SUPREME COURT OF INDIA

Union of India & Ors.

Vs.

Vishav Priya Singh

C.A.No.8360 of 2010

(T.S.Thakur,CJI., Uday Umesh Lalit,JJ.,)

05.07.2016

JUDGMENT

Uday Umesh Lalit,J.,

1. Civil Appeal Nos.8360 of 2010 and 8830-8835 of 2010, at the instance of Union of India challenge correctness of the common judgment and order of the High Court of Delhi dated 25.01.2008 in Writ Petition (Civil) Nos.2511 of 1992, 3519 of 1998, 6185 of 2002, 2433 of 2003, 17622 of 2004, 18185 of 2004 and 20233 of 2005. Civil Appeal No.8838 of 2010 seeks to assail the decision of the High Court of Delhi dated 02.05.2008 in Writ Petition No.4341 of 1999 which relied upon the earlier decision dated 25.01.2008.

2. For the sake of facility we may reproduce Paragraph Nos.2 to 7 of the judgment of the High Court of Delhi dated 25.01.2008 which cull out the factual matrix in each of the petitions before it. Said Paragraph Nos.2 to 7 are as under:-

> "2. In CWP 2511/1992 the Petitioner, Ex. L Nk Vishav Priya Singh, has alleged that he had made complaint against the CO, 19th Batallion Mahar Regiment of prejudicial treatment meted out by him to the Petitioner. It has been asseverated in the Writ Petition that initially the Brigade Commander had nominated the CO, 17th Kumaon to investigate into the Petitioner's complaint. The CO of 19th Mahar through manipulation got his close friend, the CO of 18th Batallion, Punjab Regiment, detailed to investigate these complaints. The Petitioner was ordered to proceed to 18th Punjab Regiment. Eventually, the CO, 18th Punjab Regiment tried the Petitioner by SCM and convicted/sentenced him to suffer Rigorous Imprisonment of six months in the Civil Jail and dismissal from service. The argument is that since the Petitioner belonged to the 19th Mahar, but was tried by SCM held by CO of 18th Punjab Regiment, the Trial was rendered coram non judice It is important to mention that the Petitioner had made complaints against his CO on 26.3.1990; he was interviewed by the Brigade Commander on 30.5.1990; was asked to appear before the CO, 18th Punjab Regiment on 15.7.1990; was charged under Section 41(2) of the Army Act for

disobeying a lawful command given by a superior officer in that he, when asked to accept a letter dated 16.7.1990, requiring his presence in CO's Office for investigation in Unit refused to do so and disobeyed verbal orders.

2. Ex. NK Prem Singh has filed CWP 3519/1998 pleading that he belonged to 15 INF DIV ORD Unit which assertion stands admitted. On 17.4.1998 he was charged under Section 40(a) of the Army Act for using criminal force to his superior officer in that he, at Amritsar on 20.10.1997 struck with an iron implement on the head and legs of Company Hav. Major Clerk. The Petitioner was sentenced to (a) reduced to ranks, (b) dismissed from service and (c) Rigorous Imprisonment for six months in the Civil Jail The CO, 194 Field Regiment, convened the SCM which concluded on 21.4.1998. The Respondents have pleaded that the Petitioner was attached for disciplinary purposes with 194 Field Regiment vide letter dated 21.10.1997. In paragraph 3 of the Counter Affidavit it has been asseverated that the 'occurrence for which the petitioner was taken into custody took place on the evening of 20.10.1997. He was taken into custody by the CO of his Unit and since his Unit had no quarter guard, the petitioner was shifted to the quarter guard towards of 194 Field Regiment for safe custody'. It has further been pleaded that by letter dated 24.10.1997 the Petitioner was attached with the Unit for disciplinary purposes, to remain attached till finalisation of the investigation against him. In other words, six months had elapsed between the incident which is the subject matter of the SCM and the holding of the SCM. 4. CWP 6185/2002 has been filed by Ex. NK Dwarka Prasad stating that he belonged to 24th Rajput Regiment. In the year 2000 he was temporarily attached to 61st Infantry Brigade to perform the duties as a Sahayak. By Charge-sheet dated 29.10.2001 under Section 69 of the Army Act he was accused of committing a civil offence on 25.10.2001, that is to say, using criminal force to a woman with an intent to outrage her modesty and on that very date the Commander, 65th Infantry Brigade ordered that he be tried by an SCM. The Petitioner was tried by the SCM between 3.11.2001 and 5.11.2001 and was convicted/sentenced (1) to be reduced to ranks (ii) to be dismissed from service, (iii) to suffer imprisonment in civil jail for one year.

5. CWP 2433/2003 has been filed by Ex. Hav Dharambir Kanker who had been promoted to the rank of Havaldar in the Corps of the Military Police. After sixteen years he was posted to 4th Corps Provost Unit at Tezpur in Assam. By Charge-sheet dated 9.6.2000 the Petitioner was accused of making sundry accusations against a person subject to the Army Act. On 22.6.2000 the SCM sentenced the Petitioner (a) to be reduced to -the ranks and (b) to be dismissed from service.

