not be cross-examined upon it. The accused may then call his witnesses, if he so desires, any witnesses as to character.

(4) The evidence of the witnesses and, the statement (if any) of the accused shall be recorded in the English language. If the witness of accused, as the case

may be, does not understand the English language, the evidence or statement, as recorded, shall be interpreted to him in a language which he understands.

(5) If a person cannot be compelled to attend as a witness, or if owing to the exigencies of service or any other grounds (including the expenses and loss of time involved), the attendance of any witness cannot in the opinion of the officer taking the summary (to be certified by him in writing), be readily procured, a written statement of his evidence purporting to be signed by him may be read to the accused and included in the summary of evidence.

(6) Any witness who is not subject to military law may be summoned to attend by order under the hand of the Commanding Officer of the accused. The summons shall be in the form provided in Appendix III.

Summary disposal of charges against Officer, Junior Commissioned Officer or Warrant Officer.- (1) Where an Officer, a Junior Commissioned Officer or a Warrant Officer is remanded for the disposal of a charge against him by an authority empowered u/s 83, 84 or 85 to deal summarily with that charge, the summary of evidence shall be delivered to him, free of charge, with a copy of the charge as soon as practicable after its preparation and in any case not less than twenty four hours before the disposal.

(2) Where the authority empowered u/s 83, 84 or 85, decides to deal summarily with a charge against an Officer, Junior Commissioned Officer or Warrant Officer, he shall unless he dismisses the charge, or unless the accused has consented in writing to dispense with the attendance of the witnesses, hear the evidence in the presence with the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witness and make a statement in his defence.

(3) The proceedings shall be recorded as far as practicable in accordance with the form in Appendix IV and in every case in which punishment is awarded, the proceedings together with the conduct sheet, summary of evidence and written consent to dispense with the attendance of witnesses (if any) of the accused, shall be forwarded through the proper channel to the superior military authority as defined in Section 88.

In spite of the fact that the statutory procedure as prescribed by the rules was required to be followed by the authorities, it is apparent from the record of the case that though the petitioner gave a list of documents and witnesses which he wanted to examine in his defence during recording of the summary of evidence under Rule 23 as well as during summary trial under Rule 26, the authorities rejected his prayer on the ground that the witnesses were not considered relevant. As a result of this serious infraction of the procedure prescribed by law on the part of the respondents, the petitioner has been denied the right to adduce evidence in his defence, denied the right to defend himself due to non-supply of documents and the statements of the defence witnesses which, on being recorded in writing and added to the record during the summary of

evidence proceedings, would have been available on record for proper adjudication in accordance with the law are totally absent.

The learned Counsel for the petitioner has specifically pointed out that on the basis of his applications for the documents sought by him it would have been conclusively established that the petitioner's Commanding Officer Col. Devinder Yadav was on leave from 29-4-2001 to 7-5-2001 and that during this period, Le., up to 6-5-2001 the petitioner was officiating Commanding Officer and that the letter dated 6-5-2001 was written by him in that capacity. The learned Counsel for the petitioner on the basis of the documents has also submitted that he specifically requested the authorities to examine Nayak Devi Prasad Hawaldar and P.C. Swain in his defence and his Commanding Officer Col. Devinder Yadav in cross-examination to establish the fact that the petitioner was the Commanding Officer from 29-4-2001 to 6-5-2001 and that he was personally not involved in despatching the letter on 12-5-2001. The petitioner had also sought to examine witnesses in support of his defence to establish that on a previous occasion when an officer had directly corresponded with the Chief of Army Staff and his complaints had been found true, that Officer had in fact been appreciated for bringing to the notice of the higher authorities illegalities and irregularities committed by his immediate superior and fellow Army Officer. In spite of such a specific request made by the petitioner repeatedly, the respondent-authorities rejected his request for examining his defence witnesses and for producing the documents though they were statutorily bound to do so under Rule 23(3) and (4) and Rule 26(2).

In view of the aforesaid facts and circumstances it is apparent that the rejection by the authorities of the petitioner's request for examining the witnesses in his defence by simply stating that they were irrelevant and denial of documents to him in spite of the aforesaid specific provisions of Rules 23 and 26 (2) and the clear opinion of Deputy Judge Advocate General in Paragraph 34 of his comments, vitiates the entire proceedings and renders them illegal and unsustainable in the eyes of law as the petitioner has been denied his valuable statutory right to defend himself, in fact, in the instant case the petitioner has been punished without giving him due and proper opportunity to defend himself in total violation of the procedure prescribed by law.

