
(2008) 07 PAT CK 0127
In the Patna High Court
Case No : CWJC No. 6289 of 2005

Devjee Mishra

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-07-2008

Acts Referred:

Air Force Act, 1950 — Section 107, 161, 39
Constitution of India, 1950 — Article 14, 21, 22, 311

Citation : (2008) 56 BLJR 2653 : (2008) 4 PLJR 438

Hon'ble Judges : V.N. Sinha, J

Bench : Single Bench

Judgement

V.N. Sinha, J.—Heard learned Counsel for the petitioner and the counsel for the Union of India.

2. Petitioner at the relevant time was serving as Corporal in 27th Wing of the Air Force and was posted at Bhuj Air Force Station in the State of Gujarat. He is aggrieved by the order dated 17.6.2004, Annexure-1, whereunder he has been sentenced to undergo R.I. for three months and thereafter dismissed from service as also reduced in rank since he was found guilty by the District Court Martial, which order has also been promulgated on 2.7.2004 and is contained in Annexure-2 to this application. Having been dismissed from service, petitioner preferred appeal u/s 161 of the Air Force Act, 1950 (hereinafter referred to as the Act) before the Chief of the Air Staff, vide his memo of appeal dated 11.10.2004 as also served a reminder dated 1.12.2004 for early consideration of the appeal, which was considered and appeal dismissed, the order dismissing the appeal has been communicated by the Wing Commander is dated 12.1.2005, as contained in Annexure-3 to this application. The three orders aforesaid have been challenged on the ground that petitioner was not given ample opportunity to defend his case before the Court Martial and the finding of guilt recorded by it proceeds only on the basis of the concession recorded by the Judge Advocate without the approval of the petitioner as also contrary to the plea of illness raised by the petitioner before the Summary/District Court Martial.

3. For better appreciation of the facts of this case, it is necessary to notice the charges levelled against the petitioner, which is contained in Annexure-11 to this application at page 158 of the brief, perusal whereof indicates that the petitioner was charged u/s 39(a) and (b) of the Act as while he was posted at Air Force Station, Bhuj, he was granted 10 days Casual Leave from 12.4.2003 to 25.4.2003, but he is said to have overstayed the leave without sufficient cause until he surrendered in the Main Guard Room, 27 Wing AF at 10.00 hours on 20.3.2004. Further charge against him is that, he absented himself without leave from 7.30 hours on 22.3.2004 till apprehended by Air Force authorities at his village Parasurampur, P.O. Krishnagarh, District Bhojpur at 10.00 hours on 30.4.2004.

4. It is submitted on behalf of the petitioner that on the basis of the aforesaid two charges initially Summary Court Martial Proceeding was drawn in which he submitted that he became ill while he remained posted at Air Force Station, Bhuj and as he could not recover from illness, the authorities allowed him leave for ten days for the period between 12.4.2003 to 25.4.2003 and advised him to visit home so that he may recover from illness. As advised, he came to his village home, but could not recover from illness rather his condition became even worse than before and he was treated at his village home by the local doctors as also by the doctors available in the Government hospital at Bihta and the District Hospital at Ara. Once he recovered from illness, he reported at Air Force Station, Bhuj on 20.3.2004 when the authorities confined him to a Cell without making any enquiry u/s 107 of the Act and initiated proceedings for the Summary Court Martial. In the Summary Court Martial Proceedings also petitioner submitted that as he could not recover from his illness he could not report soon after the leave was over on 25.4.2003 and in support of his plea of illness, he submitted that even before grant of leave he was ill and appreciating his illness only he was granted leave so that he could recover while staying at home, but when his condition could not recover even at home then he could not report for his duty after expiry of the leave. In support of his plea of illness, petitioner furnished prescription and certificates issued by the doctors attending on him at his village home, District hospital and other doctors, who attended on him during his aforesaid illness. It was also stated in his written defence before the authorities of the Summary Court Martial, vide written defence dated 20.5.2004 that on account of acute illness, petitioner could not join the Station soon after the leave was over. Information regarding different stages of illness was duly furnished to the authorities by telegram. Receipt of telegram was also placed before the authorities along with written defence dated 20.5.2004. The Flag Officer conducting the Summary Court Martial, however, submitted that the petitioner neither wishes to cross-examine the prosecution witnesses nor does he wish to examine any witness in defence and, accordingly, certified the records on 21.5.2004 whereafter matter was referred to the District Court Martial. It may be stated here that on 21.5.2004 itself petitioner requested the Station Commander under application dated 21.5.2004, Annexure-24 to the rejoinder affidavit to