6. CWP 20233/2005 has been filed by Sepoy U.S. Mishra stating that he was enrolled in the Indian Army in March, 1987 and that on 18.3.1999 he was posted to 38 defence Medical Store Depot. By letter dated 27.3.2002 the Petitioner was attached, for disciplinary purposes, to 38 AMSD Blocks. The Petitioner was, along with 15 Army personnel, tried by SCM between 20.12.2004 and 4.1.2005 by CO 118 Field Regiment where the Petitioner was attached for disciplinary purposes. The first charge under Section 52(f) of the Army Act was that the Petitioner between 4.8.1999

to 6.6.2001, with intent to defraud, improperly altered several entries in the Issue Vouchers. The Petitioner was found guilty and sentenced to be reduced to ranks on 4.1.2005. The contention is that the CO of 118 Field Regiment could not try the Petitioner by SCM since he was only 'attached with the Unit'. Delay in convening the SCM would also obviously come in for consideration.

7. The facts in CWP 17622/2004 filed by Sep/Clerk S.K. Nair and CWP 18185/2004 filed by Sep/Clerk Balwinder Singh are similar. In September 1998 a Court of Inquiry was ordered to investigate into the irregular enrollment during a recruitment rally held at Pathankot in March 1995. The Petitioners' assert that since they were posted to 14th Sikh Regiment, only the CO of that Unit was competent to try them by an SCM. Accordingly, SCM by the CO of 1 TB ASC Centre, Gaya was legally incompetent and non-est. Delay in convening the SCM would also obviously come in for consideration."

3. Writ Petitions before the High Court of Delhi raised two common questions of law pertaining to Summary Courts Martial (hereinafter referred to as SCM):-

(a) whether an SCM can be convened, constituted and completed by the Commanding Officer ("CO" for short) of a Unit to which the accused did not belong and

(b) the circumstances in which the SCM can be convened rather than a General Courts Martial ("GCM" for short), a District Courts Martial ("DCM" for short) or Summary General Courts Martial ("SGCM" for short) as envisaged in Section 108 of the Army Act 1950 (hereinafter referred to as the Act). While allowing these Writ Petitions, the High Court in Paragraphs 20, 22, 23 and 24 of its judgment observed as under:

"20. An SCM can legitimately be convened where there is grave and compelling cause for taking immediate action which would be defeated if reference to a District Court Martial or Summary General Court Martial is made. In other words, holding of an SCM is the exception and not the rule. From the multitude of possible offences it is only those envisaged in Sections 34, 37 and 69, that can be tried by an SCM, further fortifying the exceptional and extraordinary character of an SCM. We think it necessary to underscore that it is not proper to convene an SCM merely because the offence(s) with which a sepoy of the force is charged finds mention in the enumeration contained in these three Sections. What is of pre-eminence in convening an SCM is that it should be found imperative that immediate action is manifestly necessary. Therefore, it is essential that this factor, viz. need to hold a trial immediately, is articulated and reasoned out in writing in the order convening the SCM. Failure to do so would create good reason to quash the SCM itself. Routinely, and certainly far too frequently, the sentence passed by SCMs violates the spirit of Regulation 448(c) (supra) thereby taking away the sepoys' livelihood without affording them the normal procedural protections of law.

22. We shall endeavor to discharge this duty by enunciating firstly that it is the CO of the Unit to which the accused belongs who is empowered to convene an SCM. This is not a empty formality or pointless punctilio. There is an abiding and umbilical connection between the CO and his regime. The Ranks have always looked up at their CO as the father figure who will be as concerned with their welfare as with their discipline. This is the only conclusion that can be arrived at on a holistic reading of the Army Act, Rules and Regulations.

23. As per our analysis above, the exception to this Rule is restricted to the case of Deserters and that too where the CO of the Unit to which they belong is not readily and easily available. Secondly, an SCM must be the exception and not the Rule. It can only be convened where the exigencies demand an immediate and swift decision without which the situation will indubitably be exacerbated with widespread ramifications. Obviously, where the delinquent or the indisciplined action partakes of an individual character or has civil law dimensions, an SCM should not be resorted to. Delay would thus become fatal to an SCM. Thirdly, the decision to convene an SCM must be preceded by a reasoned order which itself will be amenable to Judicial Review. We are certain that once this formality is complied with, the inevitable disregard of the accused rights for a fair trial shall automatically be restricted to those rare cases where the interests of maintaining a disciplined military force far outweigh the protection of the minor civil rights of a citizen of India.

24. In this analysis of the law in the context of the factual matrix spelt out in the Petitions, we set aside the verdict of the impugned SCMs on the short ground that it was not convened, constituted and completed by the CO of the Unit to which the Petitioner belonged. We are fully mindful of the fact that in Vishav Priya Singh's petition the situation is a complex one, inasmuch as the allegations have been levelled against the CO of the Unit to which the Petitioner belongs. If the CO were to himself convene the SCM it would tantamount to his being a judge in his own cause. It has so often been quipped in the portals of the Court that hard cases should not make bad law. Therefore, solution may lie in constituting any other Court Martial, on an emergency footing if the circumstances so dictate. None of the Petitioners have been charged with the most reprehensible offence conceivable in the Armed Forces, that is of Desertion. Even if so charged it would have to have been further established, as a pre-condition for the holding of an SCM by the CO of the Unit to which the Petitioner was attached, that the CO of the Unit to which the accused belonged was serving in a high altitude area, or overseas or engaged in counter-insurgency operations or active hostilities or in Andaman and Nicobar Islands. We clarify that since the Trial is non est, the Respondents shall be free to proceed against the Petitioners de novo in accordance with law."

