Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ WP (C) No. 2683 of 1995

Reserved on : April 03, 2008
Pronounced on : May 30, 2008

Gurnam Singh IC – 28082 K . . . Petitioner

through : Major K. Ramesh, Advocate

VERSUS

Union of India & Ors. . . . Respondents

through : Mr. Sanjeev Sachdeva, Advocate

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE J.M. MALIK

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The petitioner was tried by a General Court Martial (GCM) on two charges, which read as follows :-

> "(a) An omission prejudicial to good order and military discipline in that he on 03 July 1986 having collected two official files No. 1209/Accounts (closed) and No. 1209/A/Current from Havildar Bahuguna improperly failed to return the same to the custodian.
>
> (b) Using criminal force to a person subject to the Army Act being his subordinate in position in that he at Dehradun on 16 Aug 1986 used criminal force to Late Major AS Randhawa by throwing a chair on the said officer and gave blows on his face."

The petitioner was found guilty and sentenced *'to be cashiered from military service'*. The effect of this punishment is that not only

the petitioner lost his job, it deprived him of his pensionary benefits as well. The petitioner preferred a statutory petition under Section 164 of the Army Act. The competent authority in the Ministry of Defence, Govt. of India, though maintained the guilt and conviction of the petitioner and thus rejected the statutory petition to this extent, commuted the cashiering to dismissal from service vide order dated 18.9.1990. Challenging these orders, the present petition is filed. This is not the first petition by the petitioner and there is a history of litigation. We proceed to take note thereof along with the facts necessary for adjudication of this writ petition.

2. The petitioner was commissioned into the parachute regiment of the Indian Army on 2.3.1968. He performed his duties from time to time at different places and also earned promotion to higher ranks. On 21.5.1985, the petitioner was posted to 127 Infantry Battalion (TA) ECO as Company Commander of 'H' Company. On 10.6.1985, he was detailed to perform the duties of Second-in-Command and Unit Accounts Officers through a Battalion Routine Order. During this period, one Lt. Col. O.P. Sindhu was the Commanding Officer of the unit, under whom the petitioner was serving. As per the petitioner, the said Lt. Col. O.P. Sindhu was misappropriating and committing other irregularities in relation to the Government money. The petitioner in his capacity as Officiating Commanding Officer observed that Lt. Col. O.P. Sindhu had verified receipt of 20,000 kgs. of G.I. wire valued at Rs.3,06,000/- and had forwarded the bills for

making payment to the supplier, whereas no stores had been received on ground in the Unit. The petitioner queried from the Special Project Officer who was responsible for making the payment and also from Lt. Col. O.P. Sindhu in this regard which resulted in unpleasant exchange of words. Similarly, the petitioner made further queries about three duplicate bills of G.I. wire. On 1.7.1986, the petitioner submitted, in writing, his request for seeking an interview with Major General K.L.K. Singh, who was the then Addl. Director General, TA. The petitioner was granted audience on 3.7.1986 with the said Major General and the petitioner took file Nos. 1209/Accounts and 1209/A from the office to substantiate the allegations of misdeeds indulged in by Lt. Col. O.P. Sindhu and the SPO. The said audience took place in the presence of Lt. Col. O.P. Sindhu. Major General K.L.K. Singh (who later on became Lt. General) advised the petitioner to put up a written complaint through proper channel and the petitioner left the room after the audience, leaving said two files containing damaging and conclusively incriminating documents showing indulgence in and commission of fraud on the part of Lt. Col. O.P. Sindhu. In consequence of the said audience, the petitioner submitted a written complaint on 19.7.1986 and Staff Court of Inquiry was convened by HQ Sub Area on 24.7.1986 against Lt. Col. O.P. Sindhu.

