
(2009) 02 MAD CK 0205
In the Madras High Court
Case No : Writ Petition No. 12044 of 1999

G. Udayasuriyan	Vs	APPELLANT
The Union of India (UOI)		RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Army Act, 1950 — Section 108, 116, 116(1), 130, 34
Army Rules, 1954 — Rule 106, 107, 108, 109, 110

Citation : (2009) 02 MAD CK 0205

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : T.R. Sethuraman, for the Appellant; K. Balachandran, ACGSC, for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—The writ petitioner seeks for setting aside the order dated 22.7.1998 passed by the third respondent Commanding Officer, Engineering Regiment, C/o. 56 APO and for a consequential direction to reinstate the petitioner in service.

2. The writ petition was admitted on 14.7.1999. Pending the writ petition, the petitioner sought for return of his educational certificates and also to pay amounts towards Army Provident Fund, Group Insurance and credit balance. This Court by an interim order directed settlement of the amounts as well as the payment of the amounts due to the petitioner which was also granted to him with a covering letter dated 2.5.2001.

3. On notice from this court, the respondents have filed a counter affidavit dated 30.11.1999. The petitioner was enrolled as a Naik on 30.8.1982 and he was serving at various places and finally at Nazirabad. The petitioner was tried by Summary Court Martial by the Commanding Officer at No. 12, Engineering Regiment on 22.7.1998. It was stated that the petitioner had a history of committing offences under various sections of the Army Act. Even earlier,

offences were committed under Sections 39(b), 39(a) and 54(b). He was punished during September 1997. The petitioner was granted three days' mid-term leave from 08th to 10th September. He failed to report for duty the next day and reported on 13.9.1997 thereby overstaying for three days. The reasons given by him was that his father had expired which was found to be wrong by the Court of Inquiry. Once again, he had absented himself on 29.9.1997 and the Court of Inquiry found that the said absence was without any reason and that he did not report to any one before leaving the station. The petitioner reported on 26.11.1997 after his absence for 59 days.

4. The petitioner once again had absented himself for 89 days from 31.12.1997 to 24.3.1998. Therefore, he was sent for and brought to Nazirabad on 15.5.1998 under custody and remanded. The Court of Inquiry was conducted and a summary of evidence was recorded. The summary of evidence was duly submitted.

5. On the basis of the evidence and the gravity of offence, a Summary Court Martial was ordered by the Commanding Officer. The petitioner was given the assistance of a friend to defend him in the enquiry. The Medical Officer found him fit on 22.7.1998. In the Summary Court Martial held on 17.2.1998 due procedure was followed. He was awarded the punishments of reduction in rank, sentence of RI in Civil Jail for one month and also dismissal from service. He was handed over to the District Jail, Ajmer with a warrant of commission and direction to be transferred to the jail near his native place which was also done. It is this punishment which is under challenge by the petitioner in this writ petition.

6. It was the contention of the petitioner that the petitioner during the Summary Court Martial was not asked whether he is objecting to any of the members of the Court Martial including the third respondent and, therefore, that would vitiate the entire Court Martial proceedings.

7. The petitioner placed reliance upon Section 130 of the Army Act, 1950, which reads as follows:

130. Challenges.

(1) At all trials by general, district or summary general court-martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded and the remaining officers of the court shall, in the absence of the challenged officer decide on the objection.

(3) If the objection is allowed by one-half or more of the votes of the officers entitled to vote, the objection shall be allowed, and the member objected to shall retire, and his vacancy may be filled in the prescribed manner by another officer

subject to the same right of the accused to object.

(4) When no challenge is made, or when challenge has been made and disallowed, or the place of every officer successfully challenged has been filled by another officer to whom no objection is made or allowed, the court shall proceed with the trial.

8. In this context, learned Counsel relied upon the judgment of the Supreme Court in *Ranjit Thakur Vs. Union of India (UOI) and Others*, . He placed reliance upon paragraphs 8 to 14 of the said judgment, which reads as follows:

Re contention (a):

8. The records of the proceedings of the special summary court-martial do not indicate that the procedural safeguard against bias contained in Section 130 of the Act was complied with. Section 130 provides:

130. (1) At all trials by general district or summary general court-martial, as soon as the court is assembled, the names of the presiding officer and members shall be read over to the accused, who shall thereupon be asked whether he objects to being tried by any officer sitting on the court.

(2) If the accused objects to any such officer, his objection, and also the reply thereto of the officer objected to, shall be heard and recorded, and the remaining officers of the court shall, in the absence of the challenged officer, decide on the objection.

9. The proceedings do not indicate this was not disputed at the hearing that appellant was asked whether he objects to be tried by any officer, sitting at the court-martial. This, in our opinion, imparts a basic infirmity to the proceedings and militates against and detracts from the concept of a fair trial.

