

(1995) 02 DEL CK 0050

In the Delhi High Court

Case No : Criminal Writ Appeal No. 209 of 1993

J.S. Punia

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-02-1995

Acts Referred:

Air Force Act, 1950 — Section 107
Air Force Rules, 1969 — Rule 22
Constitution of India, 1950 — Article 226

Citation : (1995) ILR Delhi 768

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : Prasanthi Prasad, A.P. Vinod, V.K. Shall and V.K. Seth, for the Appellant;

Judgement

Mohd. Shamim, J.

(1) The petitioner through the present writ petition wants this Court to issue a writ of prohibition restraining]the respondents from convening the General Court Martial. He further wants direction from this Court for his release from the service.

(2) Brief facts which gave rise to the present petition in order to fully and properly appreciate the points involved herein are as under; that the petitioner was commissioned as a Pilot Officer in Indian Air Force in June 1980. On account of his diligence, intelligence and hard work he was promoted to the rank of Sqn. Ldr. in the year 1990. The petitioner is an honest, upright and a man of rectitude. Thus he could not tolerate corruption and other illegal activities in the Force.

(3) SQN. Ldr. Nair on May, 18,1990 forced the wife of the petitioner to have drink in a function which she declined. It led to a flaming row in between the petitioner and the said Sqn. Ldr. Nair. Shri Nair reported the matter to the Commanding Officer whereupon the Commanding Officer issued a warning to the petitioner.

Shri Nair thereafter started harassing the petitioner in one way or the other. The petitioner applied for leave on June 29,1990 in order to enable him to attend engagement ceremony of his younger brother. The said application was rejected on flimsy grounds. The petitioner lodged a complaint with the Commanding Officer against Sqn. Ldr. Nair on October 29,1990 where through he exposed his corrupt practices. The Commanding Officer instead of looking to the charges leveled against Sqn. Ldr. Nair raised A.F.M.S. Form 10, against the petitioner on November 3,1990. The petitioner was flown to Military Hospital, Ahmedabad Along with a guard to be admitted in a psychiatric ward. Subsequently he was transferred to the Military Hospital, Pune.

(4) The petitioner at Pune Hospital was under the treatment of Lt. Col. Bhattacharya. He administered such type of drugs to the petitioner at the instance of Brig. B. P. Singh who instead of giving any relief to him induced severe depression. As a corollary whereof condition of the petitioner further deteriorated. His wife made representations to high-ups including Chief of Air Staff and President of India and sought the release of the petitioner from the hospital, but to no avail. The a fore said drugging was against all medical rules and ethics inasmuch as the same was against the consent of the petitioner and his relations. It came to an end only in February 1991 when the petitioner was made to admit his mistake in complaining against his officer. Col. Bhattacharya declared him unfit for flying purposes and recommended that he should be given sedentary duties and placed him in low medical category.

(5) On March 5,1991 petitioner applied for being posted near Delhi. His request was acceded to and in April 1991 he was posted at Rajokri Air Force Station. Petitioner was on leave during March 1991. He consulted other doctors, including Dr. Vohra, who opined that it was a case of chronic depression on account of heavy drugging. The petitioner was referred to Dr. B. S. Saini, Senior Psychiatrist. A.F.C.M.E. Subroto Park. New Delhi. He advised anti depressants for his recovery from depression. The petitioner appeared before Medical Board, Bangalore subsequently and was declared fit by them. They commended him for sedentary duty.

(6) The petitioner was posted as Counter Intelligence Officer at Rajokri Air Force Station on April 22,1991. The petitioner while acting as Counter Intelligence Officer reported mala practices and corruption rampant in the department in granting No Objection Certificates for building Farm Houses. He also reported with reward to the destruction of liquor consignments of spurious nature without proper permission and authority in order to save the distillery from being, blacklisted. The petitioner traced 42 such bottles and he handed over some of them to C.B.I for being tested at laboratory. The petitioner was called to explain by the C.O. on March 12. 1992 as to why did he give four bottles of liquor to C.B.T. without his prior permission.

(7) Simultaneously the C.O. asked Senior Medical Officer to administer antidepressant medicines to the petitioner. On his refusal to take the said drugs

the respondent No 4 C.D. raised A.F.M.S. Form 10 on wrong acts to silence the petitioner.