3. However, subsequently on 1.5.1987, charge sheet was issued against the petitioner leveling the aforesaid two charges. One charge

pertains to missing of two files, which according to the petitioner contained incriminating material against Lt. Col. O.P. Sindhu. The defence of the petitioner was that he was falsely blamed for the missing of two files which he had kept with the then Major General K.L.K. Singh and, moreover, there could not have been any motive on the part of the petitioner as the petitioner had, in fact, placed reliance on the incriminating material contained in those files against Lt. Col. O.P. Sindhu. According to the petitioner, those files were, in fact, taken away by Lt. Col. O.P. Sindhu after the petitioner had left the office of Lt. Gen. K.L.K. Singh. He also pleaded that utilizing his influence as Commanding Officer, the said O.P. Sindhu obtained a note from Havildar Clerk Bahuguna that these files had been taken away by the petitioner.

The petitioner had denied the second charge as well and had contended that he was falsely implicated. As aforesaid, the general court martial found the petitioner guilty of both the charges and cashiered him from service. The petitioner filed post-confirmation appeal under Section 164(2) of the Army Act. During the pendency of the said statutory petition, the petitioner received show-cause notice dated 17/21.10.1988 asking him as to why his pension be not forfeited. The petitioner submitted his interim reply requesting the respondents to keep the matter pending till the statutory complaint was decided. As the decision of this petition was getting delayed, he even preferred WP (C) No. 11462/1989 in the Punjab & Haryana High Court, which was disposed of vide order dated 8.9.1989

directing the respondents to decide the post-confirmation petition within a period of four months. The petitioner filed another writ petition bearing WP (C) No. 1053/1990 in the year 1990 in the High Court of Punjab & Haryana which was dismissed as pre-mature, inasmuch as, the statutory petition was still pending decision. However, as the petition was not decided even after the lapse of four months time granted by the High Court, the petitioner filed Contempt Petition No. 439/1990 against the respondents on 25.9.1990. At this stage, the petitioner came to know that his post-confirmation petition had been decided vide orders dated 18.9.1990 and the same was dismissed, though the punishment of cashiering was commuted to one of dismissal from service. This rendered his contempt petition infructuous.

4. The petitioner, in these circumstances, filed another writ petition before the High Court of Punjab & Haryana against the show-cause notice for forfeiture of pension as well as his trial and the award of sentence of dismissal. This writ petition was, however, dismissed on the ground that the said High Court had no territorial jurisdiction. The petitioner filed yet another writ petition in the same High Court for grant of pensionary benefits, in response to which he has now been sanctioned 50% of the pension. That writ petition is still pending in the High Court of Punjab & Haryana. Insofar as the petition of the petitioner against the court martial as well as sentence of dismissal is concerned, after the dismissal thereof by the Punjab &

Haryana High Court for want of jurisdiction, these orders are challenged by means of the present petition.

5. This petition earlier came up for hearing and was allowed by a Division Bench of this Court vide judgment dated 2.5.2003. The Union of India, however, preferred SLP thereagainst, which was granted and the SLP is converted into Civil Appeal No. 1883/2004. It was finally heard and decided vide a detailed judgment dated 23.3.2004. The Supreme Court set aside the judgment of this Court and remitted the matter back for reconsideration. We may state at this stage that this Court, in its judgment dated 2.5.2003, set aside the impugned order *inter alia* on the ground that there was violation of Rule 37 of the Army Rules, 1954. The Apex Court, however, did not agree with the said view taken by this Court and held that there was no violation of Rule 37. It is also pointed out by the Supreme Court that the petitioner herein did not raise any plea either under Rule 44 or under Rule 51 alleging that the court martial was not properly constituted. The petitioner herein had also not raised the issue of violation of Rule 37 at the time of general court martial proceedings. The concluding portion of the judgment of the Apex Court, insofar as the question of violation of Rule 37 of the Army Rules is concerned, is reproduced below :-