4. During the course of its judgment, the High Court of Delhi considered Sections 116 and 120 of the Act along with Note 5 below Section 116 and Note 5 below Section 120 as well as

Paragraph 381 of the Defence Service Regulations (hereinafter referred to as the "DSR"). According to the High Court in cases concerning trial of deserters as dealt with in Paragraph 381 of the DSR, a specific exception was carved out enabling CO of a unit other than the one to which the accused belonged to convene, constitute and complete an SCM. Barring such exception, according to the High Court, it is the CO of the unit to which the accused belonged, who alone is empowered to convene, constitute and complete an SCM. The High Court further held that for convening an SCM it was imperative that immediate action was manifestly necessary.

5. Along with the Appeals arising from the decision of the High Court of Delhi, Civil Appeal Nos.2547-2550 of 2011 at the instance of Original Writ Petitioners, challenging the correctness of the common decision of the High Court of Rajasthan at Jaipur dated 31.08.2006 dismissing their Appeals arising from dismissal of their writ petitions, were also placed before us. Though the question as regards competence of the CO of a Unit other than the one to which the accused belonged to convene, constitute and complete an SCM, was not raised before the High Court of Rajasthan, the other question as to the circumstances in which an SCM could be convened rather than a GCM or DCM or SGCM did arise in the matters dealt with by the High Court of Rajasthan. In any case, we proceed to consider these appeals even with regard to the former question.

6. The factual aspects of the matters which were dealt with by the High Court of Rajasthan, as found in its judgment relating to the present appellants, were as under:-

> "In Writ Petition no.2490/1987 petitioner Roop Singh was found by the Duty Officer running from the direction of out-of-bound area at about 0030 hours in the night of 17/18 May, 1987 when he was supposed to be on sentry duty for which he was tried by summary court martial for committing an act prejudicial to good order and military discipline under Section 63 of the Army Act. Before being subjected to court-martial, summary of evidence was recorded in presence of an independent witness, the charge and names of witness were made known to him. The petitioner refused to accept copy of the charge-sheet and the summary of evidence. During summary court-martial proceedings, in the circumstances, charge was read over to him in presence of two witnesses. On completion of the proceedings, he was sentenced to one year's rigorous imprisonment which was later reduced to six months' and dismissed from service on 14.6.1987. From the reply of the respondents it appears that the incident had taken place when the unit was posted 1.5 kms. from the border during Operation Trident'. An incident had occurred in the neighbourhood in which a woman had been reportedly raped by some army personnel and in the circumstances, instructions had been issued declaring the adjoining villages as 'out-of-bound' area. In violation of the instructions, the petitioner went to the said area, he was seen in the midnight running from that direction. He took the plea that he had gone to that side to know the password. The reply states that earlier two red ink entries had been made against the petitioner.(i) for absence without leave under Section 39(a) of the Army Act; and (ii) for committing act prejudicial to good order and military discipline

(consuming liquor) under Section 63 of the Army Act. At the relevant time, he had four years and ten months service to his credit including one year as a recruit. In Writ Petition No.5506/1994, petitioner Dilip Singh was enrolled in the Army in 1986 as Sepoy (Nursing Assistant). He was charged with absence without leave from the unit lines from 1600 to 2200 hours on 1.8.1993 and using criminal force to his superior officers namely Sub./NA H.N.Gautam and Hav/NA Shawale Babasahab Shrimuri whom he allegedly assaulted by hands on their face and chest. Summary of evidence was recorded. He declined to cross-examine and accepted his guilt. He was supplied copy of charge-sheet, summary of evidence. At the stage of summary court-martial, he was again apprised of the charges and consequences of his pleading guilty. The petitioner again admitted his guilt. He was punished with three months' rigorous imprisonment and dismissed from service on 7.8.1993. He preferred appeal without any success. In Writ Petition No.5689/1994, petitioner Bhagwan Sahai was enrolled as Sepoy in the Army on 8.1979. While he was posted with Det.515 ASC Bn attached with 5011 ASC Bn(MT), he was sanctioned 42 days annual leave from 16.3.1992 to 26.4.1992. He failed to report on 27.4.1992. He had been informed about refusal of his request for extension of leave. He ultimately submitted joining on 2.2.1993 after remaining wilfully absent from duty for 302 days. Charge-sheet was served and summary of evidence was recorded in course of which he was afforded opportunity to cross-examine witness and examine his own in defence. He declined to cross-examine the witnesses and make any statement in his defence. Instead, he admitted his guilt. Summary Court Martial was thereafter held. Charge was explained and papers were supplied, and he was provided with 'friend of accused' and informed of the consequences of pleading guilty. After going through the papers supplied to him, he admitted his guilt which was recorded. He was declared deserter and held guilty of the charge under Section 38(1) of the Army Act and dismissed from service on 8.4.1993. He preferred appeal which was rejected on 26.7.1994. In Writ Petition No.6134/1994, petitioner Chatar Singh was enrolled in the Army on 28.9.1976. He proved to be the habitual absentee. He remained absent from duty without leave for 12 days from 1.1.1982 to 2.11.1982 for which he was awarded punishment of 21 days rigorous imprisonment in military custody on 6.12.1982. He overstayed leave without sufficient cause for 05 days from 8.10.1991 to 13.10.1991 for which he was awarded penalty of reduction in rank after Summary Court Martial. The punishment was set aside on technical ground and the authority was advised to hold de novo proceeding. After fresh proceeding, the same punishment of reduction in rank was awarded on 24.10.1992. He again remained absent without leave for 16 days from 28.10.1992 i.e. within four days of the above order of punishment. Earlier too, he had overstayed leave for 02 days from 13.7.1992 to 14.7.1992, and remained absent without leave from 19.8.1992 to 01.09.1992 for which he was subjected to court martial. In course of the summary court marital proceeding he pleaded guilty. He had been told about nature of the charge and consequences of pleading guilty and difference in procedure in case of pleading guilty. He was found guilty of the charge under Section 39 (a) and (b), and dismissed from service on 5.1.1993. He preferred appeal which was rejected on 28.6.1994."

