
(1995) 11 AHC CK 0069

In the Allahabad High Court

Case No : Civil Miscellaneous W. P. No. 14481 of 1987

Havildar Clark, Dharm Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 30-11-1995

Acts Referred:

Army Act, 1950 — Section 116, 120, 63
Army Rules, 1954 — Rule 22, 23
Constitution of India, 1950 — Article 226
Pension Regulations for Army, 1961 — Para 381

Citation : (1995) 11 AHC CK 0069

Hon'ble Judges : D.K.Seth, J

Final Decision : Dismissed

Judgement

D. K. Seth, J.—A writ of certiorari for quashing the sentence of Summary Court Martial (Annexure 5) and a writ of mandamus directing the respondents to reinstate the petitioner with his antedate of seniority and a declaration that he continues to be in service and to pay his full arrears of pay and allowances have been sought by the petitioner in the present writ petition.

2. The contention of the petitioner was that the petitioner was a Havildar Cleric in the Indian Army, was lastly posted at 46 Air Defence Regiment. After 22 years of service when he was likely to go for Head Clerks Duty Course he was falsely involved along with one Ram Veer in a recruitment scandal resulting into denial of the said course to him. A statutory complaint under Section 26 of the Army Act was filed by the petitioner before the Chief of Army Staff, in respect whereof no reply having been received a second statutory complaint was made which was rejected by the Officer Commanding, 67/46 Air Defence Regiment C/o 56 A.P.O. After having been attached with 46 Air Defence Regiment, the petitioner was subsequently attached with 50 Light Air Defence Regiment, the Commanding Officer whereof had issued a chargesheet under Section 63 of the Army Act on 27th December, 1986 (Annexure 3). The order of summary Court Martial was issued by 611 Air Defence Brigade. Summary evidence was recorded by 436 Air

Defence Regiment, but the petitioner was tried by Commanding Officer 50Light Air Defence Regiment. The respondent awarded the punishment on the summary evidence. In order to circumvent the provisions of Section 120 of the Army Act the petitioner was attached with 50Light Air Defence Regiment being respondent No. 5 whereas the summary evidence was recorded by Commanding Officer 436Air Defence Regiment, respondent No. 6. 3. Appearing on behalf of the petitioner, Mr. O. D, Mukerji submitted that the petitioner could not have been attached with respondent No. 5. The Summary CourtMartial (hereinafter referred to as S.C.M.) ought to have been held by respondent No. 4. Then again summary evidence having been recorded by respondent No. 6, the passing of order of sentence by respondent No. 5 is illegal. The attachment with respondent No. 5 was made in order to circumvent the provision of Section 120 of the Army Act. He further submits that Rule 22(2) of the Army Rules have not been followed and, therefore, the recording of summary evidence under Rule 23 which follows the procedure laid down in Rule 22 is invalid. The chargesheet issued under Section 63 of the Army Act is illegal and untenable in law since the petitioner was charged wrongly under a wrong Section of the Army Act. Therefore, the Summary CourtMartial stands vitiated. That the procedure laid down in Rules 118 and 119 of the Army Rules had not been] followed.

4. In support of his contention that the petitioner should be tried by the respondent No. 4, his own Regiment, Mr. Mukerji relied on the case of Mahipal Singh v. Union of India. 1994 Lab 1C12365. In the said case, Summary Court Martial was conducted by a Commanding Officer of an outside Unit to which the petitioner did not belong, and, therefore, it was held that he had no jurisdiction to proceed in the matter and the trial was accordingly vitiated. Inasmuch as Note5 at appended to Section 120 provides that a N.C.O. or a sepoy can not be attached to another unit for the purpose of trial by S.C.M. except as provided In Army Regulations, Para 381. In support of his contention that Rules 22 to 24 of the Army Rules are mandatory, he relies on the judgment in the case of Lt. Col, Prithi Pal Singh Bedi v. Union of India, AIR 1982 SO 1413. The said case lays down that the requirement of Rules 22 to 24 are mandatory in respect of every person subject to the Act other than an Officer.