> "In the instant case, the officiating General Officer Commanding, Major General Raj Kumar Singh approved the constitution of the court-martial and the officers were detailed for the said purpose. The proceedings dated 7.5.1987 are signed by Col. R.N. Singh and it is stated that it is by the order of the Officer Commanding. Therefore, we find there was no violation of sub-rule (3) of Rule 37. It is pertinent to note that

the respondent did not raise any plea either under Rule 44 or under Rule 51 alleging that the court-martial was not properly constituted. In order to ensure proper constitution of court-martial, detailed procedure is laid down under the Army Rules. Rule 41 says how the court-martial proceedings have to be commenced. It is stated that on the court assembling, the order convening the court shall be laid before it together with the charge sheet and the summary of evidence and also the ranks, names and corps of the officers appointed to serve on the court and the court shall satisfy itself that it is legally constituted. Rule 44 says that the order convening the court and the names of the presiding officers shall be read over to the accused and he shall be asked whether he has any objection to being tried by any officer sitting on the court. If the accused raises any objection, such objection shall be considered and disposed of in accordance with the provisions of that section. The accused is given opportunity to adduce evidence in support of his objection and if his objection is sustained in respect of any member, such member shall forthwith retire and the presiding officer shall appoint any officer in waiting. Rule 51 says that the accused before pleading to a charge, may offer a special plea to the general jurisdiction of the court, and if the court finds that anything stated in such plea shows that the court has no jurisdiction, it shall not proceed with the trial and adjourn, but report it to the convening authority. The above rules have been indicated to show that the delinquent officer would get ample opportunity to point out that the order convening the court-martial was defective.

Admittedly, the respondent did not raise any such objection, much less the violation of Rule 37. The respondent submitted that at the commencement of the court-martial he was not aware of the alleged violation of Rule 37 and that these facts came to his notice only later.

It is satisfactorily proved that sub-rules (1) and (3) of Rule 37 have been fully complied with and the High Court erred in finding that there is violation of Rule 37. Such finding is without any factual foundation. We reverse that finding on the question of non-compliance of Rule 37."

6. In the aforesaid circumstances, the Supreme Court remanded the case back for fresh consideration in the following manner :-

"In the impugned judgment, the High Court has made certain passing references regarding the merits of the case, though such matters were not dealt with in detail. It was also observed that the punishment imposed on the respondent was totally disproportionate. We do not express any opinion on other contentions raised by the respondent in this case. We feel that the matter requires to be re-considered by the High Court.

> In the result, we set aside the judgment of the High Court and remit the matter to be considered on all the points urged by the respondent, except his plea regarding the infraction of Rule 37 of the Army Rules, 1954…"

7. It is clear from the above that plea of the petitioner *qua* Rule 37 stands decided against him. Leaving that contention, we are to decide other issues raised afresh in this petition. The grounds which were raised by learned counsel for the petitioner, at the time of hearing, impugning the court martial proceedings may be stated in a summarized manner :-

(a) The averments contained in the first charge under Section 63 for non-returning the files does not reveal culpability or a criminal liability inviting penal consequences. Section 63 being a residuary section would invite strict interpretation for inviting penal action and consequences. Besides the petitioner had no interest, motive to keep these files as it was he who had complained on the basis of these two files against his Commanding Officer Lt. Col. O.P. Sindhu. This charge is also belied from the evidence on record which clearly revealed that the petitioner had left the files in the office. The submissions in this regard made before this Court are noticed in the judgment dated 2.5.2003. Even it was viewed by the DJAG that charge in this regard ought to be preferred against Lt. Col. O.P. Sindhu, Charge as it stands is vague and was incapable of being defenced.

(b) Second charge preferred against the petitioner under Section 47 is totally wrong and misconceived and hence no conviction can be sustained thereon. Section 47 punishes use of criminal force against a person subject to the Act who is subordinate in rank or position. As per the allegations the criminal force allegedly used by the petitioner was against Major A.S. Randhawa. Since

the petitioner was having a rank of Major, the victim Major A.S. Randhawa was not subordinate in rank. He was not subordinate in position to the petitioner and there is evidence in this regard placed on file. Rather Major A.S. RAndhawa was senior to the petitioner having been commissioned in the year 1963 and had been promoted to the rank of Lt. Col. (Time Scale) whereas the petitioner was commissioned in 1968 . With effect from 7.7.1986, the petitioner was removed from the post of Second-in-Command and the Unit Accounts Officer and in his place Major A.S. Randhawa was detailed to perform the duties of the Accounts Officer. The charge under Section 47 as such could not be preferred and is misconceived. This is substantiated by notes under Section 63 of the Army Act. In addition to the same, this charge is not sustainable in view of the fact that the same is not supported by the evidence on record. The detailed discussion in this regard is contained in the earlier judgment dated 2.5.2003 of this Court, which clinches the issue in favour of the petitioner.

