
(2016) 02 KL CK 0051
In the High Court Of Kerala
Case No : W.P. (C) No. 20048 of 2004 (J)

John P. Mathew

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-02-2016

Acts Referred:

Army Act, 1950 — Section 161, Section 162, Section 164, Section 165

Citation : (2016) 02 KL CK 0051

Hon'ble Judges : K. Vinod Chandran, J.

Bench : Single Bench

Advocate : M.R. Rajendran Nair, Sr. Adv., M.R. Sudheendran, Rekha Vasudevan, Suraj S. and Vineetha B., Advocates, for the Appellant; John Varghese, SCGSC, Thomas Mathew Nellimoottil, Sr. P. Arm, N. Nagaresh, Assistant Solicitor General and T.D. Rajalakshmi, SCGSC, f

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—1. The petitioner had approached this Court against the proceedings issued pursuant to Ext.P4 and the verdict of the Court Martial indicated at Ext.P8. The petitioner was found to have disobeyed a lawful command given by the superior Officer and absented himself without leave. On such finding, the petitioner was imposed with a punishment of imprisonment for three months and reduction to the ranks.

2. The petitioner's contention is that the petitioner had filed an appeal, which was rejected under Ext.P6. A further application, made before the Chief of Army Staff, has been rejected as per Ext.P8. The petitioner seeks reconsideration of Ext.P8.

3. The learned Additional Solicitor General of India, at the outset raised the question of maintainability, since the proceedings were carried out in Chennai, when the petitioner was posted at Chennai. The petitioner has filed the above writ petition after his retirement in 2004 and the mere fact that the petitioner having retired to the State of Kerala would not confer jurisdiction on this Court,

is the contention. The learned ASGI also places reliance on the decisions of this Court in *Nakul Deo Singh v. Deputy Commandant* [, 1999 (3) KLT 629(FB)], *Anand Anoop v. Union of India* [, 2014 (3) KLT 171] and *Registrar, Indian Maritime University, Chennai v. Dr. K.G. Viswanathan and Another* [2014 (4) KHC 451 (FB)] to urge this Court to dismiss the writ petition on the ground of lack of jurisdiction.

4. However, it is to be noticed that the writ petition filed was in the year 2004. Notice was sent on 08.07.2004, indicating the admission of the writ petition itself. The respondents have also filed a Counter Affidavit, wherein no question of maintainability was raised. The fact that, the question of maintainability was not raised in the Counter Affidavit, would not stand against the respondent, since the same would have to be considered independently. However, if such a contention was raised, the petitioner could have, at that point of time itself, approached the appropriate forum. Here, what has to be noticed is that the writ petition itself was filed in the year 2004 and once it was transferred to the Armed Forces Tribunal, after the constitution of such Tribunal. The Tribunal found that since the punishment is only for three months, the proceedings would not lie there. Again, the matter was transferred here and has been kept pending for all these years, totalling about 12 years. It may not be proper for this Court to now reject the claim of the petitioner on the ground of jurisdiction, especially noticing that he is a soldier, retired from service.

5. The contention raised by the petitioner is on the basis of Sections 161, 162, 164 & 165 of the Army Act, 1950 [for brevity, the Act of 1950]. Section 161 deals with the finding and sentence of a Summary Court Martial, which does not require confirmation and could be carried out forthwith. Section 162 requires the transmission of proceedings of such Summary Court Martial to the Chief of Army Staff or any Officer, empowered in this behalf by the Chief of Army Staff. On such transmission of proceedings, the officer empowered could also interfere with the proceedings or reduce the sentence, which the Court has passed, for reasons based on the merits of the case, not being a technical reason.

6. Section 164 provides for an appeal against the order, finding or sentence of Court Martial, but only in cases where it requires confirmation, as is evident from a reading of sub-sections (1) & (2). Section 165 is an independent provision, which enables any person convicted in the Court Martial to move the Central Government, the Chief of Army Staff or any prescribed Officer.

7. A reading of the above provisions would indicate that though an appeal under Section 164 is not provided against the finding or sentence in a Summary Court Martial, the Legislature has been careful in providing for a review as per Section 162, which is in the nature of a suo motu proceedings, but however as per established principles could also be invoked by the accused. Here, the petitioner has filed an application, which was considered as per Ext.P6, which has to be deemed to be one under Section 162 of the Act of 1950.

8. The further proceedings taken before the Chief of Army Staff has been rejected by Ext.P8, only on the ground that one legal remedy has been exhausted. One of the legal remedies having been exhausted was not a sustainable or sufficient reason for rejecting the application filed before the Chief of Army Staff, especially when the statute provides for a two-tier remedy.

9. When, by a statute, remedies are provided to challenge the order and they are so provided to the officers superior in hierarchy; the consideration by one would not frustrate the other remedies. The highest Officer so empowered cannot reject an application filed, merely for the reason that a lower Officer had considered the issue and the aggrieved had exhausted one of the remedies available in the statute. As was noticed, Sections 162, 164 & 165 indicate that Section 165 is a separate remedy provided for an application to the Central Government or Chief of Army Staff or any prescribed Officer, who is also competent to annul the proceedings of any Court Martial, on grounds of illegality and on finding of the same to be unjustified.

In such circumstance, Ext.P8 cannot be sustained. Ext.P8 would stand set aside. The petitioner shall forward a certified copy of the judgment to the 2nd respondent and the 2nd respondent shall consider the same within a period of three months from the date of receipt of the certified copy of this judgment. In the context of the relief granted, being confined to a reconsideration; again the consideration by this Court, ignoring the jurisdictional aspect, visits the respondent with no grave prejudice or injury.

The writ petition is allowed to the limited extent noticed herein. No costs.