7. The submissions advanced before the High Court of Rajasthan were rejected by the High Court after considering the relevant statutory provisions. It was observed that the rules in question not only contained sufficient safeguards but also ensured fair degree of transparency in the proceedings. It was observed:-

> "If the decision of the commanding officer under Rule 22 to try an accused by summary Court-martial depends on the nature of the charge, evidence collected at the stage of hearing on the point of charge, it is clear that trial by summary Court-martial depends on facts of the particular case, and if that is so, the sub-mission of the counsel that the choice of trial by summary Court-martial depends on status of the offender and not on nature of the offence must be rejected. This was the thrust of the case of the petitioner. We find no substance therein"

8. Civil Appeal CAD Nos.13803 and 18038 of 2015, at the instance of Union of India seek to challenge common judgment and order dated 13.12.2015 passed by the Armed Forces Tribunal, Kolkata in TA Nos.6 and 8 of 2011. Though one of the questions raised was relating to the competence of the CO of the Unit where the accused were later sent on attachment, to convene, constitute and complete the SCM, the Tribunal found on facts that the offence in respect of a major charge was not proved. It however found that the charge in respect of a minor offence stood proved and thus awarded punishment of seven days' detention with consequential directions protecting their retiral benefits.

9. In Civil Appeal No.6679 of 2015 decision of the High Court of Rajasthan dated 24.01.2014 dismissing Civil Writ Petition No.401 of 2014 affirming the decision of the Armed Forces Tribunal, Jaipur in dismissing/rejecting the challenge to the sentence of dismissal from service and rigorous imprisonment awarded by an SCM, is under challenge before this Court. In this case the challenge was negated on facts though one of the questions raised pertained to the competence of the CO of the attached Unit, to convene, constitute and complete the SCM.

10. In these appeals, by order of this Court dated 12.11.2014, Mr. Arun Mohan and Ms. Jyoti Singh, learned Senior Advocates were appointed amicus curiae to assist this Court. We are deeply grateful for the assistance rendered by them. It was submitted by Mr. Arun Mohan, learned Amicus Curiae that absence of an appeal from the decision of an SCM did weigh with the High Court of Delhi but that factor would stand modified with the enactment of the Armed Forces Tribunal Act, 2007 which came into force on and with effect from 16.02.2008. He further submitted that Note 5 below Section 120 considered by the High Court was already deleted vide Government Order dated 28.01.2001. In his submission, the sentence appearing in Paragraph 20 of the judgment of the High Court, "From the multitude of possible offences it is only those envisaged in Sections 34, 37 and 69, that can be tried by an SCM, further fortifying the exceptional and extraordinary character of an SCM" was not correct. Ms. Jyoti Singh, learned Amicus Curiae submitted that SCM was available only in the Army Act and not in the Air Force Act or in the Navy Act, that in SCMs there was less observance of due process of law even though the procedure contained in the Statute was in

tune with concept of fair trial, that the quantum of punishment awarded in SCMs was hugely disproportionate to the offences and that the provisions enabling convening of an SCM ought to be used in rarest of the rare cases. In her submission an accused should be tried by CO of the parent unit of the accused. Mr. R. Balasubramanian appearing for the Union of India submitted that there was nothing in the Act to suggest that it is only the CO of a Unit to which the accused belonged, who alone could validly convene, constitute and complete an SCM and according to him even a CO of a Unit to which the accused was attached or later sent on attachment would have requisite competence. Learned Counsel appearing for the respondents led by Mrs. Rekha Palli, learned Senior Advocate supported the view taken by the High Court of Delhi. In matters arising from the High Court of Rajasthan, learned counsel appearing for the appellants led by Ms. Aishwarya Bhati, learned Advocate submitted that the view taken by the High Court of Rajasthan was not correct.

11. Chapter X of the Act deals with "Courts Martial" and the relevant Sections are:-

> "108. Kinds of courts- martial. -For the purposes of this Act there shall be four kinds of courts- martial, that is to say,-
>
> (a) general courts- martial;
>
> (b) district courts- martial;
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> (c) summary general courts- martial; and
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> (d) summary courts- martial.
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> 109. Power to convene a general court- martial.- A general court- martial may be convened by the Central Government or the Chief of the Army Staff or by any officer empowered in this behalf by warrant of the Chief of the Army Staff.
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> 110. Power to convene a district court- martial. -A district court- martial may be convened by an officer having power to convene a general court- martial or by any officer empowered in this behalf by warrant of any such officer.
>
> 112 Power to convene a summary general court- martial. - The following authorities shall have power to convene a summary general court- martial, namely,-
>
> (a) an officer empowered in this behalf by an order of the Central Government or of the Chief of the Army Staff;
>
> (b) on active service, the officer commanding the forces in the field, or any officer empowered by him in this behalf;

(c) an officer commanding any detached portion of the regular Army on active service when, in his opinion, it is not practicable, with due regard to discipline and the exigencies of the service, that an offence should be tried by a general court- martial.

113. Composition of general court- martial.- A general court- martial shall consist of not less than five officers, each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain.

114. Composition of district court-martial. -A district court- martial shall consist of not less than three officers, each of whom has held a commission for not less than two whole years.