(c) Punishment awarded to the petitioner is strikingly harsh, disproportionate to the gravity of the sentence. The evidence reveals that the petitioner was in fact victim of the wrath of Major A.S. Randhawa who was the aggressor. Secondly, the files were misplaced by Lt. Col. O.P. Sindhu as he was only the beneficiary and the petitioner had nothing to gain from the loss. Rather the petitioner was interested in showing the files to the authorities as he was complaining against Lt. Col. O.P. Sindhu for action. Failing to return these files would not attract such penal consequences as to result in dismissal of a Field Officer who had served the nation with pride, dignity and had complained against corruption. The sentence as such is strikingly disproportionate and extremely harsh and in itself would reveal infirmity requiring correction.

8. Learned counsel for the respondents refuted the aforesaid submissions and submitted that there was no infraction of any Rules or provisions of the Army Act. The court martial was properly convened; it held the proceedings in accordance with law giving full opportunity to the petitioner; there was no violation of principles of natural justice; the findings of the general court martial were appropriate and proper on the basis of material brought on record; this Court would not sit as an Appellate Authority over the said findings and further that the punishment was not disproportionate to the nature of charge. Detailed submissions on this aspect shall be taken note of while discussing the respective arguments.

9. As far as the first charge is concerned, which relates to the non-return of files of the petitioner to the custodian, argument of Major Ramesh, learned counsel for the petitioner, was that there could not have been any motive on the part of the petitioner to do so. This argument flows from the submission that the petitioner had rather made complaint against the Commanding Officer Lt. Col. O.P. Sindhu wherein he had leveled allegations of corruption against the said officer and in support of his version he had referred to those two files. The intention of the petitioner if at all would be to ensure that the files are not lost. On the other hand, it could be the motive of Lt. Col. O.P. Sindhu, or any other office at his instance, to see that the files are not available so that it becomes difficult to examine the veracity of the complaint filed by the petitioner in the absence of

those files. There appears to be significant force in this submission of learned counsel for the petitioner. The matter has not been examined by the GCM from this angle at all. It was a very vital aspect which should have been considered and discussed.

10. Learned counsel for the respondent had argued that the witness who deposed in the said court martial proceedings clearly stated that he had seen the petitioner taking away those files and, thus, there is evidence which links the petitioner with those files and this Court would not sit as an appellate authority over the findings of the GCM. He may be right in pointing out the scope of judicial review in such matters. However, if it is found that the findings are perverse and no reasonable person could have arrived at those findings, the Court has necessary jurisdiction to interfere. According to us, the present case is of that nature. While coming to this conclusion, we discuss some of the material evidence which has come on record and is totally ignored. The same is as follows:

11. Major A.S. Randhawa had written letter dated 22.7.1986 in which he stated that he had noticed the petitioner coming out of the meeting with Lt. General K.L.K. Singh. He has further mentioned in this letter that when the petitioner went inside, he was having certain documents/files, but when he came out he did not see the petitioner carrying any files in his hands. This letter is exhibited in the proceedings as Appendix 'DE' to Exhibit 'GG' of the GCM proceedings. We further find that after the two files went missing,

following noting was made by the respondent on the basis of preliminary inquiries :-

> "DJAG HQ Central Comd has appreciated the evidence for prosecution in paras 4 to 15 of their letter at PUC. It has formally been advised by the DJAG HQ Central Comd vide para 17 of the Rat that prima-facie case exists against the accused offr (Maj Gurnam Singh of 48 GL sec att the Jat Reg Centre) with regard to using criminal force against PW-6 and for his omission to return the account files taken by him. It has, however, been mentioned that the charge on account of omission to return the file will be weak as the only available evidence to this effect is available from the statement of Lt. Col. O.P. Sindhu who appears to be not of impeachable character. If so, he should be held responsible for the loss of life."

