

(1999) 11 AP CK 0066

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22464 of 1999

Capt. K.M. Saxena

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-11-1999

Acts Referred:

Army Act, 1950 — Section 106
Constitution of India, 1950 — Article 21, 226

Citation : (2000) 3 ALT 416

Hon'ble Judges : Motilal B. Naik, J;D.S.R. Varma, J

Bench : Division Bench

Advocate : K.M. Saxena and Party in Person, for the Appellant; B. Adinarayana Rao, Sr. Central Govt. Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

Motilal B. Naik, J.—The party-in-person Capt. K.M. Saxena, who is aged about 54 years, also an Advocate, presented this writ petition against the respondents invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India seeking a Writ of Habeas Corpus to set aside the impugned order of arrest dated 26-10-1999 passed on the detenu- Lt. Col. S.S. Shekhar and for producing the detenu before this Court and to set him at liberty forthwith.

2. Petitioner has stated in para 2 of the affidavit filed in support of the writ petition that since there is no person at present in the family of the detenu Lt. Col. S.S. Shekhar to take up the cause of his unlawful arrest effected by the respondents, he has chosen to file the writ petition seeking the above relief as he is acquainted with the detenu and knows the facts of the case.

3. It is alleged by the party-in-person in the writ petition that in the General Court Martial convened by the fourth respondent for the trial of one Subedar? Army Act, he has been the defending Counsel on behalf of the Sub. B.R. Mouli. According to him, the General Court Martial was assembled on 20-3-1999 and continued till 27-10-1999. In the said General Court Martial, Lt. Col. S.S.

Shekhar - detenu, had been performing the duties of Senior Member. According to the petitioner, said Lt. Col. S.S. Shekhar made certain observations during the proceedings in the open Court expressing his unhappiness as to the manner in which the proceedings are recorded. This was not to the liking of the respondents, who according to the petitioner, brought pressure on Lt. Col. S.S. Shekhar to desist from interfering with the recording of the proceedings. Being a senior member, Lt. Col. S.S. Shekhar refused to be a party to the proceedings unless the proceedings are recorded according to rules.

4. Petitioner submitted that on 27-10-1999 pursuant to the impugned order No. 3111/GCM/SUB/SKT B.R. Mouli/A, dated 26-10-1999 issued by the 5th respondent directing the Senior Member of the General Court Martial Lt. Col. S.S. Shekhar to be taken into military custody. The detenu was taken into military custody. It is urged in the writ petition that the detenu who was taken into custody under the impugned order enjoyed total immunity from arrest u/s 30 of the Army Act, which provided immunity even from arrest under any Civil Law.

5. According to the petitioner, the respondents have taken the detenu Lt. Col. S.S. Shekhar into military custody on 27-10-1999 when he had been performing his duties as Senior Member of the General Court Martial and his family members have not been informed about such arrest. It is also alleged that the arrest order passed by the respondents suffer from lack of jurisdiction as a Senior Member of the General Court Martial cannot be taken into custody under any law, either civil or military. According to the petitioner, the impugned order of arrest is based on the alleged absence of the detenu without leave from 12-7-1999 to 27-8-1999. According to him, during the period under question, the detenu had been the member of the General Court Martial and during the period of adjournment of the General Court Martial, he had been undergoing treatment at Nizams Institute of Medical Sciences, Hyderabad, Andhra Pradesh. Being concerned with the progress of the case as a defence Counsel, petitioner claimed that he has been keeping track of the events including the whereabouts of the Senior Member of the GCM during this period.

6. It is alleged by the party-in-person that since the detenu - Lt. Col. S.S. Shekhar has refused to fall in line with the other members of the GCM, on a false ground that said Lt. Col. S.S. Shekhar was absent from 12-7-1999 to 27-8-1999, the respondents have arrested him though he attended the GCM proceedings on 26-8-1999. It is in this background, petitioner complained that the action of the respondents in ordering arrest of the detenu - Lt. Col. S.S. Shekhar is violative of his fundamental rights guaranteed under Article 21 of the Constitution of India and the said arrest is illegal. Apprehending danger to the life of the detenu - Lt. Col. S.S. Shekhar as the respondents are trying to shift him away from Secunderabad, petitioner claimed that he filed this writ petition seeking a direction as indicated above including a direction to the respondents not to shift the detenu -Lt. Col. S.S. Shekhar away from Secunderabad and for passing appropriate orders.