115. Composition of summary general court-martial. –A summary general court-martial shall consist of not less than three officers.

116. Summary court-martial. -(1) A summary court- martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court. (2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed[1].

118. Powers of general and summary general courts- martial. -A general or summary general court- martial shall have power to try any person subject to this Act for any offence punishable therein and to pass any sentence authorised thereby.

119. Powers of district courts-martial. -A district court- martial shall have power to try any person subject to this Act other than an officer or a junior commissioned officer for any offence made punishable therein, and to pass any sentence authorised by this Act other than a sentence of death, transportation, or imprisonment for a term exceeding two years: Provided that a district court-martial shall not sentence a warrant officer to imprisonment.

120. Powers of summary courts-martial. -(1) Subject to the provisions of sub- section (2), a summary court- martial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court- martial for the trial of the alleged offender, an officer holding a summary court- martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69, or any offence against the officer holding the court.

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[1]Below Section 116 following Note 5 appears in the Manual" "Note 5:- See Regs Army para 381 for the circumstances under which a CO of a different unit may hold the trial by SCM of a person subject to AA" .

(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.

(4) A summary court-martial may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section(5).

(5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant colonel and upwards, and three months if such officer is below that rank. "

12. Provisos to Sub-Rules 2 and 3 of Rule 22 in Section 1 of Chapter V of the Army Rules 1954 (hereinafter referred to as the "Rules") under the sub-heading "Power of Commanding Officers" also deal with issues concerning trial by SCM . Said Rule 22 is as under:

"22. Hearing of Charge. − (1) Every Charge against a person subject to the Act shall be heard by the Commanding Officer in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call such witness and make such statement as may be necessary for his defence: Provided that where the charge against the accused arises as a result of investigation by a Court of inquiry, wherein the provisions of rule 180 have been employed with in respect of that accused, the commanding officer may dispense with the procedure in sub-rule (1).

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, he is satisfied that the charge ought not to be proceeded with: Provided that the commanding officer shall not dismiss a charge, which he is debarred, to try under sub-section (2) of Sec. 120 without reference to superior authority as specified therein.

(3) After compliance of sub-rule (1), if the commanding officer is of opinion that the charge ought to be proceeded with, he shall within a reasonable time−

(a) Dispose of the case under section 80 in accordance with the manner and form in Appendix III; or

(b) Refer the case to the proper superior military authority; or

(c) Adjourn the case for the purpose of having the evidence reduced to writing; or

(d) If the accused is below the rank of warrant officer, order his trial by a summary court-martial: Provided that the commanding officer shall not order trial by a summary court-martial without a reference to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender unless−

(a) The offence is one which he can try by a summary court-martial without any reference to that officer; or

(b) He considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline.

(4)Where the evidence taken in accordance with sub-rule

(3) of this rule discloses an offence other than the offence which was the subject of the investigation, the commanding officer may frame suitable charge (s) on the basis of the evidence so taken as well as the investigation of the original charge."

13. In Section 2 of the Rules under the heading "General and District Courts Martial" and under sub-heading "Convening of Court", Rules 39 and 40 of the Rules are as under:

"39. Ineligibility and disqualification of officers for court-martial.−

(1) An officer is not eligible for serving on a court-martial if he is not subject to the Act.

(2) An officer is disqualified for serving on a general or district court-martial if he−

(a) Is an officer who convened the court; or

(b) Is the prosecutor or a witness for the prosecution; or

(c) Investigated the charges before trial, or took down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

(d) Is the commanding officer of the accused, or of the corps to which the accused belongs; or

(e) Has a personal interest in the case.

(3) The provost-marshal or assistant provost-marshal is disqualified from serving on a general court-martial or district court-martial.

40. Composition of General Court-martial. −

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

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

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

14. In Section 3 of the Rules, Rule 109 deals with swearing or affirming of Court and interpreter which Rule also sets out the concerned forms of oath and affirmation. Rule 133 dealing with review of proceedings of an SCM is as under:-

"133. Review of proceedings. −The proceedings of a summary court-martial shall, immediately on promulgation, be forwarded (through the Deputy Judge-Advocate General of the command in which the trial is held) to the officer authorised to deal with them in pursuance of section 162. After review by him, they will be returned to the accused person's corps for preservation in accordance with sub-rule (2) of rule 146."

15. In Section 4 of the Rules dealing with "General Provisions" applicable to all kinds of Courts Martial, Rule 146 of the Rules states as under:-

"146. Preservation of proceedings. −

(1) The proceedings of a court-martial (other than a summary court-martial) shall, after promulgation, be forwarded as circumstances require, to the office of the Judge-Advocate General, and there preserved for not less, in the case of a general court-martial, than seven years, and in the case of any other court-martial, than three years.

(2) The proceedings of a summary court-martial shall be preserved for not less than three years, with the records of the corps or department to which the accused belonged."

16. Lastly, we may also quote Regulations 9 and 381 of the DSR which are to the following effect:-

"9.Commanding Officer.- Except where otherwise expressly provided in these Regulations, the Commanding Officer of a person subject to the Army Act is either:-

(a) The officer who has been appointed by higher authority to be a commanding officer while able effectively to exercise his power as such, or

(b) Where no appointment has been made, the officer who is, for the time being, in immediate command of –

(i) The unit to which the person belongs or is attached to , or

(ii) Any detachment or a distinct sizeable separate portion of a unit with which the person is for the time being serving. and in respect of which it is the duty of such officer, under these Regulations or by the custom of ;the service, to discharge the functions of a Commanding Officer."