12. The aforesaid note reflects upon the character of Lt. Col. O.P. Sindhu and it is also recorded that Lt. Col. Sindhu should also be held responsible for loss of file. In view of the aforesaid nothing, how even the charge could be framed against the petitioner, and at the same time supporting Lt. Col. Sindhu, defies commonsense. There should have been some explanation on the part of the respondents as to why ultimately it was decided to rope in the petitioner with the said charge. In the counter affidavit filed by the respondents, it is submitted that on the written complaint of the petitioner a Court of Inquiry was convened by the Headquarter, Dehradun Sub-Area on 24.7.1986 against Lt. Col. O.P. Sindhu. It is also stated that on the basis of the said Court of Inquiry, which was convened against Lt. Col. O.P. Sindhu, Officiating GOC directed that action be taken against the petitioner herein for not reporting the matter earlier and for taking the files as well as for indulging in direct correspondence with the contractors. However, it is further stated in the counter

affidavit that the said recommendation was revised on 29.10.1986 as follows :-

> "I direct that administrative action be taken against IC-14764 Lt Col OP Sindhu of 127 Inf Bn (TA) ECO for showing visible lack in material management, viz. floating of tenders, receipt, maintenance and issue of stores, maintenance of proper ledger, for not utilizing 1700 kgs. of GI wire purchased on emergency basis as per his own statement from fourth week of May 86 to 1st week of July 86 as well as for not utilizing 20 bags of cement at all which were also purchased on emergent basis".
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> "Lt Col OP Sindhu was conveyed displeasure of the GOC."

Thereafter, why action was initiated against the petitioner going contrary to the letter dated 22.7.1986 of Major A.S. Randhawa and recommendation of GOC on 29.10.1986 is not stated. No such satisfactory explanation is forthcoming, which infuses further strength in the argument advanced by the petitioner that insofar as he is concerned, there could not have been any motive on his part in the loss of files. If at all, the interest of the petitioner was that the files remain intact and are used as evidence against Lt. Col. Sindhu. This is very important and clinching aspect of the matter which cannot be lightly brushed aside or lost sight off. According to us, it is sufficient to hold that there could not have been any such charge against the petitioner and even if a charge is framed against the petitioner, there is no convincing evidence, worth the name, to link the petitioner with the said charge.

13. The second charge against the petitioner relates to using criminal force against Late Major A.S. Randhawa by throwing a chair on the said officer and giving blows on his face. For the alleged act, the

petitioner is charged under Section 47 of the Army Act. Submission of learned counsel for the petitioner is that the said section has no application as Major Randhawa was not his subordinate, but was of the same rank and in the same rank he was even senior to the petitioner. To appreciate this contention, we first take note of the provisions of Section 47. It makes the following reading :-

> "**47. Ill-treating a subordinate.** – Any officer, junior commissioned officer, warrant officer or non-commissioned officer who uses criminal force to or otherwise ill-treats any person subject to this Act, being his subordinate in rank or position, shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

14. It is very clear from the language of this provision that the person against whom criminal force is used or who is ill-treated has to be subordinate in rank or position than the officer accused of such conduct. According to the petitioner, Major Randhawa was commissioned on 1.1.1963 whereas the petitioner was commissioned on 2.3.1968; Major Randhawa was promoted to the rank of Lt. Colonel (time-scale) and was, thus, senior to the petitioner.

15. Learned counsel for the respondent, on the other hand, submitted that Section 47 uses the expression *"rank or position"* and, thus, the officer who is victim of the criminal force or ill-treatment should be subordinate in rank or position and not necessarily lower in rank. Even if they are of same rank and the victim is lower in position, namely, the junior, Section 47 would be applicable. In persuading the Court to interpret Section 47 in the aforesaid manner, the

learned counsel, in contradistinction, referred to the provisions of Section 40 of the Army Act which deals with offences against *'superior officer'*, which reads as under :-

> "**40. Striking or threatening superior officers.** – Any person subject to this Act who commits any of the following offences, that is to say. –
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> (a) uses criminal force to or assaults his superior officer; or
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> (b) uses threatening language to such officer; or
>
> (c) uses insubordinate language to such officer,
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> shall, on conviction by court-martial,
>
> if, such officer is at the time in the execution of his office or, if the offence is committed on active serve, be liable to suffer imprisonment for a term which may extend to fourteen years or such less punishment as is in this Act mentioned; and
>
> in other cases, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned;
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> Provided that in the case of an offence specified in clause (c), the imprisonment shall not exceed five years."

