

(2002) 08 DEL CK 0263
In the Delhi High Court
Case No : CWP No. 4562 of 2002

Brig. V.K. Anand

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-08-2002

Acts Referred:

Army Act, 1950 — Section 27
Army Rules, 1954 — Rule 22, 23, 24

Citation : (2010) 17 STR 451

Hon'ble Judges : S.B. Sinha, C.J.; A.K. Sikri, J

Bench : Division Bench

Advocate : Shyamliha Pappu, C.M. Khanna and S.M. Dalal, for the Appellant;
Anjana Gosain, for the Respondent

Judgement

A.K. Sikri, J.—Within three months the petitioner is back to this Court as this writ petition is the second round of litigation. On the earlier occasion, the petitioner had filed CWP. No. 2459/2002 in which he had averred that the petitioner is a Brigadier who was commissioned in the Indian Army as Second Lieutenant in the year 1967. He was promoted to the rank of Brigadier on 8th January, 1996. Certain irregularities were alleged against him and by order dated 3rd November, 1999 the Court of Inquiry against the petitioner was convened. This inquiry was concluded in June, 2000. However, nothing happened for quite some time. Thereafter vide Order dated 13th February, 2002 disciplinary action against the petitioner was initiated by conducting hearing of the charge proceedings under Army Rule 22 by GOC 9 Inf. Div. (the Commanding Officer of the petitioner) under whom the petitioner was attached and he ordered the evidence to be reduced to writing.

2. The petitioner averred in earlier as well as in this writ petition that he wrote two letters dated 12th and 15th March, 2002 to his Commanding Officer for making certain prosecution witnesses available for his cross-examination. By Order dated 17th March, 2002 the Commanding Officer asked the petitioner to

submit the names of his defense witnesses and the petitioner complied with this requirement of his letter by submitting his list of witnesses on the same day. However, it was followed by number of reminders by the petitioner for making these witnesses available for cross-examination and his defense. The Commanding Officer vide letter dated 5th April, 2002 replied that necessary action was being taken to procure all the witnesses called for by the petitioner.

3. It was the grievance of the petitioner that while eight prosecution witnesses and fourteen defense witnesses were yet to appear for their deposition the Commanding Officer suddenly and prematurely directed the summary of evidence to be closed vide Order dated 10th April, 2002 which was done on the orders of the respondent No. 4 i.e. GOC 11 Corps.

4. As he did not receive any response, on the very next date i.e. 11th April, 2002 the petitioner submitted a statutory complaint of the Central Government u/s 27 of the Army Act read with para 346 of the Regulations for the Army. As no response was received he filed writ petition No. 2459/2002 on 17th April, 2002 as he apprehended that the respondent would go ahead and convene the Court Martial proceedings and in case General Court Martial is convened and is allowed to be proceeded with the petitioner shall suffer prejudice.

5. Thus in essence the grievance of the petitioner was that before the commencement of any trial of the petitioner by the General Court Martial he should be allowed to cross-examine the prosecution witnesses named by him as per the procedure prescribed in the Army Rules 22 to 24.

6. The aforesaid writ petition was disposed of by the judgment dated 3.5.2002. It was observed that it may not be appropriate to allow the petitioner to challenge the action of the respondents inclosing the proceeding of recording of summary of evidence as it would always be open to the petitioner to challenge the same after the completion of the General Court Martial proceedings if any action adverse to him is taken on that basis. However, since the statutory complaint of the petitioner was pending which had not been decided by the respondents, the writ petition was disposed of with the following direction:

"1. The respondents may decide the statutory complaint of the petitioner within two weeks. We are conscious of the fact that the time of 180 days is prescribed for disposal of such petition. However, this direction is given in view of the urgency involved in this case.

2. Till such time the statutory complaint is decided, although the General Court Martial proceedings may go on, no final decision be taken by the respondents."

7. The respondents could not decide the statutory complaint within two weeks as directed and instead filed CM. 6319/2002 seeking extension of time for this purpose by 8 weeks. While allowing the aforesaid application on 31.5.2002 this court also further directed that till the matter is decided further court martial proceedings against the petitioner shall remain stayed.

8. The respondents have since decided the statutory complaint by order dated 9.7.2002 as per which the complaint of the petitioner stands rejected. After rejection of this complaint, by another order dated 20.7.2002 re-assembly of General Court Martial is directed on 5th August, 2002. This rejection of statutory complaint vide order dated 9.7.2002 and as a squatter thereto reconvening of General Court Martial vide order dated 20.7.2002 has prompted the petitioner to approach this Court by means of present petition.