7. The writ petition had come up for hearing on 1-11-1999 before us. In order to enable the Counsel for the respondents to file appropriate counter, the writ petition was directed to be listed originally on 3-11-1999, However, on the evening of 1-11-1999, around 7.30 p.m. the party-in-person Capt. K.M. Saxena, who is also an advocate, telephonically contacted one of us (Dr. Justice Motilal B. Naik) at residence and brought to notice about the preparations being made by the respondents to shift the detenu who is under treatment in the Military Hospital, Secunderabad to an unknown destination with a design to cause harm to him and requested for issuing appropriate directions preventing the respondents from moving the detenu from Military Hospital, Secunderabad.

8. Since the alleged attempts of the respondents are made known to one of us (Dr. Justice Motilal B. Naik) by the party-in-person on telephone, in the light of the apprehension expressed by the party-in-person, reacting to the said request, the other member of the Division Bench (Justice D.S.R. Varma) is contacted on telephone and after due deliberations, it was decided by us to issue necessary directions to the respondents including that of directing the Military Hospital authorities at Secunderabad not to move the detenu -Lt. Col. S.S. Shekhar from that hospital and also to produce him before the Court on the next day i.e., 2nd November, 1999 enabling us to" ascertain the state of affairs from him. Having taken that view, we desired that appropriate direction could be issued to the respondents, which could be communicated through the Registrar (Judicial) of this Court. We accordingly, instructed the Registrar (Judicial) of this Court to communicate our directions as indicated above, to the concerned and report compliance. The Registrar (Judicial) of this Court reported to us telephonically on 1-11-1999 itself around 8-30 p.m. as to his communicating our directions to the concerned telephonically. Simultaneously, we also communicated orally our directions to the junior Counsel Sri Srinivasa Rao, attached to the office of Sri B. Adinarayana Rao, Senior Central Government Standing Counsel for intimating our directions to the respondents in order to ensure that our directions are implemented by the respondents, on the very same evening.

9. Pursuant to our directions, the detenu, Lt. Col. S.S. Shekhar was produced before us on 2-11-1999 around 10-30 a.m. and after being informed of his production before the Court, we retired to one of our chambers (Chambers of Dr. Justice Motilal B. Naik) and interacted with the detenu for about 45 minutes. The detenu informed to us about the manner in which he was treated and the suffering he had undergone. Thereafter, during the course of hearing of the writ petition on the same day, we required certain particulars be placed by the respondents before us and adjourned the case to 4-11-1999.

10. On 4-11-1999, during the course of hearing of the writ petition, the party-in-person disclosed to us that the earlier apprehension role issued on 22nd August, 1999 through which proceedings the detenu was declared as a deserter on which basis the impugned order of arrest dated 26-10-1999 was passed, following which the detenu was arrested on 27-10-1999, have been withdrawn by

Headquarters 12 Corps (Ord) which was communicated vide Signal No. A 5508 dated 6-9-1999 and to that effect the prosecution Counsel read out the said signal in GCM proceedings on 21-10-1999. In view of this fact being brought to our notice during the course of hearing of the writ petition on 4-11-1999, we required the party-in-person to file an additional affidavit to that effect so that the respondents could also file counter, if any, to give us a correct picture. We, therefore, directed the party-in-person to file an affidavit on 5-11-1999 and also directed the party-in-person to serve a copy of the said affidavit on the Counsel for the respondents on 5-11-1999 itself, which would enable him to file appropriate counter on 8-11-1999 on which date the case was directed to be listed for hearing.

11. On 8-11-1999, a detailed counter is filed on behalf of the respondents indicating the genesis of the litigation. It is stated in the counter that a transfer order dated 2-7-1999 was issued transferring the detenu from Secunderabad to HQ 12 Corps East pursuant to which the detenu should have reported at his new station, after availing the joining time. However, it is stated in the counter that the detenu did not join in his new posting but filed a writ petition questioning his transfer order dated 2-7-1999, which was, however, dismissed. A Division Bench of this Court has also dismissed the Writ Appeal filed by the detenu against the dismissal of the writ petition. The respondents further alleged in the counter that the detenu has been, for one reason or the other, trying to stay back in Secunderabad and causing anxiety to all concerned. The respondents have also indicated that after the detenu is arrested on the ground that he absented himself from duties and was declared deserter, an enquiry u/s 106 of the Army Act has been initiated against the detenu. The respondents have denied the allegation that the detenu is being harassed.

