

(2004) 03 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 2826 of 2003

Commodore Narinder M. Pandit

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-03-2004

Acts Referred:

Constitution of India, 1950 — Article 226
NAVY ACT, 1957 — Section 106, 160, 162, 77, 78
Prevention of Corruption Act, 1988 — Section 13, 19, 25

Citation : (2004) 4 BomCR 814 : (2004) 106 BOMLR 98

Hon'ble Judges : A.S. Oka, J;A.P. Shah, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.S. Oka, J.—Heard learned Counsel appearing for the parties.

2. The challenge in this petition under Article 226 of the Constitution of India is to the Court Martial proceedings initiated against the petitioner.

3. The petitioner was granted permanent commission in Indian Navy in January, 1971 and in January, 2000, the petitioner was promoted to the rank of Commodore. On 20th October, 2003, the petitioner was served with a charge-sheet and connected documents including notice of trial and was called upon to present himself before the Court Martial. The charge-sheet was issued against the petitioner alleging that the petitioner has committed various offences under Navy Act, 1957 (hereinafter referred to as "the said Navy Act") as well as certain offences punishable under the Prevention of Corruption Act, 1988 (hereinafter referred to as "the said Prevention of Corruption Act"). On 28th October, 2003, the Court Martial assembled which was adjourned to 13th November, 2003. On 13th November, 2003, Defence Counsel representing the petitioner raised various objections to the constitution of the Court Martial as well as objection to the appointment of the Trial Judge Advocate on the ground that the Trial Judge Advocate was junior in rank to the petitioner. The Defence Counsel representing

the petitioner raised various objections regarding pre-trial defects. A contention was raised that the order of investigation passed in terms of Regulation No. 149 of the Regulations for the Navy Part-II (Statutory) 1965 (hereinafter referred to as "the said Regulations"). The objections raised on behalf of the petitioners were overruled and the Court Martial proceeded further. The petitioner was arraigned in terms of Section 106 of the Navy Act and the petitioner pleaded not guilty to all the charges.

4. The contentions raised by the learned Counsel for the petitioner in the petition can be summarised as under :

(i) The appointment of the Trial Judge Advocate i.e. respondent No. 7 herein, being junior in rank and status as compared to the rank and status of the petitioner/accused caused humiliation to the petitioner/accused during the trial. The rank of the Trial Judge Advocate is Lieutenant Commander which is junior in rank and status to the rank of the petitioner who is Commodore. He contended that the convening order does not specify any reason for appointment of Trial Judge Advocate who is junior in rank to the accused. The petitioner submitted that the appointment of the Trial Judge Advocate was contrary to law laid down by the Apex Court in a Judgment in Union of India and Another Vs. Charanjit S. Gill and Others, .

(ii) The petitioner was sought to be prosecuted under certain offences punishable under the said Act of 1988 without obtaining valid sanction as required by the mandatory provisions of Section 19 of the said Prevention of Corruption Act.

(iii) The Court Martial convened by respondent No. 3 had no territorial jurisdiction to enquire into and try the offences covered by the charge Nos. 1 to 7 of the charge-sheet as the cause of action as regards the said charges started and completed within the jurisdiction of Delhi area.

(iv) Respondent No. 6, who ordered investigation in terms of Regulation No. 149 had no jurisdiction to order investigation and to submit misconduct report.

(v) The ordering of Court Martial by respondent No. 3 was without observing mandatory provisions of Regulation Nos. 156 to 159 of the Regulations.

(vi) The members of the Court Martial were hand picked officers by the convening authority.

(vii) By not ordering board of enquiry, the petitioner has been denied his rights enshrined under the law.

(viii) Respondent No. 6 having no jurisdiction to initiate misconduct report against the petitioner initiated the report in the form of circumstantial letter dated 9th October, 2003 and submitted the same to respondent No. 3.

(ix) The preliminary objections of the Counsel for the petitioners were rejected arbitrarily by the Court Martial.

5. Apart from the judgment of the Apex Court in the case of Charanjit case (supra), the learned Counsel for the petitioner relied upon another judgment of the Apex Court in Union of India and Ors. v. L.D. Balam Singh 2002 M.L.J. 1, and contended that when the recourse was taken to the Prevention of Corruption Act without complying with the statutory safeguards under the Prevention of Corruption Act, the entire trial will stand vitiated. He also relied upon a Judgment of the Madras High Court in Writ Petition Nos. 3067 and 3068 of 1984 and contended that if the proceedings of a Court Martial are without jurisdiction, the High Court can definitely exercise powers under Article 226 of the Constitution of India.