5. On the other hand, the learned counsel for the respondents, relying on the counteraffidavit, contends that the petitioner was last posted at 46 A. D. Regiment and was attached to 50 Light A.D. Regiment with effect from 17 November 1986 since a disciplinary proceeding was going on against him. However, in the mean time, at the request of petitioner's wife, the petitioner was attached to 436 A. D. Missile Regiment. Such attachment was effected because 46 A.D. Regiment had moved out whereas the S.C.M. was to be held at the said place. However, 435 A.D. Missile Regiment moved out of the location and the petitioner was attached to 50 Light A. D. Regiment for trial. For the purpose of continuation of the trial of the petitioner, the movement of the Regiment cannot be forestalled. At the same time, the petitioner cannot also be taken along with th; moving Regiment since the trial was to be held in the location where the

charges have been issued. On account of movement of 46 A.D. Regiment, summary evidence was recorded by respondent No. 6. The said evidence was examined by respondent No. 5 on the attachment of the petitioner to the said Unit. The respondent No. 6 after having recorded summary evidence and going through the summary evidence satisfied itself that there was prima facie case for Summary Court Martial. Having examined these records, the respondent No. 5 ordered holding of Summary Court Martial against the petitioner. A Certificate to that effect was attached to the Summary Court Martial and the chargesheet was forwarded to the headquarter 611 (1) A. D. Brigade on 5111987. The trial commenced on 921987. The reference was made under Section 120(2) of the Act to the Commander 611(1) A.D. Brigade who is competent to convene a District Court Martial. The petitioner was never tried by the respondent No. 4 against whom he made certain allegations, but he was tried by respondent No. 6. Therefore, the same cannot be said to be violative of Section 120 of the Army Act. The attachment of the petitioner with the respondent No. 5 was never made for circumventing Section 120 of the Act. It was made because the respondent No. 6 along with his Regiment had moved out of the location to Gwalior and, therefore, the petitioner had to be attached with the respondent No. 5 located there who held the Summary Court Martial after reference was made to Commander 611(1) A.D. Brigade. Since the petitioner was attached to respondent No. 5, therefore, the contention with regard to the question of attachment can not be sustained. The provisions of Rule 22 have been fully complied with by respondent No. 6. The petitioner had participated and had cross-examined the witness produced at the time of the hearing of the case. The summary evidence was recorded only after complying with the provisions of Rule 22. There was no infraction of Section 63 of the Act. The petitioner while appearing in the Court Martial submitted the names of four defence witnesses who were called and examined in defence. The petitioner was allowed to be provided with all relevant documents connected with the charges. The perusal of the Summary Court Martial proceedings clearly shows that the petitioner was allowed to call his defence witnesses when he had examined. There was no violation of Rules 118 and 119.

6. Rule 22 of the Army Rules prescribes that the charge should be heard in the presence of the accused who shall have full liberty to cross examine any witness against him and call any witness and make any statement in defence and the Commanding Officer, if he is of the opinion that the evidence does not show any offence, he may dismiss the charge. If, on the other hand, he feels otherwise, he shall proceed with without unnecessary delay and dispose of the case summarily under Section 80 in accordance with the manner and form in Appendix 111 or refer the case to the proper superior Military authority or adjourn the case for the purpose of having the evidence reduced to writing, or if the accused is below the rank of warrant officer, order his trial by a Summary Court Martial. But he shall order Summary Court Martial only after reference to the officer empowered to convene a District Court Martial unless the offence is an offence which can be

tried by Summary Court Martial without reference or he considers that there are grave reasons for immediate action and such reference would be detrimental to discipline. In order to appreciate the above situation, Rule 22 is quoted hereinafter for ready reference.

"22. Hearing of charge. (1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witnesses against him, and to call any witnesses and make any statement in his defence.