9. The essence and thrust of the petition remains the same that is abrupt closure of the recording of summary of evidence without giving opportunity to the petitioner to cross-examine 8 prosecution witnesses and examine 14 defense witnesses named by him. It is also stated that even the authority deciding statutory complaint erred in rejecting the same disregarding provisions of Army Rules 22 to 24. Ms. Shyam Pappu, learned senior counsel appearing for the petitioner submitted that non-compliance of Army Rule 22 would cause great prejudice to the petitioner. It was submitted that Army Rule 22 in no uncertain terms mandates that the accused is to be given full liberty to cross-examine any witness against him and to call such witness and make such statement as may be necessary for his defense. It was on the basis of the evidence recorded in the manner provided in Sub-rule 1 of Rule 22 that the Commanding Officer is supposed to proceed further and in terms of Sub-rule 2 he could even dismiss the charge brought before him if he is of the opinion that evidence does not show that any offence under the Act has been committed. Therefore, giving of proper opportunity to the petitioner to cross-examine the witnesses and to produce his witnesses, submitted the learned senior counsel was of vital importance inasmuch as given an opportunity the petitioner could satisfy the Commanding Officer that there was no evidence to show that offence under the Act had been committed and in such an eventuality the petitioner would not have to undergo General Court Martial proceedings. Elaborating this argument, it was further contended that there was violation of Rule 23 of the Army Rules as well in not giving the aforesaid opportunity. It amounted to infraction of the procedure contained in the said Rule for taking down the summary of evidence. Rule 23 is to the following effect:

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

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

(3) The evidence of each witness after it has been recorded as provided in the

rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked: "Do you wish to make any statement? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence". Any statement thereupon made by the accused shall be taken down and read to him, but he will not be cross-examined upon it. The accused may then call his witnesses, if he so desires, any witnesses as to character.

(4) The evidence of the witnesses and the statement (if any) of the accused shall be recorded in the English language. If the witness of accused, as the case may be, does not understand the English language, the evidence or statement, as recorded, shall be interpreted to him in a language which he understands.

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

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

10. It was argued that the process of recording the summary of evidence had not been completed as per procedure contained in Army Rule 23 which fact was within the knowledge of the Commanding Officer of the petitioner who vide his letter dated 5.4.2002 had informed the petitioner that efforts are being made to make the said witnesses available to him. It was submitted that completion of recording of Summary of Evidence is sine qua non for two reasons. Firstly, it was a mandatory requirement, before the Commanding Officer could take a decision whether to dismiss the case against the petitioner or remand/refer the same to superior authority for his trial by court martial. In the present case the Commanding Officer i.e. respondent No. 6 did not have before him the complete record of Summary of Evidence based on which he could have applied his mind judiciously. This position is apparent from the provision of Army Rule 24, which reads as under:

"24. Remand of Accused.-(1) The evidence and statement (if any) taken down in writing in pursuance of Rule 23 (hereinafter referred to as the "Summary of Evidence"), shall be considered by the Commanding Officer, who thereupon shall either-

a. remand the accused for trial by a court-martial; or

b. refer the case to the proper superior military authority; or

c. if he thinks it desirable, re-hear the case and either dismiss the charge or dispose of it summarily.

(2) If the accused is remanded for trial by a court martial, the commanding officer shall without unnecessary delay either assemble a summary court martial (after referring to the officer empowered to convene a district court martial or on active service as summary general court martial when such reference is necessary) or apply to the proper military authority to convene a court martial, as the case may require."

11. Secondly, the completion of record of Summary of Evidence is also a mandatory requirement to empower the competent authority to order trial of an individual by court martial, who is required to apply his mind by considering the record of Summary of Evidence to arrive at a judicious decision, whether in the facts and circumstances of the case trial of individual by court martial is required to be ordered or not.

12. The learned counsel argued that it was settled position in law that in case where law required a thing to be done in a certain manner, it has to be done in that manner or not at all and in support of this proposition referred to the judgment of Supreme Court in the case of Dhananjaya Reddy etc. Vs. State of Karnataka, . She also argued that non-compliance of mandatory provisions of Army Rules 22 to 24 would render the action of the respondents illegal as has been held by the Apex Court in the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, which judgment has been followed by this Court in Lance Dafedar Laxman Vs. Union of India and Others, .

13. Ms. Anjana Gosain learned counsel appearing on behalf of respondents on the other hand made twin submissions for dismissal of this writ petition. These are:

1. The arguments raised now, namely, infraction of Rules 22 to 24 of the Army Rules were raised in the earlier writ petition No. 2459/2002 filed by the petitioner as well. In fact, according to learned counsel thrust of the present petition is same as that of the previous petition. However, this Court had, while disposing of earlier writ petition No. 2459/2002 refused to entertain the same at that stage on the ground that it was pre-mature and that the petitioner could challenge closing of the proceedings of recording of summary evidence after completion of General Court Martial proceedings, if any action adverse is taken on that basis. The position had not changed as General Court Martial proceedings had yet to begin. The only development which had taken place after the earlier judgment was the decision in the statutory complaint filed by the petitioner and under the garb of challenging the said decision, the petitioner could not maintain this petition and could challenge the action only after the General Court Martial proceedings. Therefore, she submitted that the present writ petition was not maintainable.