6. The learned Additional Solicitor General appearing for the respondents has supported the legality and validity of the constitution of the Court Martial and has contravened various submissions made by the learned Counsel appearing for the petitioner. The contentions raised by the learned Additional Solicitor General are as under :

(i) The Rule 40 of the Army Rules, 1954, specifically provides that the members of the Court Martial for trial of an officer shall be of a rank not lower than that of an officer unless in the opinion of convening officer, the officers of such rank are not available and such opinion shall be recorded in the convening order. Rule 102 of the said Army Rules provides that an officer who is disqualified from sitting in the Court Martial shall be disqualified from acting as Judge Advocate at the Court Martial. There is a specific provision which requires the Judge Advocate to attend the meeting of the Court Martial for deciding whether the accused was guilty. Under the said Navy Act, the Trial Judge Advocate cannot sit with Court Martial, when the Court is considering the finding. Moreover there is no provision of disqualification of the Trial Judge Advocate under the Navy Act as found in Rule 102 of the Army Rules.

(ii) The rank of the Trial Judge Advocate vis-a-vis the accused has not specifically been provided by the Legislature and even the civilian officers can also be appointed as Judge Advocate/Judge Advocate General (Navy).

(iii) The Trial Judge Advocate in the present case was commissioned as Judge Advocate in the Indian Navy in the first batch of women officers on 13th July, 1992 and has held judicial office for almost 12 years and she is also eligible to be appointed as Judge Advocate General (Navy). There is no Judge Advocate available who is of the rank of the petitioner. As distinguished from Army Act, there is no requirement in the Navy Act which makes it mandatory to mention in the convening order the fact that the officer of the equivalent rank is not available for being appointed as Judge Advocate.

(iv) Section 25 of the said Act of 1988 gives overriding effect to the provisions of the Army Act and the Navy Act on the provisions of the Prevention of Corruption Act and therefore requirement of sanction is not attracted.

(v) There is a remedy available to the petitioner to challenge the findings

recorded by the Court Martial and therefore, the objections which are raised by the petitioner in this petition can be raised in accordance with the law after the final order is passed by the Court Martial. The purported grounds which are raised in this writ petition can be dealt with by the Naval Tribunal.

(vi) Almost all the prosecution witnesses have been examined before the Court Martial and full opportunity of cross-examination has been availed of by the petitioner. The petitioner has yet to examine defence witnesses for which he will be granted an opportunity.

7. We have considered the submissions made by the learned Counsel appearing for the parties. We have also perused the petition and the documents annexed to the petition as well as the affidavits filed by the respondents and the petitioner.

8. The Apex Court in the case of Charanjit (supra) examined the scheme of the Army Act and the Rules framed thereunder. The Apex Court held that:

In other words the Judge-Advocate appointed with the Court Martial should not be an officer of a rank lower than that the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public services) available and the opinion regarding non-availability is specifically recorded in the convening order.

The Apex Court was dealing with Rule 40 of the Army Rules 1954, which reads thus :

40. Constitution of 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 exclusively 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 regards to the exigencies of the public service) available. Such opinion shall be recorded in the convening order.

(3) In 110 case shall an officer below the rank of captain be a member of a Court Martial for the trial of a field officer.

9. The learned Addl, Solicitor General has pointed out that there is no officer available of the rank of the petitioner who can be appointed as Judge Advocate. The learned Addl. Solicitor General also pointed out that there is no provision in the Navy Act which is equivalent to Rule 40(2) of the Army Rules. He pointed out that there is no provision either in the Navy Act or in the Navy Regulations which requires that Judge Advocate must be of the same rank of the accused. As in case of Army Act, there is no disqualification in the Navy Act or the Regulations which provides that an officer who is below the rank of the accused is disqualified for becoming the Judge Advocate.

10. However, we need not go into the larger controversy regarding the difference

between the provisions of the Army Act and the Navy Act. What is brought on record is that there is no officer available who can be appointed as Judge Advocate who is of the rank of the petitioner or who is of the rank which is superior to the rank of petitioner. Therefore, the challenge to the appointment of the Judge Advocate is baseless and cannot be accepted. The respondents have pointed out that the Trial Judge Advocate appointed in case of the petitioner is a very experienced officer who has held judicial office for 12 years and is eligible to be appointed as Judge Advocate General (Navy).