(2) The commanding officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion he is satisfied that the charge ought not to be proceeded with.

(3) At the conclusion of the hearing of a charge, if the commanding officer is of opinion that the charge ought to be proceeded with, he shall without unnecessary delay

(a) dispose of the case summarily under Section 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority ; or

(c) adjourn the case for the purpose of having the evidence reduced to writing ; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary courtmartial:

Provided that the commanding officer shall not order trial by a summary court martial without a reference to the officer empowered to convene a district courtmartial or on active service a summary general courtmartial for the trial of the alleged offender unless either

(a) the offence is one which he can try by a summary court martial without any reference to that officer ; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline."

7. In the present case, the petitioner has admitted that the summary evidence was recorded by respondent No. 6 and that the chargesheet was issued only after a reference to the Headquarter which, according to the petitioner, was not necessary and thereafter the trial was held by respondent No. 5. Admittedly the observation of the procedure laid down in Rules 22 and 23 being mandatory, as held in the case of Lt. Col. Prithi Pal Singh Bedi (supra), so far as it relates to SCM against an army personnel other than officer, the ratio whereof was cited with approval in the case of Union of India v. Naik Subedar Baleswar Ram, JT 1989 (4) SC 250. On the said question, while the petitioner denies the

observation of the said Rules, the respondents affirm the same. It is difficult to ascertain that situation on the basis of the statements made to the writ petition and the counteraffidavit which requires examination in detail because it is recorded at one stage in the proceeding itself that the petitioner had declined to call any witness. I am afraid that if such an investigation as to whether the petitioner is telling the truth on the record is correct is to be undertaken in exercise of writ jurisdiction, then the record is to be preferred unless contrary is prima facie proved.

8. The learned counsel for the respondents relied on the judgment in the case of *Bhuvneswar Singh v. Union of India*, JT 1993(5) SC 154. In the said case, it was held :

"This Court as also the High Courts under Article 226 have the power of judicial review, in respect of proceedings of courtmartial as well as the proceedings subsequent thereto, even though to a limited extent, and can in appropriate cases grant it relief, where there has been denial of the fundamental rights of the citizens or if the proceedings before the Courtmartial suffer from a jurisdictional defect or any other substantive error of law apparent on the face of the record (See *S. N. Mukherjee v. Union of India*, AIR 1990 SC 1984)."

In the present case, a combined reading of the writ petition and the counteraffidavit reveals that Rule 22 was complied with. On the other hand there is no evidence of noncompliance of Rule 22. The petitioner has not pointed out which particular procedure required to be followed under Rule 22 was not followed. It was held in the case of *Ruval Kumar Vasve v. Chief of Army Staff, Army Head Quarter, New Delhi*, 1986 UPLBEC 663, that

".....Further more Rule 22 was only a sort of preliminary investigation to find out or ascertain whether there existed any prima facie case to proceed with it or not. The Learned Counsel for the petitioner could not point out as to which particular procedure, which was required to be observed and undertaken under Rule 22, had not been followed."

In the above circumstances, the contention that Rule 22 was not complied with can not be accepted.

9. Section 120 provides for power of Summary CourtMartial which runs as follows :

"120. Powers of summary courtmartial(1) Subject to the provisions of subsection (2), a summary courtmartial may try any offence punishable under this Act.

(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district courtmartial or on active service a summary general courtmartial for the trial of the alleged offender, an officer holding a summary courtmartial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the court.

(3) A summary courtmartial may try any person subject to this Act and under the command of the officer holding the court, except an officer. Junior commissioned officer or warrant officer.

(4) A summary courtmartial may pass any sentence which may be passed under this Act, except a sentence of death or (imprisonment for life) or of imprisonment for a term exceeding the limit specified in subsection (5)

(5) The limit referred to in subsection (4) shall be one year if the officer holding the summary courtmartial is of the rank of lieutenantcolonel and upwards, and three months if such officer's is below that rank."