12. The party-in-person filed an additional affidavit as directed by us on 4-11-1999, narrating the fact that the apprehension role issued on 22nd August, 1999 was withdrawn by HQ 12 Corps (Ord) which was communicated vide Signal No. A 5508, dated 6-9-1999 and that the same was read out in the GCM proceedings by the prosecution Counsel. In the additional counter-affidavit filed on behalf of the respondents on 8-11-1999 which is sworn in by Major R.K. Singh, it is fairly conceded that after the detenu reported to GCM proceedings, the apprehension role issued vide Lr. No. 5001/02/Maj.SS/Est. (PC) dated 22-8-1999 was withdrawn by HQ 12 Corps (Ord) which was communicated vide Signal No. A 5508 dated 6-9-1999 and the same was made known to the detenu. It is also indicated in the counter about the prosecution Counsel reading out the said signal in the GCM proceedings on 21-10-1999, which was also recorded in the GCM proceedings. The respondents have stated that the Southern Command HQ, Pune had by its letter dated 22-10-1999 directed that after conclusion of the GCM proceedings, the detenu may be taken into military custody for progressing the disciplinary case against him by the Commander, Andhra Sub Area, Secunderabad. Pursuant to the said order, the Commander, Andhra Sub Area had passed the order dated 26-10-1999 directing the detenu be taken into military

custody and as such the detenu was taken into military custody. The respondents have pleaded that since the detention is in accordance with law a Writ of Habeas Corpus does not lie and prayed for dismissal of the writ petition.

13. We have heard Sri K.M. Saxena, party-in-person, who has taken up legal profession after retirement, on behalf of the detenu and Sri B. Adinarayana Rao, Senior Central Government Standing Counsel on behalf of the respondents.

14. Apart from submitting the factual position as indicated in the counters filed on behalf of the respondents, Sri B. Adinaryana Rao, learned senior Central Government Standing Counsel appearing on behalf of the respondent has contended that after arresting the detenu, proceedings u/s 106 of the Army Act have been initiated and it would not be open to the Courts to interfere in such a procedure contemplated by the respondents. Learned Counsel, in this connection, has also drawn our attention to few relevant provisions of the Army Act, 1950. Learned Counsel submitted that the detention of Lt. Col. S.S. Shekhar cannot be termed as illegal detention requiring interference by this Court and in support of his contentions, he has referred to the following decisions of the Supreme Court in Ram Sarup Vs. The Union of India (UOI) and Another, , Lt. Col. Prithi Pal Singh Bedi v. Union of India, AIR 1982 SC 143 and in Capt. Virendra Kumar through his wife Vs. Chief of The Army Staff, New Delhi, .

15. In the wake of the above submissions, the question that arises for our consideration is whether a Writ of Habeas Corpus could be issued setting the detenu -Lt. Col. S.S. Shekhar, at liberty by declaring the impugned order of arrest dated 26-10-1999 in the facts and circumstances of the case?

16. There is no dispute as to the power of the Army authorities to initiate proceedings u/s 106 of the Army Act basing on the arrest and further to make enquiry on the allegations in an appropriate forum.

17. The decisions cited (1) to (3) by the learned Senior Standing Counsel for Central Government appearing on behalf of the respondents supporting his contention that when once the proceedings u/s 106 of the Army Act have been initiated by the respondents after arresting a person, it would not be open to the Courts under Article 226 of the Constitution of India to entertain the dispute and declare such arrest made by the Army authorities as illegal, we must say, there is no dispute with regard to the principle emerging from these decisions. But, however, the question is whether the principle emerging from these decisions could be made applicable to the facts of the case? On a perusal of the three decisions cited by the learned Counsel appearing on behalf of the respondents, the facts obtaining in those decisions are otherwise and not akin to the present set of facts. We have, therefore, no hesitation to say that the principle emerging from the three decisions cited on behalf of the respondents has no application to the facts of the present case on hand.

18. The fact is that through the impugned order dated 26-10-1999; the detenu was arrested on 27-10-1999 while he was participating in the General Court

Martial proceedings. The very foundation for the impugned proceedings dated 26-10-1999 is the alleged absence of the detenu from 12-7-1999 to 27-8-1999, his failure to join at HQ 12 Corps (Ord) pursuant to his transfer order dated 2-7-99. It is noticed by us that in the order dated 22-10-1999 issued by the Southern Command, HQ, Pune, the fact of the detenu's failure to join duty at HQ 12 Corps (Ord) pursuant to his transfer order dated 2-7-1999 has prompted the Southern Command, HQ, Pune to direct the Comander, Andhra Sub Area to pass an order of arrest, which ultimately led to the arrest of the detenu.