10. The 'Act' constitutes a special law in force conferring a special jurisdiction on the court-martial prescribing a special procedure for the trial of the offences under the 'Act' Chapter VI of the 'Act' comprising of Sections 34 - 68 specifies and defines the various offences under the 'Act'. Sections 71 to 89 of Chapter VII specify the various punishments. Rules 106 to 133 of the Army Rules, 1954 prescribe the procedure of, and before, the summary court-martial. The Act and the Rules constitute a self-contained code, specifying offences and the procedure for detention, custody and trial of the offenders by the courts martial.

11. The procedural safeguards contemplated in the Act must be considered in the context of and corresponding to the plenitude of the summary jurisdiction of the court-martial and the severity of the consequences that visit the person subject to that jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute. The oft-quoted words of Frankfurter, J. in *Vitarelli v. Seaton* are again worth recalling:

...if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword.

12. "The history of liberty" said the same learned Judge "has largely been the history of observance of procedural safeguards".

13. We are afraid, the non-compliance of the mandate of Section 130 is an infirmity which goes to the root of the jurisdiction and without more, vitiates the proceedings. Indeed it has been so held by this Court in *Prithi Pal Singh v. Union of India* where Desai, J. referring to the purpose of Section 130 observed: [SCC pp. 167-68, SCC (Cri) p. 667, para 32]

Whenever an objection is taken it has to be recorded. In order to ensure that anyone objected to does not participate in disposing of the objection.... This is a mandatory requirement because the officer objected to cannot participate in the decision disposing of the objection.... The provision conferring a right on the accused to object to a member of the court-martial sitting as a member and participating in the trial ensures that a charge of bias can be made and investigated against individual members composing the court-martial. This is pre-eminently a rational provision which goes a long way to ensure a fair trial.

14. What emerges, therefore, is that in the present case there is a non-compliance with the mandate of Section 130 with the attendant consequence that the proceedings of the summary court-martial are rendered infirm in law. This disposes of the first limb of the contention (a).

9. It is a definite stand of the respondents that what was conducted against the petitioner was a Summary Court Martial and not a Summary General Court Martial. Section 108 of the Army Act contemplates different kinds of Court Martials. Chapter X of the Army Act sets out the procedure for conducting of the Summary Court Martial. Section 116 of the Army Act empowers the Commanding Officer to constitute himself as the Court together with two persons attending the said Summary Court Martial. Section 130 of the Army Act for which reliance was placed upon comes under Chapter XI wherein the procedure for Court Martial is provided. Unless the proceedings initiated against the petitioner is a Summary General Court Martial, he cannot invoke the benefit u/s 130 of the Army Act read with Rule 44 and 154 of the Army Rules, 1954.

10. The petitioner is not aware of the fact that subsequent to the pronouncement of the judgment in *Ranjit Thakur's* case (cited supra), the Union of India filed a review petition No. 43 of 1988 and notice was ordered. The second proceedings on the issuance of notice is reported in *Union of India and Ors. v. Ranjit Thakur*. Para 4 of the said order may be usefully extracted below:

Para 4. Contention at (a)(i) was that in the conduct of the Court Martial there

was violation of the mandatory provisions of Section 130 of the Indian Army Act, 1950. In the present review petition it is pointed out prima facie with some justification that the Court Martial was a ?Summary Court Martial? and not ?Summary General Court Martial? and that to the former, the provisions of Section 130 were not attracted.

11. Thereafter the Supreme Court passed a final order in Union of India v. Ranjit Thakur reported in (1989) 2 SCC 438. In paragraphs 2 and 3, it was held as follows:

Para 2. It is pointed out in this review petition by the Union of India, and in our opinion quite rightly, that the court martial in question was not a ?Summary General Court Martial? to which Section 130 would be so attracted, but was only a ?Summary Court Martial? to which by virtue of Section 116(1) of the Act, the applicability of Section 130 is clearly excluded. This position requires to be clarified and the judgment dated 15-10-1987 corrected accordingly. The need for this correction was also indicated in our order dated 20-1-19882. However, the principles enunciated would apply to a ?Summary General Court Martial?. But it is not disputed that the court martial in this case was a ?Summary Court Martial? the constitution of which was regulated by Section 116(1) of the Act.

Para 3. The purpose of the review petition would be served if the contention at point a(i) as also the finding on that point in the judgment dated 15-10-1987 is deleted. They are accordingly, deleted. But, this will not make any difference to the operative part of the judgment. All the other findings, including the quashing of the penalty imposed, would remain undisturbed.

(Emphasis Added)

12. Since in the present case, the petitioner was only faced with a Summary Court Martial and not Summary General Court Martial, his invoking of protection u/s 130 of the Army Act is misconceived. Even in the Court Martial, the petitioner had only pleaded guilty for all the three charges and hence this was the only point urged by the petitioner. Therefore, there is no case made out to interfere with the punishment imposed on the petitioner. Accordingly, the writ petition will stand dismissed. However, there will be no order as to costs.