10, Section 118 empowers the holding of general or summary general courtmartial which runs as follows :

"118. Powers of general and summary general courtmartial. A general or summary general courtmartial shall have power to try any person subject to this Act for any offence punishable therein and to pass any sentence authorised thereby."

11. In the present case, Summary Court Martial was held which is subject to Section 120(2). Here a reference is made to the Headquarter being the officer empowered to convene a District Court Martial and the respondent permitted holding of Summary Court Martial. Therefore, Section 120(2) appears to have been complied with. Section 120(3) prescribes that the persons subject to Court Martial shall be tried by officer under whose command he is attached. The question of attachment as raised by the petitioner leaves us to refer to Section 116 of the said Act which runs as follows :

"116. Summary courtmartial.(1) A summary courtmartial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court.

(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such be sworn or affirmed."

12. The said section provides that Summary Court Martial may be held by the Commanding Officer of any corps, department or detachment of the regular Army, and he shall alone constitute the court. The decision in the case of Lt. Col. Prithipai Singh Bedi (supra) proceeded on the basis of Note 5 under Section 116 which runs as follows :

"5. See Army Regulations, para 381 for the circumstances under which a company of a different unit may hold the trial by the SCM of a person subject to A A."

13. The same is only a Note and is not part of the Act. Therefore, the same cannot be a guiding principle to the proposition that the accused has to be tried by a Commanding Officer to which he originally belonged. Even if the said note is

accepted, then also the said proposition can not be pushed through inasmuch as Para 381 has two parts. The first part deals with deserters, while the second parts deals with others. The second part runs as follows i

"In no circumstances will a man be tried by summary courtmartial held by a company other than the company of the unit to which the man properly belongs ; a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs." The said part proceeds further on the third part which runs :

"This Rule is not intended to limit the power of any convening officer who at his discretion may order trial by General, Summary General, or District CourtMartial at any place, if such a course appears desirable in the interest of discipline."

15. Thus Para 381 read with Section 116 appears to be clear. Section 116 of the Act says that the CourtMartial may be held by a Commanding Officer of any of the corps, department or detachment of the regular Army while Para 381 of the Regulation prescribed that the CourtMartial can be held either by the Commanding Officer to which the petitioner belonged or by the Commanding Officer of some other Unit to which the petitioner might be attached after the commission of the offence and in case of attachment after the commission of the offence, the said Unit shall be the Unit to which the man properly belongs. In the present case, the petitioner having been attached to 436 A.D. Regiment after the commission of the offence he belongs to that Unit and alter he was attached with 50 A.D. Regiment, he belongs to that Unit by virtue of second part of Para 381 of the Regulations. Therefore, the respondent No. 5 cannot be said to have no jurisdiction to hold the Summary CourtMartial. The order was made by respondent No. 5 in terms of 120(2) after the competent authority who could call for District CourtMartial having ordered Summary CourtMartial by respondent No. 5, the same is also legal and valid by reason of third part of para 381 of the said Regulation which did not limit the discretion for holding Summary CourtMartial at such places which the competent authority may direct.

16. The learned counsel for the respondents refers to an Army Order being AO 89/81 issued by Adjutant General's Branch relating to attachment of service personnel other than Officers to Unit and formations nearest to the place of their trial in a Criminal Court and for progressing disciplinary/ vigilance cases. The text of the said Army Order is quoted below :

"(1) In accordance with Para 420 of the Regulations for the Army, 1962, a Junior Commissioned Officer, Warrant Officer or Other Ranks including an Enrolled NonCombatant, Released on bail and awaiting trial by the civil power, will, during the period he remains on bail, perform all military duties without prejudice to his trial by the civil power.