381- Trial of Deserters - Under normal circumstances trial by summary court martial for desertion will be held by the CO of the unit of the deserter. However, when a deserter or an absentee from a unit shown in column one of the table below surrenders to, or is taken over by, the unit shown opposite in column two and is properly attached to and taken on the strength of the later unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by summary court-martial by the OC of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter-insurgency operation or active hostilities or Andaman and Nicobar Islands. In no circumstances will a ;man be tried by summary court-martial held by a CO other than the CO of the unit to which the man properly belongs a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs.

TABLE

Column one	Column two
Armoured Corps Regiment	Armoured Corps Centre and School
A unit of Artillery	..Regimental Centre Concerned
A Unit of Engineers	..Headquarters Engineers Group, concerned
A unit of Signals	.. Signal Training Centre, Jabalpur
Infantry battalion	..Regimental Centre concerned
Gorkha Rifle battalion	Gorkha Regimental Centre concerned

ASC unit	ASC Centre concerned
RV Crops ..	RVC Centre

This rule is not intended to limit the power of any convening officer, who at his discretion may order trial by General, Summary General, or District Court Martial at any place, if such a course appears desirable in the interest of discipline."

17. Chapter X of the Act after setting out four kinds of Courts Martial, deals with issues like who is empowered to convene such Courts-Martial, composition of such Courts Martial and the powers of such Courts-Martial. According to Section 118, a GCM has power to try any person subject to the Act for any offence punishable therein and to pass any sentence authorized by the Act. Reading of Section 112 shows that while on active service an SGCM can be convened if having due regard to discipline and exigencies of the service, satisfaction is arrived at that it would not be practicable to try the offence by a GCM. According to Section 118, such SGCM is again empowered to try any person subject to the act for any offence punishable therein and to pass any sentence authorized thereby. Section 119 of the Act states that in respect of any person other than an officer, Junior Officer, a DCM can also be convened but Section 119 limits the power of punishment, in that a DCM cannot pass a sentence of death, transportation or imprisonment for a term exceeding two years. Further, a DCM cannot sentence a Warrant Officer to imprisonment. Sections 109, 112 and 119 confer power to convene such GCM, SGCM and DCM respectively upon the Authorities mentioned in the respective sections. The composition of GCM, SGCM and DCM are again set out in Sections 113, 115 and 114 respectively.

18. As regards SCM, Section 120 stipulates that an SCM may try any offence punishable under the Act but sub-Sections (4) and (5) limit the award of sentence. According to sub-Section (4), an SCM can pass any sentence which may be prescribed under the Act, except a sentence of death or transportation or of imprisonment of a term exceeding the limit specified in sub-Section (5). Sub-Section (5) of Section 120, then prescribes the limit to the level of one year, if the officer holding the SCM is of the rank of Lieutenant Colonel and upwards and at the level of three months if the officer holding the SCM is below the rank of Lieutenant Colonel.

19. Section 116 of the Act empowers the CO of any Corps, Department and Detachment of the regular Army to hold an SCM and specifically states that he alone shall constitute the Court. Sub-Section (2) then prescribes that the proceedings shall, however, be attended through-out by two other persons specified therein. However, such persons are not to be sworn or affirmed. Unlike Sections 113, 115 and 114, where composition of the concerned Court-Martial is prescribed to consist of atleast three officers, it is the CO alone who constitutes the Court under Section 116 in respect of SCM. Further, under Rules 39 and 40 of the Rules, CO of the accused, or of the Corps to which the accused belongs is specifically disqualified for serving on a GCM or DCM and composition of a GCM ought to compose of officers of different corps or departments. However no such restriction applies to SCMs and

in fact the CO himself must constitute the Court. The Act has thus given drastic power to one single individual, namely, the CO who alone is to constitute the Court. No doubt, this power comes with restrictions insofar as the power to award sentence is concerned in terms of sub-Sections (4) &(5) of Section 120. However even with such restrictions the power is quite drastic. The reason for conferment of such power is obvious that in order to maintain discipline among the soldiers and units, the CO must have certain special powers, for it is the discipline which to a great extent binds the unit and makes it a co-hesive force.

20. The High Court of Delhi was therefore completely correct in observing that such power must be exercised rarely and when it is absolutely imperative that immediate action is called for. The satisfaction in that behalf must either be articulated in writing or be available on record, specially when the matter can be considered on merits by a tribunal, with the coming into force of the Armed Forces Tribunals Act, 2007.

21. We now deal with the question as to what kind of offences can be tried by an SCM. An SCM can try any offence punishable under the Act by virtue of sub-Section (1) of Section 120 but this general principle is subject to the provisions appearing in sub-Section (2) of Section 120. Sub-Section (2) of Section 120 deals with some offences in respect of which certain restrictions are applicable. The offences so stipulated are those punishable under Sections 34, 37 and 69 of the Act or those against the Officer holding the Court. Apart from Sections 34, 37 and 69 of the Act, there are various other provisions where different kinds of offences are spelt out and dealt with. For example in Chapter VI of the Act, Section 38 deals with offence of desertion, Section 39 deals with offence of absence without leave, Section 40 deals with striking or threatening a Superior Officer, Section 41 deals with disobedience to the Superior Officer, Section 42 deals with insubordination and so on. Out of multitude of such offences, only Sections 34, 37 and 69 are mentioned in sub-Section (2) in respect of which restrictions stipulated in sub-Section (2) apply. Additionally, one more category, namely "any offence against the officer holding a Court" is also specified. Such of the offences as are directed against the officer holding the Court, may include those under Sections 40, 41, 42 and so on, depending upon facts of the case.

