

**HIGH COURT OF JAMMU, KASHMIR AND LADAKH
AT JAMMU**

Reserved on : 28.04.2022

Pronounced on: 02.06.2022

WP (C) No. 947/2022(O&M)

Naik Bibhu Prasad

.....Appellant(s)/Petitioner(s)

Through: Mr. D. S. Balouria, Advocate

vs

Union of India and others

..... Respondent(s)

Through: Mr. Vishal Sharma, ASGI

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

JUDGEMENT

1. With the consent of the learned counsel for the parties, the present petition was taken up for final consideration.
2. The petitioner has filed the present petition assailing the order dated 22.04.2022 whereby a plea regarding jurisdiction of the Summary General Court Martial (SGCM) to conduct trial of offences under Protection of Children from Sexual Offences Act, 2012, has been rejected by the respondent No. 5.
3. The only issue raised by the petitioner in the present petition is that the Summary General Court Martial has no jurisdiction to try the offences under the Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) as the POCSO Act is the special enactment that provides for the constitution of special courts for the trial of offences under the POCSO

Act and as the SGCM is not a special court, so the petitioner cannot be tried under the POCSO Act in SGCM.

4. Response stands filed by the respondents, in which it has been stated that the petitioner has wrongly invoked the writ jurisdiction of this Court as after the rejection of the plea with regard to the jurisdiction, the petitioner should have filed the petition under section 164 (1) before the confirming authority. Thereafter, if not satisfied with the decision, then the petitioner has an option to file a petition under section 164 (2) before the Chief of Army Staff or before the Armed Forces Tribunal. It is also stated that in **OA-79 of 2015, Col. Hardeep Singh Bindra vs Union of India and others**, it was held by Armed Forces Tribunal, Mumbai that the SGCM has jurisdiction to try the offences under the POCSO Act. In criminal appeal No. 140/2016, the Supreme Court has dismissed the said appeal against the order of the Armed Forces Tribunal, Mumbai. In the response, factual aspects have also been narrated those may not be relevant for the consideration of the present writ petition. It is also stated that the SGCM has jurisdiction to try the case against the accused who is charged with two charges under section 69 of the Army Act. In the response, reference has also been made to the relevant sections of the Army Act. Precisely, it is stand of the respondents that the SGCM has jurisdiction to try the offence under the POCSO Act.
5. Mr. D. S. Billouria, learned counsel for the petitioner vehemently argued that as per the mandate of section 28 of the POCSO Act, only the special court has jurisdiction to try the offences under the POCSO Act and further that the POCSO Act, 2012 has an overriding effect over all other Acts including the Army Act.

6. Mr. Vishal Sharma, learned ASGI has vehemently argued that the petitioner has been charged for commission of a civil offence under section 69 of the Army Act as the petitioner has acted contrary to section 11(i) of Protection of Children from Sexual Offence Act, as such, the SGCM has jurisdiction to try the offences under the POCSO Act as well.
7. Heard and perused the record.
8. The only issue that arises for consideration of this Court is whether the SGCM has jurisdiction to try the offences under the POCSO Act, 2012.
9. Before adverting to the contention raised by the parties, it is apt to take note of the purpose for which the Act was enacted by the Parliament. The very purpose of the Act was to protect the children from offences of the sexual assault, sexual harassment and pornography and to provide for establishment of special court for trial of such offences. The enactment was made taking into consideration the convention on the rights of the child adopted by the General Assembly of the United Nations that has prescribed the set of standards to be followed by all the state parties in securing the best interest of child. It was also through the medium of this Act that the right to privacy and confidentiality of the child has been protected through all the stages of judicial process involving the child. This enactment was made so as to ensure the healthy, physical, emotional, intellectual and social development of the child. The Act itself is the victim specific and to ensure the well being of the victim child and to protect him from any emotional and social harassment, certain safeguards have been provided in the Act itself even during the trial of said offences. The main stress of the Act is on providing the child-friendly procedure.