(2) The arrest of a person subject to the Army Act by the civil police is required to be reported to his Commanding Officer by them in accordance with the instructions issued by the Ministry of Home Affairs vide letter No. F. 9/7/60Judl

11 dated 14 July, 60 (reproduced in AO 409/71). As soon as this information is received, the arrested person will be instructed telegraphically that, if and when he is released on bail by the Court, he will report for duty to the nearest station or formation headquarters immediately so that he may be able to perform duty in terms of the Regulations quoted above. The Station or Formation Headquarters concerned to which he reports when released on bail will intimate the date of his arrival to his parent unit. To avoid delay, the attachment in such cases will be effected by the immediate formation headquarters of the parent unit concerned by making a direct request to the Headquarters of the Sub Area where such attachment is required to be made, endorsing copies to all the superior formations concerned. This procedure for effecting attachment will also apply in cases where the individual after committing the crime reports to his unit and is later claimed for investigation/ trial by the civil authorities.

(3) Attachments to units/establishments which do not have facilities for boarding and lodging and/or sufficient resources of manpower and transport e.g. Recruiting Officer and NCC units, will, as far as possible, be avoided.

(4) Where the criminal case in which the person is facing trial is adjourned for long period i.e. for over 60 days, he will be returned to his parent unit with the proviso that he is made available on the next date of hearing of the case. However, when the parent units make a specific request that the attached person be returned when the adjournment is for period 3060 days, the unit/formation to which the person is attached will accede to such a request.

(5) The provisions of para 2 above shall also apply to cases where attachment is visualised in progressing disciplinary/vigilance cases under the Army Act, During attachment the individuals will continue to be held against the appointment in the parent unit and no replacement will be made until completion of the disciplinary proceedings."

17. Para 2 prescribes that in order to avoid delay, in the trial of Army personnel, request may be made to the Headquarters of the SubArea where such attachment is required to be made so as to keep the person at the place of trial. Para 5 makes the provisions of Para 2 applicable also in cases of disciplinary and vigilance under the Army Act. Therefore, it cannot be said that the attachment of the petitioner to 50 Light A.D. Regiment is bad and that the respondent No. 5 had no authority to hold the CourtMartial.

18. With utmost respect, I am unable to agree with the proposition laid down in the case of Mahipal Singh (supra) for the simple reason that the said decision has not taken into account the second and third part of para 381 of the said Regulation, while relying on Note 5 which is merely a commentary and not part of Section 120 of the Act,

19. The contention that the chargesheet issued under Section 63 of the Army Act is illegal and untenable in law since the petitioner was charged wrongly under a wrong section of the Army Act. During the course of the argument, the learned

counsel for the petitioner has not been able to point out as to how and in what manner the petitioner was charged wrongly under a wrong section of the Army Act. The vague allegation made in the writ petition is not sufficient to decide the said question in absence of material particular. In order to assail the chargesheet on such a ground, it is incumbent on the petitioner to specify the particulars on which ground the chargesheet is bad. Therefore, the contention of the learned counsel that the S.C.M. stands vitiated on that account can not be sustained. I am unable to find out any force in the submission of the petitioner in that regard.

20. The other contention that Rules 118 and 119 of the Army Rules have not been followed also does not have any force, inasmuch as admittedly a preliminary enquiry was held and evidence was recorded and a reference was made to the authority who could convene a District General CourtMartial and the proceedings having been taken thereafter only when the authority was satisfied that there was a case to be tried, it cannot be said that Rule 118 was not followed. The petitioner himself pleaded not guilty and he was given an opportunity to defend himself. He was also allowed to call his witnesses. Therefore, it cannot be said that there was any infraction of Rule 118 as was sought to be contended by the learned counsel for the petitioner. Rule 119 is discretionary on the part of the Court which runs as follows ;

"119. Witness in reply to defence. The Court may, if it thinks it necessary in the interest of justice, call witnesses in reply to defence."

21. It is for the Court if it feels necessary to call witnesses in reply to the defence. Normally calling of witness in reply to the defence can not vitiate a procedure as it appears from the scheme of Rule 119 read with Rule 118. Therefore, there is no merit in the submission of the petitioner's counsel on the above score.