It is also clear from a perusal of the record of the summary trial that though the petitioner repeatedly submitted before the authorities that the charges relating to violation of Paragraph 557 of the Army Regulations could not be proceeded with any further against the petitioner as he had already been exonerated of the charges on his pleading guilty and submitting an unconditional apology, vide order dated 27-3-2002 the authorities have totally ignored this aspect. I am of the considered opinion that this aspect was also relevant as all the aforesaid complaints made by the petitioner related to the same irregularities and illegalities said to have been committed by his Commanding Officer, Col. Devinder Yadav and Major R.S. Dudee and all the four complaints made by him

were practically identical and, therefore, once the authority had already discharged the petitioner in respect of the last complaint made by him on 9-11-2001 and had already accepted his apology and dropped the charges, they were required to take into consideration the impact of the aforesaid order of discharge dated 27-3-2002 while considering charge Nos. 2, 3 and 4 levelled against the petition in the charge-sheet dated 26-9-2003, with all the material therein and the conclusion recorded by the authority. However, on a perusal of the record of the summary trial, I do not find any consideration of this aspect by the concerned authority. In fact, the order dated 27-3-2002 discharging the petitioner is not even on record in the proceedings of the summary trial. Moreover, as the charges against the petitioner had been dropped by the order, dated 27-3-2002, there was no adverse entry in the petitioner's service record which would have reflected that the petitioner had been discharged and, therefore, though a certificate in respect of the petitioner's service record finds place in the record of the summary trial, in the absence of any adverse entry or mention of the fact that the petitioner had been discharged vide order dated 27-3-2002 on a similar charge the authority concerned had no occasion to apply his mind to the aforesaid aspect.

For the aforesaid reasons the contention of the learned Counsel for the respondents that the petitioner had admitted the writing of complaints and, therefore, even in the absence of any evidence the finding of guilt in respect of the charge Nos. 2, 3 and 4 cannot be found fault with, deserves to be rejected as the authorities were bound to take into consideration the fact that the petitioner had already been discharged in respect of, submitting the complaints regarding the same incident on the basis of which he was being prosecuted and the fact that subsequent to his discharge, in accordance with the undertaking, he had not filed any complaint thereafter or repeated the alleged mistake and as his defence witnesses and documents in respect of these charges were also denied to him.

In view of the aforesaid analysis and discussion, I am of the considered opinion that the respondent-authorities have failed to follow the procedure prescribed by Rules 23 and 26 of the Army Rules by denying the petitioner the right to summon and get the statements of the defence witnesses recorded and by not supplying copies of the documents in support of his defence as a result of which the entire proceedings taken up against him is vitiated and rendered illegal as the petitioner has been deprived of his valuable statutory right to defend himself during the summary of evidence and summary trial. I am of the considered opinion that failure of complying with the procedure prescribed by Rules 23 and 26 of the Army Rules, which provide for giving an opportunity to the accused-officer to ask for documents and get the statements of his defence witnesses reduced to writing and to produce them during the summary trial, resulted in rendering the petitioner defenceless and as a consequence the entire disciplinary proceedings being illegal and the order of punishment and the review order being perverse, illegal and suffering from non-application of mind deserve to be quashed.

At this stage, it is relevant to take note of the fact that the petitioner has been subsequently promoted as a Lieutenant Colonel and, therefore, the summary trial cannot be held against him under the provisions of Section 84. That apart, as three years from the date of incident have elapsed a fresh trial against the petitioner is also not permissible in view of the provisions of Section 122 of the Army Act and, therefore, at this stage there is no provision in the Army Act or Rules which could permit recording of the statements of the defence witnesses in the summary of evidence afresh or fresh hearing of the defence witnesses during the summary trial nor is there any provision or justification for remitting the matter back for recording the statements of defence witnesses after such a long lapse of time. At this juncture, I may also take note of the specific fact as stated by the learned Counsel for the petitioner and not denied by the respondents that on the basis of the petitioner's complaints action was taken by the respondent-authorities by passing appropriate orders against his Commanding Officer, Col. Devinder Yadav and have also initiated proceedings against Major R.S. Dudee who has thereafter been cashiered from Army Services.

In the backdrop of the aforesaid facts and circumstances, I am of the considered opinion that the impugned order dated 1-10-2003 and the order passed in review, dated 27-9-2004 deserve to be and are hereby quashed.

The petition stands allowed accordingly.

In the facts and circumstances of the case, there shall be no order as to costs.