
(2001) 12 MP CK 0043
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5100 of 1989

Joginder Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-12-2001

Acts Referred:

Army Act, 1950 — Section 109, 52(d)

Citation : (2002) 2 MPLJ 472

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : N.K. Maan, for the Appellant; Indira Nair with Dubey, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.

The petitioner was dismissed from service on 14th June, 1989 as per order Annexure 7 on being found guilty in General Court Martial. This order was confirmed on 28th October 1989 as per Annexure 8.

The petitioner challenges the entire proceedings to be unauthorised leading to his dismissal. General Court Martial was ordered to be convened on 20th Feb. 1989 by Dy. General Officer Commanding. It was not signed by General Officer Commanding Chief.

3-4. The petitioner was initially appointed in the Defence Services in the Boys' Regiment as a "Boy". He retired from the service in 1983. He rose and retired in that "Captain". After retirement in 1983, he was re-employed in Defence Security Corps on 25th September, 1985 and was posted as Security JCO in C.O.D., Jabalpur. On 6th October, 1987, the petitioner was off duty. Risaldar Daulat Singh brought 13 vehicles from Babina on 25-10-1987 in which fired ammunition was loaded. Certain other vehicles loaded with live as well as fired ammunition also came to Jabalpur from Babina. They were brought by Risaldar

Jaikaran. The vouchers were handed over to Naik Batli who was examined, in the General Court Martial as PW5. Naik Batli fraudulently cleared the vouchers and took the vehicle of fired ammunition along with Risaldar Daulat Singh to the house of the petitioner and unloaded the same in the open ground at 3.50 p.m. near the house of the petitioner and subsequently it was alleged that the fired ammunition was transferred to the house of the petitioner. It was alleged that the same was recovered by the Civil Police and the Military Police from the house of the petitioner. The petitioner was charged u/s 52(d) of the Army Act for receiving stolen property knowingly or having reason to believe that the theft has been committed in respect of those empty cartridges by Risaldar Daulat Singh. In all 60 empty cartridges of 105 mm ammunition, property of the Government, were recovered from the house of the petitioner. The General Court Martial was conducted. The petitioner was found guilty and sentence was passed of dismissal from service. An appeal was filed to the competent authority and the same was rejected, hence the present writ petition.

The learned counsel for the petitioner submits that as per section 109 of the Army Act, power to convene General Court Martial is with the Central Government or the Chief of the Army Staff or by an officer empowered in this behalf by warrant of any such officer. Section 109 of the Army Act is quoted below:-

Power to convene General Court Martial. - A General Court Martial may be convened by Central Government or the Chief of the Army Staff or by an Officer empowered in this behalf by warrant of any such officer.

It is the common case that GOC-in-C is empowered by the Chief of the Army Staff to order General Court Martial. The petitioner's case is that this power could not be further delegated to be used by anyone since warrant of authorisation is necessary in order to exercise power to convene a General Court Martial. In the instant case, the petitioner submits that power was exercised by Deputy General Officer Commanding. The learned counsel for the petitioner submits that the entire proceedings are bad in law and deserve to be quashed only on the ground of jurisdictional incompetence of Dy. G.O.C.

Smt. Indira Nair, Senior Advocate, appearing for the respondents, has produced the record and rightly, so after perusal of the record, submits that the order was not signed by General Officer Commanding in Chief. The position of fact is indisputable, hence the law follows. Following is the order passed by Deputy General Officer Commanding;

GCM in respect of (Hony. Capt) Joginder Singh of COD, JBP, att with GRC Jabalpur is scheduled to be assembled on 03 March, 1989. The JCO is charged under AA Sec. 52(d).

(2) Draft convening order for assembly of ibid GCM is put up for approval please. Convening order will be signed by Col. "A" on behalf of GOC.

Put up for approval please.

Maj

DAAG(L)

-II.89.

Rule 37, Army Rules insofar as it is relevant reads as follows:-

37(1) An officer before convening a General or District Court Martial shall first satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act, and that the evidence justified a trial on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to superior authority.

(2) He shall also satisfy himself that the case is a proper one to be tried by the kind of Court-martial which he proposes to convene.

(3) The officer convening a court-martial shall appoint or detail the officers to form the Court and may also appoint or detail such waiting officers as he thinks expedient, he may also, where he considers the services of an interpreter to be necessary, appoint or detail an interpreter to the Court.

A bare reading of Rule 37 of the Army Rules, 1954 makes it clear that an officer before convening a General or District Court Martial has to first satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act, and that the evidence justifies a trial on those charges. Such a satisfaction has to be recorded. The order passed by Deputy General Officer Commanding does not indicate any such satisfaction, hence condition precedent to exercise power under Rule 37(1) and 37(2) was not adverted to, hence order is illegal on this ground alone. Further u/s 109 of the Army Act, it is the Chief of the Army Staff or by an officer empowered in this behalf by warrant can order convening of the General Court Martial. In the instant case, Deputy General Officer in Command who was not authorised by warrant ordered convening of the General Court Martial which was totally unauthorised as GOC in C was competent to convene the General Court Martial hence entire proceedings are unauthorised.

The Supreme Court in Union of India and Others Vs. Harish Chandra Goswami, held that:

8. Admittedly there is no record whatever in the file to show that the personnel of the Court-martial were appointed by or nominated by the Lt. General. The order for the assembly of a General Court-Martial did not contain either the signature or the initial of the Lt. General. It was signed only by the Colonel and none else. In the circumstances, the said order cannot be considered to be an order evidencing the appointment of personnel of the court-martial by the Lt. General. There is no dispute before us that under Rule 37, the Commanding Officer has to apply his mind to satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act and that the evidence

justified the trial of those charges. It is also admitted that the Commanding Officer has also to satisfy himself that the case is a proper one to be tried by the kind of Court-martial which he proposes to convene. However, learned counsel for the appellants contend that sub-rule (3) of Rule 37 is only procedural in nature and there is no need for the application of mind by the Commanding Officer in the matter of appointment of the personnel of the Court-martial. That contention loses its relevance in the present case in view of the categorical stand taken by the appellant that there was an order by the Commanding Officer appointing or detailing the officers to form the Court-martial. According to the learned counsel as stated earlier, the form for assembly of a Court-martial is the only relevant form and when it is signed by an officer on behalf of the Lt. General, that is sufficient proof of the appointment of the personnel of the Court-martial by the Lt. General. We are unable to accept this contention in view of the fact that the said form does not contain either, the signature or the initials of the Lt. General. Even assuming that the Lt. General passed an oral order, there is no record of any kind whatever to prove it. The form for assembly of a Court-martial was not contemporaneous to such oral order, if any. In the absence of any record whatever to show that the appointment of the personnel of the Court-martial was by the Lt. General, we are not persuaded to accept the contention of the appellants that the requirements of Rule 37 were fully satisfied. It is unnecessary for us to consider whether sub-rule (3) of Rule 37 requires an order in writing or not in view of the specific stand taken by the learned counsel for the appellants in this case that there was an order in writing and the said order was nothing else but the form for assembly of the Court-martial.

In the instant case, there was no authorisation with the Deputy General Officer Commanding as required u/s 109 of Army Act and further more no satisfaction was recorded by the authority while convening the General Court-Martial as per mandatory requirement of Rule 37(1) and 37(2) of the Army Rules, 1954.

Resultantly, the removal order of the petitioner is liable to be quashed. The order (Annexure 7) dated 14th June, 1989 is quashed.

The writ petition is allowed. The respondents are directed to pay all the monetary benefits, which the petitioner would have obtained but for his illegal dismissal, as per terms of re-employment within three months along with interest at the rate of 6% per annum.