permit him to engage his own Advocate to defend his case before the District Court Martial as the authorities were persuading him to accept his guilt. Petitioner also requested the Station Commander vide his application dated 15.6.2004, which is contained in Annexure-19 to the rejoinder affidavit to furnish the prescription and other documents, which were generated while he was being treated in the Station Hospital at Bhuj prior to the grant of leave. The Station Commander neither permitted the petitioner to engage his own Advocate nor gave him the documents to certify the nature of illness undergone by him prior to the grant of leave. The District Court Martial Proceeding was concluded in the light of the submission of the Judge Advocate that the petitioner is accepting his guilt and petitioner was held guilty of the charge by the District Court Martial on the basis of which impugned order of dismissal was passed, which was also confirmed by the authorities and the appeal against the dismissal/confirmation order having failed, the present writ application has been filed impugning the aforesaid three orders dated 17.6.2004, 2.7.2004 and 12.1.2005, as contained in Annexures-1, 2 and 3 to this writ application.

5. Learned Counsel for the petitioner states and submits that the entire proceedings either before the Summary Court Martial as also before the District Court Martial is vitiated for the reason that the petitioner was confined to a Cell without there being any enquiry u/s 107 of the Act and as there was no enquiry in terms of the provisions contained in Section 107 of the Act, the action of the authorities to confine the petitioner into a Cell, tantamounts to violating his right to life as also amounts to not granting him adequate opportunity to defend himself, as by confining him to a Cell as also by not permitting him to engage a private lawyer for which he requested under his request letter dated 21.5.2004, Annexure- 24 as also by not giving him the documents requested for under letter dated 15.6.2004, Annexure-19 addressed to Station Commander, he was deprived of the adequate opportunity to defend himself and if he was not given adequate opportunity to defend himself before the Summary Court Martial or District Court Martial, the order passed on the basis of concession recorded by the Judge Advocate is wholly violative of the provisions contained in Articles 14, 21, 22 and 311 of the Constitution of the India and should be quashed. In this connection, he referred to the submission made in his memo of appeal submitted before the Chief of Air Staff as also the statement made in paragraph 26 of this writ application and on the basis of the statements made therein, it is submitted that the stand of the Judge Advocate is de hors the statements made by the petitioner in his written defence dated 20.5.2004 as also the application submitted before the Station Commander dated 21.5.2004 and 15.6.2004, Annexures-24 and 19 as also in the memo of Appeal before the Appellate Authority and this Court should, therefore, ignore the concession recorded by the Judge Advocate.

6. Counsel for the Union of India, however, has supported the order of dismissal and the rejection of the appeal. It is submitted by him that petitioner is a habitual deserter as earlier also he is in the habit of overstaying at home after

the leave is over. No such statement is found recorded in the impugned order, which only proceeds on the basis of the acceptance of guilt by the Judge Advocate on behalf of the petitioner. The averments made in the memo of appeal as also in paragraph 26 of this writ application that petitioner never accepted his guilt, have not been disputed/controverted in the counter affidavit.

7. In view of the contents of the letter dated 21.5.2004, Annexure-24, whereunder petitioner informed the Station Commander on the same day on which Summary Court Martial proceedings were certified (21.5.2004) as is evident from Annexure-24 that he is being persuaded by the authorities to accept his guilt and requested him to grant permission to engage private counsel, this Court accepts the plea of the petitioner that he never accepted his guilt during the Court Martial proceedings rather wanted to contest the proceeding but was prevented from doing so. Besides, the authorities having relegated the petitioner to the Cell without there being any enquiry u/s 107 of the Act, the confinement of the petitioner in the Cell was also contrary to the provisions in the Act and tantamounts to violating his right to life without observing the due process of law, which is violative of Articles 21 and 22 of the Constitution of India. This being the position, I have no option but to quash the order dated 17.6.2004 passed by the Court Martial and the Disciplinary Authority dismissing the petitioner contained in Annexure-1 as also the order dated 2.7.2004 promulgating the same contained in Annexure-2 and the appellate order contained in Annexure-3.

8. The matter, however, is remitted back to the Station Commander, who should accept the joining of the petitioner and thereafter subject him to a disciplinary proceeding in accordance with law after furnishing him the documents required by him under his letter dated 15.6.2004, Annexure 19. Petitioner be also allowed to avail the services of private lawyer of his choice, of course at his own cost. Arrears of salary for the dismissal period shall be subject to the result of the disciplinary proceeding. Current salary, however, shall be paid to the petitioner.

9. With the aforesaid directions and observations, this writ application is disposed of.