
(1996) 07 SIK CK 0003
In the Sikkim High Court
Case No : Writ Petition No. 1 of 1996

A. Jayaram

APPELLANT

Vs

General Court Martial and Others

RESPONDENT

Date of Decision : 03-07-1996

Acts Referred:

Citation : (1997) CriLJ 2777

Hon'ble Judges : Malay Sengupta, J

Bench : Single Bench

Advocate : D.K. Singh and S.S. Hamal, for the Appellant; S.P. Wangdi, for the Respondent

Final Decision : Dismissed

Judgement

M. Sengupta, J.—This case arises out of an application filed under Article 226 of the Constitution of India.

2. The fact involved in this case, in short, is that the petitioner is a senior defence personnel holding the rank of Subedar which is of the status of Junior Commissioned Officer. During the period from 12th August, 1992 and 31st May, 1993 while the petitioner was posted as Junior Commissioned Officer incharge, Liquor Canteen of 17 Mtn. Div., he alleged to have committed some offence for which he was ordered to be tried by a General Court-martial. Four charges were framed against him but the Court-martial exonerated him from two of the charges and he was found guilty of the rest of the two charges. At the conclusion of the trial the Presiding Officer of the General Court-martial sentenced the petitioner:

(a) to suffers rigorous imprisonment for four months;

(b) to be dismissed from service.

This order was passed on 25-11-95. On the very same day the petitioner filed a mercy petition before the General Court-martial but there was no result and he

was taken into custody. On 27-1 -96, the petitioner has presented this writ petition before this Court. Immediately thereafter, on 29-1-96 the petitioner submitted another petition before the appropriate Army authorities for consideration of his case before the sentence passed by the General Court-martial was confirmed.

3. One charge was that the petitioner during the period as already noted above, knowingly and with intent to defraud, altered the quantity and total value of liquor mentioned in duplicate and triplicate copies of Cash Memos, the documents which it was the duty of the petitioner to preserve. The offence comes under the purview of Section 57(c) Army Act.

4. The other charge was to the effect that with intent to defraud, during the aforesaid period, the petitioner prepared fictitious Cash Memos, well knowing that the quantities of liquor mentioned in the said Cash Memos had not been issued to the said Units. This constituted an offence u/s 52(f) Army Act. Since the conviction was with respect to the aforesaid two charges only, the other two charges framed against the petitioner are not required to be mentioned.

5. With regard to the first charge the amount involved was alleged to have been Rs. 4,16,949.29. The Court-martial, however, found that the prosecution was able to prove its case involving an amount of Rs. 3,33,460.03. In the like manner the amount involved in the second charge was alleged to have been Rs. 1,31,091.79 but the prosecution was able to prove it to the tune Rs. 43,420.40.

6. It is the allegation that against requisition from different units liquor was supplied to the respective Units under proper Cash Memos. In the said Cash Memos the quantum of liquor and the valuation of the same were properly noted and signature of the Unit representative was also properly taken. But while preparing the Cash Memos, no carbon papers used to be placed above the duplicate and triplicate copies of the Memos. Only such carbon papers were used while obtaining signatures of the Unit representatives on the original cash Memo. Thus, the duplicate or triplicate copies of Cash Memos did not have any carbon impression of the writings in the original Cash Memos, save and except the signatures of the Unit representatives who took delivery of the goods mentioned in the first copy of Cash Memo. Thereafter, the petitioner was to make carbon impressions on duplicate or triplicate copies of Cash Memos with inflated quantity of liquors and putting corresponding prices. Thus in short, the duplicate and triplicate copies of Cash Memos did not reflect the actual quantity of liquor supplied to a particular Unit and the amount received from that Unit towards the price of such supply. The carbon impression so far as it related to quantity and price were always on higher side.

7. During Court-martial, the petitioner did not or could not object to the fact that he was incharge of the Liquor Canteen or that there was no alteration in the duplicate and triplicate copies of Cash Memos. The defence case, as can be understood from the trend of cross-examination of the witnesses and from the

written submission made on behalf of the petitioner before the Court-martial was that such entries in the duplicate and triplicate Memos had to be made to cover the supplies made to other Units or parties under the direction of higher authorities. The defence version is that the quantity as were noted in the duplicate and triplicate copies were actually taken out from the Liquor Canteen for use by the Army only and that the money noted in these duplicate and triplicate Cash Memos were duly deposited in the Army Coffer and entered in appropriate Registers. Therefore, the petitioner never mis-appropriated any amount of liquor or money. There was no fraud played in these process. The petitioner also neither made any wrongful gain nor caused any loss to any person or organisation. Hence, he could not be made guilty of any of the charges u/s 57 (c) or u/s 52(f) of the Army Act.