22. Sub-Section (2) of Section 120 prescribes that in respect of such stipulated offences, in normal circumstances, an SCM shall not try the accused without making a reference to the officer who is otherwise empowered to convene a DCM in regular course or an SGCM while on active service. It further states that if there is no grave reason for immediate action, such reference to the concerned officer must be made and no person should be tried without such reference in respect of any offence so stipulated i.e. those under Sections 34, 37 and 69 of the Act or those against the officer holding the Court. However no such restriction applies in cases other than Sections 34, 37, and 69 of the Act or offences against the officer holding the Court. This provision thus categorizes the offences in two compartments i.e. those which require a reference and those which do not. This distinction is also noticeable from sub Rule 2 of the Rule 22 which mandates that CO shall not dismiss a charge in respect of offences which require a reference to superior authority in terms of Section 120 (2) of the Act. We must therefore accept the submission that the sentence appearing in Paragraph No.20 of the

judgment of the High Court to the effect that only offences under Sections 34,37 and 69 of the Act could be tried by an SCM is not correct.

23. The aforesaid provision in Section 120(2) requiring a reference to the superior authority which thought is again echoed in proviso to Rule 22 (3) of the Rules, is a salutory provision and a check on the exercise of drastic power conferred upon a CO and must be scrupulously observed. A case for non-adherence to this requirement must be made out on record and any deviation or non observance of statutory requirements must be viewed seriously. Offences under Sections 34, 37 and 69 of the Act are special categories or kinds of offences where a reference to the officer empowered to convene a DCM or an SGCM is considered imperative unless there are grave reasons for immediate action. Similarly, the offences against the officer holding the Court, where that officer could possibly "be a judge in his own cause", are also put at the same level and similar reference under sub-Section (2) ought to be made. The exercise of power in seeking such reference and consequent consideration in respect thereof must be in keeping with the seriousness attached in respect of these offences.

24. We now turn to the core question namely as to which CO is competent to convene, constitute and complete the SCM. Is it CO of the Unit to which the accused belonged or CO of the Unit to which he was attached or came to be attached. In this connection there could possibly be three kinds of situations.

> "a. An accused committing an act constituting an offence while he was part of his regular Unit is tried by SCM by his own CO i.e., the CO of the Unit itself.
>
> b. An accused while being on attachment to a different Unit commits an act constituting an offence and is therefore tried by SCM by the CO of such Unit to which he was sent on attachment. In such cases the offence itself would be committed while the accused was on attachment.
>
> c. An accused committing an act constituting an offence while being part of his regular Unit is later sent on attachment to a different Unit and is then tried by SCM by CO of such Unit i.e., Unit where he was sent on attachment after the offence was committed."

25. Unlike Rule 39 which specially disqualifies CO of the accused or of the Corps to which the accused belongs from serving on a GCM or DCM, there is no embargo on CO of the Unit to which the accused belongs being the Court for the purposes of trying the accused by SCM. The first of the aforesaid three categories of offences mentioned above can therefore certainly be tried by the CO of the Unit to which he belongs. If the act constituting an offence is linked to the Unit in question when such act was committed, in respect of matters falling in the second category, the offence could logically be tried by the CO of the Unit to which the accused was attached. Could the accused then insist that the CO of his parent unit alone must try him by SCM. Can it be said, his erstwhile connection with the parent unit must be taken to be the governing factor of such extent that the normal linkage of the Unit

and the offence in question must stand displaced. Our answer is no. If requirements of Section 120(2) are otherwise complied with and satisfied, the CO of such attached Unit is competent to convene, constitute and complete the SCM. It is in his unit that the offence in question was committed and in that sense he would be in seisin of the matter. The CO of the parent unit would have nothing to do in the matter.

26. The third category however raises some concern. There could be two sub categories under this. In the first, the commission of offence itself may come to knowledge, though the offence was committed in the parent unit, after the accused was sent on attachment. Secondly, which is the normal course adopted in the matters under consideration, an accused may be sent on attachment to another unit only for being tried by SCM by the CO of that other unit. The commission of an act constituting an offence being connected with the erstwhile unit and having no connection with the unit where he is later sent on attachment, normally the former of the units in question would be appropriate. But the matter need not be considered and decided purely from the perspective of such connection or nexus with the former or the erstwhile unit.

27. In a given case, the offence itself may have been committed against the CO of the former unit or the CO may be an important witness reflecting on matters in issue or for the purposes of discipline the accused may be required to be moved out of the unit in question. In some cases the presence of the accused even during the conduct of SCM in the Unit in question may be detrimental to maintenance of discipline. The situations could be varying in degree or context and the concept of propriety and expediency may demand that the accused be sent on attachment to and tried in a different unit. Paragraph 24 of the judgment of the High Court of Delhi shows its concern in that behalf and the fact that the High Court was alive to such complexities. But on a view that the CO of the unit other the one to which the accused belonged would be incompetent, the High Court was persuaded to accept the submission advanced on behalf of the accused.

28. We may gainfully refer to Regulation 9 of the DSR at this stage. Under this regulation the CO could be either:-

> "a) one who has been appointed by higher authority to be CO to effectively exercise powers vested in a CO; or
>
> b) one who is in immediate command of the unit to which the person is belongs; or
>
> c) one who is in immediate command of the unit to which the person is attached to; or
>
> d) one who is in immediate command of any detachment or distinct sizeable separate portion of a unit with which the person is for the time being serving."