2. It was submitted at the second place that even in the order dated 9.7.2002

rejecting the statutory complaint of the petitioner, the competent authority had clearly observed that petitioner's trial by a General Court Martial would provide him due opportunity to raise the plea regarding pre-trial infirmities, if any. Therefore, the petitioner was not remediless and he could still raise the contention regarding pre-trial infirmities, namely, infraction of Army Rule 22 to 24 during General Court Martial proceedings.

14. To allay the fears of the petitioner that no such opportunity would be given to him now, the learned counsel made a categorical statement to the effect that such an opportunity would be given and General Court Martial would also deal with the same. She further stated at the bar that if the petitioner makes any such request he would be allowed to cross-examine any prosecution witness or to lead his defense witness in addition to the recording of evidence and record of summary of evidence. She reiterated her submissions that decision for convening of General Court Martial was to be taken by 8.5.2002 as otherwise it would have become time barred.

15. It may be stated at the outset that the petitioner has challenged the procedure adopted at the stage of recording Summary of Evidence and submitted that the respondents did not adhere to Rules 22 to 24 while conducting the said recording of Summary of Evidence. As noted above, the submission was that on the basis of material produced in the said Summary of Evidence the Commandant was to take a decision for convening General Court Martial and, Therefore, such material forming part of recording of Summary of Evidence is crucial. If the accused is not given proper opportunity at this stage by not allowing him to cross-examine the prosecution witnesses and further to lead his defense witnesses, it would be tainted material on the basis of which decision would be taken by the Commandant as to whether to convene General Court Martial or not.

16. The purpose of Summary of Evidence, as per the rule position itself, cannot be under estimated. Since the record of Summary of Evidence forms the basis on which it is to be further decided whether to hold General Court Martial or not and since the time of recording witnesses by the Officer nominated to record Summary of Evidence accused is given chance to cross-examination the prosecution witnesses and to lead his defense witnesses, not giving such an opportunity to the accused person is definitely going to cause prejudice to such a person. The prosecution which is to be followed at the time of recording evidence by the Officer nominated to record Summary of Evidence is, Therefore, mandatory and infraction thereof may entail the entire proceedings including General Court Martial, to be illegal and these can be quashed. The law on this point is well settled as declared by Supreme Court in the case of Dhananjaya Reddy v. State of Karnataka (Supra) and in the case of Lt. Col Prithi Pal Singh Bedi v. Union of India and Ors. (Supra) and followed by this Court in Lance Dafedar Laxman v. Union of India (Supra). Therefore, in a given case, when it is found that the mandatory requirements of Army Rules 22 to 24 are not complied

with the Court even at this stage when decision is taken to hold General Court Martial on the basis of such invalid recording of Summary of Evidence may intervene and issue necessary directions for fresh recording of Summary of Evidence in accordance with Rules.

17. However, it is a matter of discretion to be exercised by the Court taking in view the facts and circumstances of each case. There is another line of authorities of the Supreme Court to the effect that the Court normally should not interfere with the disciplinary proceedings at an interlocutory stage when the same are in progress and the concerned employee should approach only after the conclusion of the proceedings if based thereon, any order adverse to him is passed. [Refer: 1. Dy. Inspector General of Police Vs. K.S. Swaminathan, 2. Union of India v. Ashok Kacker, 1995 Supp (1) SCC 180 and 4. Union of India (UOI) and Others Vs. Upendra Singh,]. In the instant case when the petitioner had filed the petition on earlier occasion, this Court thought it proper not to interfere with the action of the respondents at an interlocutory stage, particularly having regard to the fact that statutory complaint of the petitioner was pending with the Central Government. On earlier occasion also the petitioner had challenged the closure of recording of summary of evidence and convening of General Court Martial on the ground that the same was done in violation of the procedure prescribed under Army Rules 22 to 24. In the judgment dated 3.5.2002 rendered in the aforesaid writ petition, it was observed:

Thus it may not be appropriate to allow the petitioner to challenge the action of the respondents in closing the proceeding of recording of summary of evidence inasmuch as it would always be open to the petitioner to challenge the same after the completion of the General Court Martial proceedings of any action adverse to him is taken on that basis. Normally, the court should be reluctant to interfere with disciplinary proceedings at an interlocutory stage when the same are still in progress. [Refer: 1. Dy. Inspector General of Police Vs. K.S. Swaminathan, , 2. Union of India v. Ashok Kacker, 1995 Supp (1) SCC 180 and 4. Union of India (UOI) and Others Vs. Upendra Singh,]. The cases quoted by the petitioner's counsel are those where court entertained the petitions after the conclusion of entire disciplinary proceedings."