He submitted that whereas the expression *'superior officer'* occurs in Section 40, Section 47 uses the term *'subordinate in rank or position'*. According to the learned counsel for the respondents, since the petitioner was senior to Major Randhawa, he would be senior in *'position'* and charge under Section 47, therefore, could be framed against him.

16. In order to show that the petitioner was superior in position than Major Randhawa, submission of learned counsel for the respondent was that the petitioner was holding a substantive rank of Major in

the regular Army, whereas Major Randhawa was an officer of Territorial Army, even though he was also holding the substantive rank. On this basis, relying upon para 36 of the Territorial Army Regulations, 1948, it was sought to be projected that Major Randhawa was junior in position. Para 36 of the said regulations reads as under :-

> "**36. Seniority – Territorial Army Officers vis-à-vis Regular Army Officer** – Territorial Army Officers when serving with officers of Regular Army will be junior to the Regular Army Officers in the same rank except that a Territorial Army Officer holding a substantive rank will be senior to a regular Army Officer holding the same rank in an acting capacity.
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> *Exception:* In the case of a Rly Engrs Group (TA), its 21C will be deemed to be senior than the Adm Officer of that unit."

It was also submitted that the petitioner had raised this issue, which was considered by the GCM and plea of the petitioner was rejected.

17. Refuting these submissions, learned counsel for the petitioner argued that the Army list maintains the Senior Roll of the officers in which Major Randhawa is shown senior to the petitioner in service. It was also argued that the GCM, while rejecting the plea of the petitioner, did not consider or discuss any of the points sought to be raised by the respondents now and, therefore, the decision of GCM on this aspect was not correct and was a fatal impropriety *per se* in view of Rule 62 of the Army Rules and Section 139 of the Army Act. He also placed reliance upon the judgment of this Court in ***Lt. Col. R.S. Bhagat v. Union of India,*** AIR 1982 Delhi 191.

18. We are of the opinion that the rank of both the officers was same. Since Major Randhawa was senior to the petitioner, *prima facie,* he cannot be treated as a person inferior in *'position'*. However, it is not necessary to record a conclusive finding on this aspect as we are of the opinion that because of this, no prejudice is caused to the petitioner and in the absence of prejudice, finding of the GCM cannot be quashed on this ground. Discussion in this respect is contained in the succeeding paragraphs.

19. Even when we proceed on the basis that Major Randhawa was in superior position than the petitioner, we are of the view that no prejudice is caused to the petitioner by proceeding against him under Section 47 of the Army Act. The allegations of charge were very clear and the petitioner was not only made aware of the charges but knew fully well as to what he had to defend. If Major Randhawa was to be treated as higher in position, the petitioner could have been charged under Section 40 of the Army Act, punishment whereunder is much more severe than the one under Section 47 of the Army Act. In any case, on same allegation charge could have been framed under Section 63 of the Army Act as well. It is now well established that mere nomenclature of the section under which a person is charged would not be a ground to quash the proceedings unless it is shown that it has resulted in some prejudice to the charged officer. When that is not the case herein, the charge No.2 levelled against the petitioner cannot be invalidated on this ground.

20. Next submission is that there was no sufficient evidence to prove the charge and, in fact, as per the evidence, the allegations which are shown to have been proved are different than the allegations for which the petitioner was charged.