10. Now, so far as present case is concerned, a perusal of the charge sheet reveals that there are two charges against the petitioner for commission of offences under section 69 of the Army Act. The charges are reproduced as under:

“First Charge Army Act Section 69

Committing a Civil offence, that is to say, sexual harassment, contrary to section 12 read with section 11(i) of the protection of children from sexual offences Act,

In that he,
at field, on 28th November, 2021, committed sexual harassment upon miss ‘XYZ’ aged about 12 years 6 months, daughter of Lieutenant Colonel ÁBC) by uttering with sexual intent, words to the effect, “Kya main aapko haat pakad sakta hoon” followed by the words. “I miss you” with the intention that the aforesaid words shall be heard by said Miss ‘XYZ’.

Second Charge Army Act Section 69

Committing a Civil offence, that is to say, house trespass, in order to commit an offence punishable with imprisonment, contrary to section 451 of the Indian Penal Code,

In the he,
at field, on 28th November, 2021, committed house trespass by entering into Room No. 3, building No. T-19 in the vicinity of Transit Camp, residence of Lieutenant Colonel ÁBC’ in order to commit the offence of sexual harassment, as mentioned in the particular of the first charge, which is punishable with imprisonment.”

11. Section 69 of the Act (supra) deals with civil offences and provides that any person, who is subject to Act (supra), who at any place in or beyond India commits civil offence, shall be deemed to be guilty of an offence against this Act and if charged with this section, shall be liable to be tried by a court-martial. Exception to section 69 is provided by section 70 of the Act(supra), that provides that if a person subject to this Act commits murder of a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape of such a person, he shall not be deemed to be guilty of an offence under this Act and shall not be tried by a court-martial unless he commits offences while on active service, or at any place outside India, or at a frontier post specified by the Central

Government by notification in this behalf. Section 3(ii) defines civil offence as an offence which is triable by a criminal court. Further section 3 (viii) defines criminal court as a court of ordinary criminal justice in any part of India. Section 3 (xvii) defines offence as any act or omission punishable under this Act and includes a civil offence.

12. So far as offences under POCSO Act, 2012 are concerned, they are civil offences, notwithstanding the fact that section 28 of Act 2012, provides for designation of Court of Sessions as Special Court. The Special Courts have been created under the Act of 2012 with an avowed purpose of conducting speedy trial and to protect the dignity, psychology and honour of victim child. The Court of Sessions is a criminal court and once the offences under the Act of 2012 are triable by the Court of Sessions though designated as Special Court by the State Government in consultation with the Chief Justice of the High Court, the offences under the Act of 2012 would constitute a civil offence for the purpose of section 69 of the Act of 1950.
13. Now, what is required to be seen is, as to whether there is any prohibition of trial for an offence under Act of 2012, by the SGCM or not. There is no provision in the Act of 2012 that bars the jurisdiction of SGCM to try the offences under the Act of 2012. Rather section 42-A of Act of 2012 provides that the provisions of this Act shall be in addition to and not in derogation of provisions of any other law for the time being in force and in case of any inconsistency only, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of inconsistency.
14. Section 28 of the Act of 2012 does provide for designation of Court of Sessions in each district as Special Court but at the same time, the Act of

2012 does not provide for any bar upon the court-martial to try the offences under Act of 2012. There is in fact no head on collision between the Act of 1950 and Act of 2012 so that both these Acts cannot operate in the same field. The court martial, of course, has to comply with the provisions meant for purpose of protecting the identity, dignity and psychology of victim child during the course of trial so that the trial by the court-martial is not inconsistent with the provisions contained under the Act of 2012.

15. More so, Hon'ble the Supreme Court has also dismissed the appeal titled, Col. Hardeep Singh Bindra vs. Union of India, relying upon its order passed in *NK Kolebar Dhaugi Haude vs. Union of India and ors.* dismissing the challenge to the jurisdiction of the Court-martial to try the offences punishable under Act of 2012.
16. This petition is otherwise not maintainable in view of the remedy provided by virtue of section 164 of the Army Act 1950, which provides that any person subject to this Act, who is aggrieved by any order passed by any Court-Martial, the said person may present a petition to the officer or authority empowered to confirming any finding or sentence of such court-martial and the confirming authority thereafter may satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates. So, once equally efficacious remedy is available to the petitioner by virtue of section 164 of the Army Act 1950, the petitioner is well within its right to avail said remedy. On this account also, the petition is not maintainable.
17. In view of what has been discussed above, this Court is of the considered opinion that there is no error on the part of SGCM to reject the plea of