18. As the statutory complaint was pending, it was felt desirable that the respondents decide the said complaint and the directions to this effect were passed. The Central Government has now decided the complaint dated 11.4.2002 by order dated 9.7.2002. The petitioner is not satisfied with the disposition of his statutory complaint by the Central Government and has, Therefore, again approached this Court by way of present writ petition. In order to maintain judicial discipline particularly when we on earlier occasion did not deem it proper to interfere in the matter, we are of the opinion that it may not be proper to intervene in this matter at this stage although we find that some of the contentions of the petitioner are not without substance and need serious consideration. The earlier judgment has attained finality.

19. It may be observed that in order dated 9.7.2002 the Central Government has dealt with each contention of the petitioner. We are, however, refraining from expressing any view on the validity of the order or otherwise lest it may prejudice either parties as the matter is still at large and even in the penultimate para of order dated 9.7.2002 it is observed "the evidence on record made out a prima facie case against him. His trial by a General Court Martial would provide him due opportunity to raise the plea regarding pre-trial infirmities, if any". When the Central Government has itself made it clear that it would still be open to the petitioner to raise plea regarding pre-trial infirmities in the trial by General Court Martial coupled with the statement of learned counsel for the respondents to the effect that the petitioner would be given chance to cross-examine any witness, he desires, and also to lead evidence of his defense witnesses, we are not interfering with these proceedings at this stage in view of aforesaid peculiar circumstances.

20. However, we make it clear that when the Central Government has itself observed in its order dated 9.7.2002 to the effect that General Court Martial would provide him due opportunity to raise the plea regarding pre-trial infirmities and further that the learned counsel had made the statement to the aforesaid effect, interest of justice would be sub-served if this aspect of the matter, namely, whether there are pre-trial infirmities in conducting Court of Enquiry or not should be gone into by the General Court Martial as a preliminary issue and GCM should record its findings thereon. We also make it clear that if the findings of the GCM on this preliminary issue are decided against the petitioner, the petitioner shall be at liberty to challenge the same by filing appropriate proceedings. This order is passed in the peculiar facts of this case and this course is adopted keeping in view the ratio of the judgment of the Supreme Court in the case of *The Management of Express Newspapers Ltd. Vs. Workers and Staff Employed under it and Others*, . The relevant para-15 of this judgment reads as under:

15. "The High Court undoubtedly has jurisdiction to ask the Industrial Tribunal to stay its hands and to embark upon the preliminary enquiry itself. The jurisdiction of the High Court to adopt this course cannot be, and is indeed not disputed. But would it be proper for the High Court to adopt such a course unless the ends of justice seem to make it necessary to do so? Normally, the questions of fact, though they may be jurisdictional facts the decision of which depends upon the appreciation of evidence, should be left to be tried by the Special Tribunals constituted for that purpose. If and after the Special Tribunals try the preliminary issue in respect of such jurisdictional facts, it would be open to the aggrieved party to take that matter before the High Court by a writ petition and ask for an appropriate writ. Speaking generally, it would not be proper or appropriate that the initial jurisdiction of the Special Tribunal to deal with these jurisdictional facts should be circumvented and the decision of such a preliminary issue brought before a High Court in its writ jurisdiction. We wish to point out that in making these observations, we do not propose to lay down any fixed or inflexible rule;

whether or not even the preliminary facts should be tried by a High Court in a writ petition, must naturally depend upon the circumstances of each case and upon the nature of the preliminary issue, raised between the parties. Having regard to the circumstances of the present dispute, we think the Court of Appeal was right in taking the view that the preliminary issue should more appropriately be dealt with by the Tribunal. The Appeal Court has made it clear that any party who feels aggrieved by the finding of the Tribunal on this preliminary issue may move the High Court in accordance with law. Therefore, we are not prepared to accept Mr. Sastri's argument that the Appeal Court was wrong in reversing the conclusion of the trial Judge in so far as the Trial Judge proceeded to deal with the question as to whether the action of the appellant was a closure or a lockout".

21. We may state here that although statutory complaint of the petitioner is rejected by the Central Government, the impugned order does not show that there was indepth consideration of all the submissions made by the petitioner. We hope that General Court Martial should undertake this exercise in a proper manner as a quasi-judicial authority after giving proper opportunity to the petitioner. With these observations the present writ petition stands disposed of.

22. No costs.