19. Though the learned Counsel appearing on behalf of the respondents justified the arrest of the detenu contending that the arrest is made pursuant to the directions issued in para 2 of the impugned order and that even if the apprehension role is withdrawn, still the authorities are competent to arrest the detenu, we disagree with the submission. We must say, the very basis for ordering the arrest of the detenu is the alleged absence of the detenu from duty without leave from 12-7-1999 to 27-8-1999. Having declared the detenu as deserter, the authorities passed the order of arrest. When the very basis i.e., the apprehension role dated 22-8-1999 on which the order of arrest is passed, has been withdrawn by the appropriate authority as is evident from the additional counter filed on 8-11-1999 on behalf of the respondents which is sworn in by one Major R.K. Singh, we have no hesitation to say that no cause of action arose for ordering the arrest of the detenu. When the order dated 22-8-1999 declaring the detenu as deserter, leading to his arrest and enquiry u/s 106 of the Army Act is withdrawn, it is difficult for us to appreciate how the respondents could justify the arrest of the detenu on one premise or the other. We must, without hesitation, say that the respondents are unable to satisfactorily tell us the reasons for the arrest of the detenu. In our view, the respondents are trying to beat around the bushes and not able to convince us for arresting the detenu.

20. This being the factual position, can we say that the arrest of the detenu is proper and a Writ of Habeas Corpus does not lie in the circumstances?

21. It must be remembered that the party-in-person has brought to the notice of this Court alleging the illegal detention of Lt. Col. S.S. Shekhar by the respondents and has sought a Writ of Habeas Corpus seeking to produce the detenu before this Court and set him at liberty forthwith after declaring the impugned order of arrest as illegal. Counter has been filed on behalf of the respondents and additional counter-affidavit has also been filed on 8-11-1999 as indicated above which is sworn in by one Major R.K. Singh.

22. There is no doubt in our mind to say that when there is substantial material on which basis the Court comes to a conclusion that the arrest of a person by any authority for that matter, is not in accordance with law and is illegal, such an order of arrest could be declared illegal and the detenu could be set at liberty forthwith. In this case, merely because the detenu is a Defence personnel and that the respondents allege that the detenu acquired certain disqualification on which basis his arrest is ordered, his detention cannot be held to be legal. In the

light of the additional counter-affidavit filed on behalf of the respondents indicating that the apprehension role issued on 22-8-1999 on which basis the impugned order of arrest is passed on 26-10-1999, has been withdrawn, we have no hesitation to say that the detention of Lt. Col. S.S. Shekhar is not in accordance with any law and has to be declared as illegal. It may be true that Constitutional Courts exercising powers under Article 226 of the Constitution of India may not go into the manner and the procedure contemplated by the respondents for completing the enquiry u/s 106 of the Army Act. But, however, we are not on the question of the competency of the respondents to initiate proceedings u/s 106 of the Army Act. What is seen by us is that the respondents have alleged that the detenu has abstained from duty without proper leave from 12-7-1999 to 27-8-1999 and on that basis, the detenu was declared as deserter acquiring disqualification for initiation of proceedings u/s 106 of the Army Act. When the very foundation i.e. the apprehension role dated 22-8-99 leading to the arrest of the detenu disappears as a result of the withdrawal of such proceedings as is evident from the additional counter-affidavit filed on behalf of the respondents on 8-11-1999 sworn in by Major R.K. Singh, we are inclined to hold that the arrest and detention of the detenu -Lt. Col. S.S. Shekhar is illegal and a Writ of Habeas Corpus under Article 226 of the Constitution of India lies to this Court. The law as far as the Writ of Habeas Corpus is concerned, is very clear that if the detaining authority is not able to, prima facie, satisfy the Court that, in the circumstances, the order of arrest is justifiable. Constitutional Courts can certainly declare such an order of arrest and detention as illegal. When there is no material in this case justifying the impugned order of arrest, we are of the view, this Court is entitled to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India for issuing a Writ of Habeas Corpus without regard to the fact whether the detenu is a civilian or belongs to Armed forces. Article 21 of the Constitution of India is one such Article. which provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This Article has been tested in Judicial Forums and the consistent view taken by the Courts is that if the procedure as required is not followed: none shall be deprived of his personal liberty.

23. Though the party-in-person raised another contention before us as to the immunity enjoyed by the detenu in terms of Section 30 of the Army Act and on that basis the impugned order of arrest is to be declared as void, since we have reached to a conclusion in the light of our discussion made in the foregoing paragraphs that the impugned order of arrest cannot be sustained we do not think it necessary for us to examine this aspect also for quashing the impugned order of arrest.

24. Having regard to our discussion, we are inclined to hold that the impugned order of arrest dated 26-10-1999 pursuant to which the detenu - Lt. Col. S.S. Shekhar is arrested on 27-10-1999, is illegal and unsustainable. Accordingly, we quash the impugned order of arrest No. 3111/GCM/ SUB/SKT BR Mouli/A, dated 26-10-1999. We direct the detenu - Lt. Col. S.S. Shekhar shall be set at liberty

forthwith.

25. The Writ Petition is allowed. No costs.