29. Regulation 9 with its width and amplitude can possibly cover any situation so that there is no room to express any lament as was done in aforesaid Paragraph 24. If the concept of fairness in the procedure demands, as is expressly set out in the form of Rule 39 of the Rules that CO of the Unit to which an accused belongs is disentitled to serve on a GCM or DCM, it would be complete contradiction to insist upon the CO of the Unit to which the accused belongs, regardless of the status and role of such CO in connection with the offence, to be the only authority entitled to convene an SCM. Sections 116 and 120 do not admit of any such construction and in the absence of any express provision to the contrary, Regulation 9 can certainly be the guiding factor. The expression "Commanding Officer" in Section 116 is not qualified by any explanation that he must be the CO of the Unit to which the accused belongs. Regulation 9, in our view, affords such explanation and is completely consistent with and subserves the basic ingredients of fairness and impartiality.

30. Regulation 381, in the context of trial of Deserters is a special provision. If the Unit to which the accused belongs is serving in high attitude areas or overseas or is engaged in counter-insurgency operations or active hostilities, the accused could be tried in the manner laid down therein by the CO of the Units specified therein. But Regulation 381 is not the only exception as found by the High Court and the finding that in all circumstances, other than those dealt with by Regulation 381, it is the CO of the Unit to which the accused belongs who alone is competent to convene, constitute and complete an SCM, is incorrect.

31. It is noticeable that the expression "to which the accused belongs" finds mention in Rule 39 of the Rules as dealt with herein above in the context of GCM or DCM but not with respect to SCM. Under Rule 133 of the Rules the proceedings of an SCM must immediately on promulgation be forwarded through the Deputy Judge Advocate General of the command "in which the trial is held". On the other hand, under Rule 146 of the Rules the proceedings of an SCM must be preserved with the records of the corps or the department "to which the accused belonged". It is thus possible and well contemplated that the trial by SCM may be held in a unit other than the one to which the accused belongs". Rules 39 and 146 further disclose that wherever the statute wanted to specify the unit or department "to which the accused belonged" it has done that with great clarity. No such qualification is specified in respect the CO who is to convene, constitute and complete the SCM.

32. Lastly, we must note that Note 5 below Section 120 as appearing in the Manual could possibly point that an NCO or a sepoy could not be attached to another unit for trial by SCM except as provided in Regulation 381 of the DSR. Without going into the question of efficacy and force of such Note below a Section in an Act enacted by the Parliament, for the present purposes it is sufficient to notice that this Note stood deleted on and with effect from 28.08.2001.

33. In the premises, we hold that it is not imperative that an SCM be convened, constituted and completed by CO of the Unit to which the accused belonged. It is competent and permissible for the CO of the Unit to which the accused was attached or sent on attachment for the purposes of trial, to try such accused by convening, constituting and completing SCM

in a manner known to law i.e. strictly within the confines of Sections 116 and 120 of the Act and other Statutory provisions. We fully endorse and affirm the view taken by the High Court that SCM is an exception and it is imperative that a case must be made out for immediacy of action. The reasons to convene an SCM must be followed by well articulated reasons or the record itself must justify such resort.

34. Before parting, we must mention recommendations of a Committee of Experts appointed by the Defence Minister to review service and pension matters including strengthening of institutional mechanisms related to redressal of grievances, which recommendations appear at page 172 of the Ministry of Defence Report of 2015 in following terms:-

> " the Committee recommends that the environment may be sensitized that the provision of SCM should be used sparingly and exceptionally and preferably only in operational areas where resort to a regular trial is not practicable or when summary/administrative action would not meet the requirements of discipline. It may be emphasized that SCM is an exception and not the rule and was not even originally meant to be a peace-time provision or regular recourse. In the times to come, the desirability of even having such a provision on the statute book may be examined with the suitability of a replacement by amore robust system meeting the aspirations of judiciousness and Constitutional norms. We may however caution that we are not, in any manner, underestimating the requirement of discipline in the uniformed services but are simply stating that SCM may not be treated as a routine recourse when other effective tools of enforcing discipline are available."

These recommendations sum up the approach that needs to be adopted, quite well.

35. Since the High Court of Delhi had allowed Writ Petitions on the short ground of competence of a CO of a Unit other than the one to which the accused belonged, without going into the merits of the matters before it, while setting aside the view in respect of that point and allowing the appeals preferred by Union of India, namely Civil Appeal Nos.8360 of 2010, 8830-8835 of 2010 and 8838 of 2010, we remit the matters back to the High Court. The concerned Writ Petitions stand restored on the file of the High Court for consideration on merits.

36. The matters coming from the High Court of Rajasthan, namely Civil Appeal Nos.2547-2550 of 2011 and Civil Appeal No.6679 of 2015 stand on a different footing. In these appeals challenge on merits was negated but one of the issues raised was regarding competence of CO of a unit other than the one to which the accused belonged, to convene constitute and complete SCM. Having answered that question, nothing further needs to be done, especially when the challenge stood negated on merits. We therefore affirm the view taken by the High Court and dismiss these appeals.

37. Similarly, Civil Appeal CAD Nos.13803 and 18038 of 2015 where the major offences were held not to have been proved on facts also deserve to be dismissed. With the issue

regarding competence of the CO having been answered hereinabove, nothing survives in the matters and these appeals are dismissed.

38. No order as to costs.