11. The learned Counsel for the petitioner has strenuously urged that the charge against the petitioner is of commission of an offence punishable u/s 13(2) of the Prevention of Corruption Act and therefore, in view of the mandate of Section 19 of the Prevention of Corruption Act, the petitioner cannot be prosecuted unless there is a valid sanction for prosecution. u/s 77(2) of the Navy Act, every person subject to naval law, who commits any civil offence can be punished either with the punishment assigned for the offence or with imprisonment of the term which may extend to three years or such other punishment as is hereinafter mentioned. Section 78(1) provides that every person subject to naval law to be charged with a naval offence or civil offence may be tried and punished under the Navy Act. Therefore, there is a power vesting under the Navy Act to try a person who is charged with a civil offence. In this context, it is necessary to refer to Section 25 of the Prevention of Corruption Act, which reads thus :

25. Military, Navy and Air Force or other law not to be affected.- (1) Nothing in this Act shall affect the jurisdiction exercisable by, or the procedure applicable to, any Court or other authority under the Army Act, 1950 (45 of 1950), the Air Force Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), The Border Security Force Act, 1968 (47 of 11968), the Coast Guard Act, 1978 (30 of 1978), and the National Security Guard Act, 1986 (47 of 1986).

(2) For the removal of doubts, it is hereby declared that for the purposes of any such law as is referred to in Sub-section (1), the Court of a Special Judge shall be deemed to be a Court of ordinary criminal justice.

Sub-section (1) of Section 25 clearly provides that nothing in said Act shall affect the jurisdiction exercisable by Court or the authority under the Navy Act. As stated earlier, the Court under the Navy Act has jurisdiction to try a person subject to naval law who is charged with civil offence. The effect of Sub-section (1) of Section 25 is that nothing contained in the Prevention of Corruption Act will affect the jurisdiction exercisable by a Court or any other authority under the Navy Act. Therefore, the Court or authority under the Navy Act can exercise jurisdiction notwithstanding anything contained in the provisions of the Prevention of Corruption Act. The requirement of Section 19 of obtaining previous sanction for prosecution is not applicable to the petitioner as he is being tried under the provisions of the Navy Act for offences punishable under the Prevention of Corruption Act. Therefore, the contention of the petitioner based of Section 19 of the Prevention of Corruption Act will have to be rejected.

12. The reliance placed by the learned Counsel for the petitioner on the judgment of the Apex Court in Union of India and Ors. v. L.D. Balam Singh 2002 Mil. L.J. 1 will not help the petitioner. In the said case, the Apex Court was dealing with a trial by the Court Martial for committing civil offence punishable under the N.D.P.S. Act, 1985. In the present, case, we are dealing with the offence under the Prevention of Corruption Act and Section 25 thereof is the complete answer to the submissions made by the learned Counsel for the petitioner.

13. In the written submissions filed by the respondents it is stated in para 2 as under :

The purported grounds raised by the petitioner in the present writ petition can be dealt with by the Naval Tribunal itself and there is no cause of action for the petitioner to approach this Hon''ble Court in the midst of Court Martial proceedings. Moreover, in the Court Martial, the petitioner is represented by practicing Advocate and another officer of Indian Navy to defend him. Almost all the prosecution witnesses have been examined and full opportunity of cross-examination has been availed by the petitioner. The petitioner has yet to examine the defence witnesses for which he would be granted full opportunity. In the event of petitioner being aggrieved by procedure adopted during Court Martial proceedings and/or if the findings of the Court Martial are against the petitioner and the petitioner is awarded any sentence or punishment, then the petitioner has statutory remedy provided under the Navy Act, 1957. It is further submitted that the Navy Act provides for complete safeguards for protecting the life and liability of the accused.

It is further contended that the statutory remedies are available to the petitioner under Sections 160 and 162 of the Navy Act. As stated earlier, the matter before the Court Martial has made substantial progress and almost all prosecution witnesses have been examined by the prosecution and have been cross-examined by the petitioner. We have elaborately dealt with first two contentions raised by the petitioner as the same go to the root of the matter. The other contentions raised in this petition cannot be considered at this stage in a petition under Article 226 of the Constitution of India when remedies are available to the petitioner against the proceedings and final order of the Court Martial. Therefore, we are not entering into the merits of the other submissions made by the learned Counsel for the petitioner. The petitioner can always agitate the said contentions when he avails of appropriate remedy for challenging the final order of the Court Martial.

14. Hence there is no merit in the petition. Subject to the observations made above, the petition is dismissed with no order as to costs.

15. At this stage, the learned Counsel for the petitioner prays for grant of leave to approach the Hon''ble Supreme Court. The said prayer is rejected.

16. The learned Counsel for the petitioner prays that ad interim order passed by

this Court on 16th December, 2003 should be continued for a reasonable period. Accordingly the said ad interim order is continued for a period of six weeks from the date on which the authenticated copy of this order is made available to the petitioner.

Parties to act on ordinary copy of this order duly authenticated by the Personal Secretary/Court Associate.