8. Preliminary objections were raised on behalf of the respondents against the admissibility of the writ petition itself. Those points were dealt with by an order of this Court on 23-3-96. We may once again reproduce the same for the sake of convenience. The learned counsel for the respondents contended that Army Tribunals like General Court-martial are exempted from application of the provision of Article 227 of the Constitution of India. It is true that this Court cannot invoke the provision of Article 227 of the Constitution of India over such a Tribunal but the Court exercising extra-ordinary writ jurisdiction cannot remain a helpless spectator to the gross violation of human rights or of fundamental rights of any person caused in the grab of the provisions of the Army Act. The Court must rise to the occasion and come to the assistance of such a person even if he is a defence personnel and even if his case is being dealt with by any Army Tribunal. In such cases the Court, in exercise of its authority under Article 226 of the Constitution may interfere with the atrocities, complained of. Decision in Subhash Chandra Sarkar Vs. Union of India (UOI) and Others, may be referred to.

9. The respondent now contends that even if Article 226 of the Constitution is invoked it can at best be done after the party has exhausted all its alternative remedies. He referred to the provisions u/s 153 and 164 of the Army Act as the course of alternative remedies. The decision in D.C.M. Chemical Employees" case reported in 1982 Lab IC 120 has been referred to in this context. It is a single bench judgment of the Delhi High Court. Against it, decisions in V. Vellaswamy Vs. Inspector General of Police, Tamil Nadu, Madras and Another, , Dr. Ajay Singh Rawat Vs. Union of India (UOI) and Others, and S.N. Mukherjee Vs. Union of India, have been referred to for establishing that judicial review under Article 226 of the Constitution is permissible in spite of alternative remedy being provided under any Act. Though the cases of 1981 and 1985, as referred to above, relate to Police and Civil Administration, S.N. Mukherjee"s case of 1990 relates to Army Act. Thus judicial review of an order passed by any Army Tribunal is permissible. It would be worth noting that in the entire procedure for trial under Army Act there is no judicial authority to deal with the same at any stage starting from the trial till the confirmation of the sentence. This point was

raised in *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, . At page 1437 of the aforesaid decision it was suggested that the Army Act should be amended providing such a provision. But nothing has been done so far and the fate of Army personnel like that of the petitioner is left with the only remedy available u/s 153 or 164 of the Army Act. The petitioner describes such provisions as lip sympathy, poor solace and meaningless ritual. Anyway, we have agreed to make judicial review of the order by invoking the provision of Article 226 of the Constitution in such a case. Learned Advocate for the respondents however, points out to the decisions in *Subhash Chandra Sarkar Vs. Union of India (UOI) and Others*, , *R.S. Ghalwal's* case reported in 1981 Cri LJ 1646 (Delhi) and *S.N. Mukherjee Vs. Union of India*, to suggest that while making judicial review the campus of the Court would be very much restricted and it would invoke its jurisdiction only where the authorities are found to have acted without jurisdiction or acted in excess of the jurisdiction or flouted the principles of natural justice or if there are errors -apparent on the face of the record.

10. While entering into the main points at issue over the merit of the case it may be noted that though in appropriate case there is scope for judicial review of an order passed by court-martial, the scope is very limited. When there is no evidence at all to substantiate a conviction, the Court can enter deep into the matter but when there is some evidence available on record the scope of the Court in the matter of interference becomes narrower and the Court is not allowed to interfere by way of substituting its own finding by analysing the evidence on record, discarding the finding arrived at by the Tribunal. In such cases the Court never acts as a Court of Appeal. Decision in *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, (at page 243), *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, (at page 400) and *Bijili Cotton Mills (P) Ltd. Vs. The Presiding Officer, Industrial Tribunal II and Others*, (at page 1909) are worth quoting in this context.

11. Learned Advocate for the petitioner insisted on taking us through the evidence on record. It is not a case of "no evidence". It is a case of "some evidence". In such a case it is not permissible to go into detail of the evidence as this Court cannot analyse the evidence on record to substitute the finding of the Court-martial with the finding of this Court on the basis of the same evidence.

12. There is no denial of the fact that changes were made in duplicate and triplicate sheets of the Cash Memo Books and that entries in such sheets differed from the entries in the original Cash Memos. There is also no denial that such was done deliberately and with knowledge, whatever be the intention or motive behind it. There cannot be any denial to the fact that such an act amounts to some kind of offence which comes under the provision of Section 463 IPC. The provision in the Army Act in the relevant sections are almost the same. The contention of the petitioner is that whatever wrong the petitioner might have committed would come under the purview of the Section 52 (f) or Section 57 (c) only when the same was done with intent to injure or to defraud. In the charges

framed against the petitioner on both the heads it was noted that the petitioner committed the wrong with intent to defraud.