22. The other contention which the learned counsel sought to raise in the present case is that even on merit the order passed in the S.C.M can not be sustained on the basis of the materials on record on account of the reasons given in the order passed in S.C.M. It is by now well established, as has been held in the case of S. N. Mukherjee v. Union of India, AIR 19yQ SC 1984 in the following expression :

"In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasijudicial functions irrespective of the fact whether the decision is subject to appeal, revision or Judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of Law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or

revisional authority agrees with the reasons contained in the order under challenge."

23. In the said case, it has been further held :

"For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasijudicial functions is required to record the reasons for its decision."

24. After having referred to the various provisions of the Army Act and the Rules in the said decision, it was laid down :

"From the provisions referred to above it is evident that the judgeadvocate plays an important role during the course of trial at a general courtmartial and he is enjoined to maintain an impartial position. The courtmartial records its findings after the judgeadvocate has summoned up the evidence and has given his opinion upon the legal bearing of the case. The members of the court have to express their opinion as to the finding by word of mouth on each charge separately and the finding on each charge is to be recorded simply as a finding of "guilty" or "not guilty". It is also required that the sentence should be announced forthwith in open court. Moreover Rule 66(1) requires reasons to be recorded for its recommendation in cases where the court makes a recommendation to mercy. There is no such requirement in other provisions relating to recording of findings and sentence. Rule 66(1) proceeds on the basis that there is no such requirement in other provisions relating to recording of findings and sentence. Rule 66 (1) proceeds on the basis that there is no such requirement because if such a requirement was there it would not have been necessary to make a specific provision for recording of reasons for the recommendation to mercy. The said provisions thus negative requirement to give reasons for its finding and "sentence by the courtmartial and reasons are required to be recorded only in cases where the courtmartial makes a recommendation to mercy. In our opinion, therefore, at the stage of recording of findings and sentence the courtmartial is not required to record its reasons and at that stage reasons are only required for the recommendation to mercy if the courtmartial makes such a recommendation."

25. However, in the present case, reasons have been given. I have not been able to find out any such lacuna which can be termed as perverse for the purpose of calling for an interference in exercise of writ jurisdiction in the present case. The learned counsel has also not been able to point out any such material in order to enable this Court to exercise writ jurisdiction for interfering with the findings and the orders passed. As has been held in the case of Ruval Kumar Vasave (supra), namely :

"This Court under Article 226 of the Constitution does not sit as a Court of Appeal and, as such, is not entitled to reappraise evidence and come to its own findings. The Army Act and the Rules framed thereunder provides the procedure relating

to the investigation and trial of an army personnel and the proceedings if under the Act had become final, this Court cannot under Art. 226 of the Constitution reverse that finding. The petitioner's counsel failed to satisfy us that the General CourtMartial proceeding holding the petitioner to be guilty of offence is either mala fide or is not based on the evidence. The Army Act makes the findings and sentences of the Court Martial final conclusive and binding upon all. We could not be satisfied that the petitioner did not have a fair trial in the General Court Martial.

26. Following the said decision, I also do not find that the petitioner did not have fair trial in the present case. Neither the learned counsel was able to point out any thing convincing to the extent that the proceeding was mala fide or that the finding was not based on evidence. Though admittedly in exercise of jurisdiction under Article 32, the Hon'ble Supreme Court and in exercise of jurisdiction under Article 226, the High Court has jurisdiction to review an order passed in CourtMartial, but the said jurisdiction cannot be exercised as an appellate jurisdiction for reappreciating the evidence and sit on appeal on the decision as has been sought to be espoused by the learned counsel for the petitioner. In that view of the matter, I do not find any force in the contention raised by the learned counsel for the petitioner with regard to the merit of the case.

27. In the result, the writ petition fails and, as such, is dismissed. There will, however, be no order as to costs.