It was submitted that the allegation in the charge was that the petitioner used criminal force to Major Randhawa by: (a) throwing a chair on the said officer; and (b) giving blows on his face. Major K. Ramesh, learned counsel for the petitioner, took pains to go through the evidence led before the court of inquiry on the basis of which it was submitted that Rifleman Mahabir Prasad had made a deposition against the petitioner which was contradictory, inasmuch as, on the one hand he stated that *"the chair struck him on his turban and **forehead**"*, while in the same deposition later on he deposed that *"the witness now reiterates that the chair did not hit late Major AS Randhawa on his **head**"*. Learned counsel queried as to how could the chair hit Major Randhawan on his forehead but not on his head. He, thus, argued that in presentation of the case the Judge Advocate was required to highlight even these points to the court in equal magnitude thereby displaying transparency and honesty. He further argued that most important witness in respect of this charge was Dr. Lt.Col. P.S. Mehta (PW-6). His deposition was very categorical where the wounds of Major Randhawa (under smell of liquor at 1000 hours) had been discussed as superficial vis-à-vis the petitioner. He submitted that though the charge sheet states of throwing a chair

at the victim and also giving blows on his face, at the same time the medical evidence talks of wounds on the left wrist and right knee, which are opined as could be *"due to fall also"*. There is no injury at all on his face, whereas the petitioner has contusion over the left cheek bone, which was very prominent as in red and blue marks under the left eye. Therefore, according to learned counsel for the petitioner, it was the petitioner who in effect was the victim in this case. Alternatively, at best, it was a case of *"contributory negligence"* where Major Randhawa also used criminal force by hitting the petitioner near the eye. This fact was not taken into consideration at all, argued the learned counsel.

Learned counsel for the respondent, on the other hand, submitted that there was sufficient evidence on record which proved the charge against the petitioner of using criminal force.

21. We have gone through the court martial proceedings as well, which were produced before us, in order to appreciate the rival contentions. We may remind ourselves that the charge against the petitioner is using criminal force by *"throwing a chair on the said officer and giving blows on his face"*. Clearly the first component of the charge is that the petitioner threw a chair on Major Randhawa. Evidence to this effect has come on record. Whether this chair struck on his turban and forehead or did not hit his head would, therefore, be not very material. Thus, the alleged contradiction pointed out in the testimony of Rifleman Mahabir Prasad would not be of much

consequence. There are other witnesses also who have testified the said incident. Having said so, at the same time, we feel that it is clear from the testimony of the doctor (PW-6) as well as medical evidence that there are no injuries on the face of Major Randhawa. Therefore, the component of charge where it is alleged that the petitioner gave blows on the face of Major Randhawa is not substantiated fully. Even if blows were given by the petitioner on the face of Major Randhawa, it hardly had any impact. Coupled with this, when we examine the opinion that injuries on the left wrist and right knee could be due to a fall as well and further that even the petitioner suffered injuries in the scuffle between him and Major Randhawa, we are of the opinion that the petitioner could not have been singled out with the said charge of using criminal force. It appears that there was some fight between the two officers and both used criminal force against each other. We are, therefore, of the opinion that though charge No.2 is partially proved, in the light of the aforesaid circumstances, it cannot be said that the charge proved against the petitioner was of a very serious nature that it warranted the severe punishment of cashiering from military service thereby depriving him even of his pensionary benefits. There is all the more reason to treat this punishment as harsh when charge No.2 is knocked out inasmuch as punishment is given by the competent authority keeping in view that both the charges were proved against the petitioner. As we have held that charge No.1 is not proved and charge No.2 is only partially proved and, above all, there are

mitigating circumstances, it would be necessary to remit the case back to the competent authority to reconsider the quantum of punishment imposed upon the petitioner keeping in view our aforesaid discussion and observations in this judgment.

22. This writ petition is accordingly partially allowed. The impugned judgment is set aside. Matter is remitted back to the competent authority to decide the quantum of punishment afresh. We would hope that the competent authority shall dispassionately and objectively consider this aspect of the matter by giving fair treatment so that there is a quietus to this litigation for all time to come. In the facts and circumstances of this case, we leave the parties to bear their respective costs.

(A.K. SIKRI)
JUDGE

(J.M. MALIK)
JUDGE

May 30, 2008
nsk