13. The petitioner contends that unless there is any iota of evidence to establish that whatever the petitioner did was with an intention to have wrongful gain or to cause wrongful loss to anybody, the case cannot come under the purview of any of the above provisions of Army Act and since those elements have not been proved in this case, no Conviction is warranted. The petitioner further contended that the witnesses for the prosecution more particularly PWs 1 and 42 categorically stated that the Cash Memos and the amounts shown therein were properly reflected in corresponding column of Columnar Cash Book and therefore, the petitioner did neither utilise the inflated quantity of liquor or the amount in the Cash Memo to his benefit nor did cause any loss to any individual or to the Department.

14. What to speak of Army Act, the term "fraud" has nowhere been defined in any known Act other than Contract Act. Section 25 IPC however, defines "fraudulent". We know, grammatically fraudulent is descriptive of something which results in, or results from, a fraud. Therefore, from no legislation we get a clear definition of fraud. In several decisions of different Courts we find that in all cases of fraud there must be some actual or likely gain of the deceiver and loss or likely loss to the deceived. In some cases fraud has been contemplated where there was benefit or advantage to the deceiver without any corresponding loss to the deceived. Ours is a peculiar case where neither there is any strong proof of wrongful gain to the deceiver or loss to the Received. On this plea the petitioner claims exoneration from the charge of commission of any fraud.

15. We have already mentioned that there is ample proof that the Petitioner omitted to place carbons while writing down the Cash Memos. Later, after issuance of the main copy of the Cash Memo to the party, caused inflated entries in the duplicate and triplicate copies of the Cash Memos. Since such figures have been duly reflected in the Registers or books of accounts for stock of liquor and prices thereof, the petitioner pleads that he has not deceived anybody. He contends further that the department has not lost any coffer because of such interpolations or forgery as we may call it. It is such a peculiar case that by haunting the reported decisions we may not get any other instance of this nature. We know of cases where signatures of any friend was forged in his Bank cheques but the maker of those forged signatures was not convicted as the person did not make use of the cheques to any Banker as genuine. In our case apparently there is no instance of any gain or loss to any person. But creating false Cash Memos cannot be taken lightly. Such a thing can never be a fun, play or pastime. Some reason must be there and it cannot be said to be lawful.

16, Gramatically fraud means deceit which is an act of deceiving. Deceit and deceive both mean a falsehood intended to mislead another or to cause him to err. In the instant case it is clear that the wrong entries made in the duplicate and triplicate Cash Memos do not reflect the real state of supply of liquor or

receipt of money for the same. The forged entries were obviously made to mislead the authorities or to represent to the authorities some situations which were different from reality. Let us assume that consumption of a particular Unit was actually "X", but by interpolation it had been represented as "Y". This is definitely deceitful means or to deceive the authorities which in other way comes as fraud. In English law, no attempt has been made at the definition of fraud but it has always been understood to mean something dishonest and morally wrong. We cannot accept the argument of the petitioner that whatever is alleged to have been committed was procedural error and a breach of procedure does not entail criminality. From all these we reject the contention of the petitioner that the commission of the impugned act does not mean to defraud and, therefore, the alleged offences do not come either u/s 52 (f) or u/s 57 (c) of the Army Act.

17. The last point raised on behalf of the petitioner is that he had to make the entries in the aforesaid manner under the dictation of his superior and also to honour the written instructions coming from his superiors from time to time. The petitioner claims himself to be a Casablanka type of soldier who believes in obeying the orders of his superiors without thinking of the consequences. The defence argued that erring superior officers had already been taken to task for their offence. We find from the record that only one senior officer was reprimanded for issuance of blank forms. But there is nothing on record to show that any superior officer has been brought to book for making the petitioner to supply liquors against written instructions, besides the requisitions made by different units in proper form. In the judgment of Court-martial, we find mention about "written instructions from superior officers to issue liquors to a person not authorised to collect liquors from 17 Mtn. Div. Liquor Canteen." Though the petitioner was not bound to follow unlawful commands but it would definitely be illogical, if not illegal, to make the petitioner a scape-goat for all the wrongs which were abetted by the superior officers.

18. The petitioner while contending that the punishment should never be excessive and should always be commensurate to the magnitude of the offence, cited the cases reported in *Ranjit Thakur Vs. Union of India (UOI) and Others*, and *Ex-Naik Sardar Singh Vs. Union of India (UOI) and Others*, . In these cases the observation of the Supreme Court is definitely like that but what were the magnitude of the offence in those two cases? In one case the Army personnel carried a few bottles of brandy from the Army quota for consumption during his in-laws marriage. In the other case an Army official disobeyed the order of his superior officer to eat food (Bhook Hartal). Those cases can never stand at par with a case which we have been dealing with.

19. From the above observation we, in exercise of our writ jurisdiction, do not find any reason to interfere with the decision of the Court-martial. But one thing we must note that the confirming authorities while dealing with matter of confirmation and the petition filed by the petitioner on 29-1-96 should take into consideration, with all seriousness, the point raised in paragraph 16 above.

20. With these observations we dismiss the writ petition on contest without costs.