(8) On March 14, 1992 the petitioner was taken to Army Hospital despite protests from him and his wife. Lt. Col. Sharma. respondent No. 5. gave oral directions on phone to administer drugs which induce depression. On his refusal he was over powered by four guards and the drug was administered The wife of the petitioner then called Wing Commander Saini who advised that no drug was to be administered to petitioner. However, at the same time he was warned that they would decide by the next date whether Lithium Carbonate would be administered to him or not.

(9) On March 17, 1992 Group Captain Marwah, respondent No. 4, came to the ward ostensibly to enquire about his health, but in fact he wanted to know whether the petitioner would withdraw his remarks made in his report. But, soon he came to know that petitioner was not amenable to Ins influence. Lt. Col. Sharma informed the petitioner at 12.30 p.m. on March 17, 1992 that it had been decided that Lithium Carbonate would be administered to him on that Very day. The petitioner apprised her wife .of the said fact. She thereupon met Col. Sharma, Respondent No. 5, and requested him not to give any medicine to her husband. However, he did not pay any heed to her requests and entreaties and advised her to see Brig. B. P. Singh. She accordingly met Brig. B. P. Singh, but to no avail.

(10) The petitioner got scared so much, as by now he was convinced that a fore said medicine would be definitely administered against his will and without his consent and that of his wife, that he decided to escape in order to save his life. Administration of the said drug has got many side effects particularly in case of a healthy person. It may lead to epilepsy, loss of memory, kidney failure, brain - damage, cardiac problems. He escaped from the hospital even Without informing his wife. The wife of the petitioner thereupon filed a writ petition, being Cr. W.P. No. 143192.

(11) After the atmosphere had cooled down petitioner reached Delhi. He was advised by his lawyers to file a civil writ petition No. 2718 92. He showed his Willingness to surrender on the condition that no drug be administered to him without his consent and that of his wife. The said writ petition was allowed and it was ordered that no drug was to be administered to the petition . without his consent and that of his wife. It was also ordered that the petitioner be got examined at the All India Institute of Medical Sciences (AIIMS).

(12) The petitioner surrendered before the .adjutant to C.O. Air Force Station Rajokri on August 8, 1992. The Air Force authorities again tried to take the petitioner to Army Hospital, Delhi Cant terribly with a fresh A.F.M.S. Form-10 and a covering letter by C.O. to continue the treatment. The petitioner protested. They ultimately gave up the idea and took petitioner to a room and kept him under close arrest. The petitioner was sent to A items under the orders of the

Court dated August 19, 1992. The Board opined that the petitioner was quite healthy and there was no psychiatric abnormality.

(13) A new C.O. took over w.e.f. August 24, 1992. Having examined the case of petitioner, he withdrew all the restrictions and allowed him to resume his normal duties w.e.f. September 1, 1992. He even allotted him a house also. It implies thereby that he did not have any evidence which Warranted a trial under rule 24(2) of Air Force Rules. It was Therefore a surprise when the C.O. served the petitioner with a charge sheet on September 10, 1992 u/s 39(a) of Air Force Act. The C.O. once having decided not to proceed against the petitioner was not competent to change his opinion and to proceed against the petitioner. It was a condition precedent u/s 107(1) of Air Force Act. An ex-parte Court of Inquiry does not meet the requirement of law. The petitioner was not provided with a copy of the Court of Enquiry proceedings and summary of evidence, if any. However, he was permitted to see the proceedings. Regulation 385 provides for the convening of C.O. (1) after thirty" clear days. In the instant case it was not so. Thus the relevant entry with regard -to declaration is not admissible in evidence. Hence a fresh Court of Enquiry was a condition precedent for holding a Court Martial. Convening of Court of Enquiry by Station Commander on April 16, 1992 was in violation of Para 78 of Air Force Regulations inasmuch as the cause of absence which was to be investigated involved criticism of .Station Commander. Hence all proceedings and findings of Court of Enquiry are illegal and invalid and as such no Court Martial can be convened for a charge u/s 39(a) of Air Force Act. No medical certificate was claimed from a competent authority for holding the Court Martial, in any case until Central Government passes an order on the release application, the convening of Court Martial is not valid. The above absence of the petitioner was involuntary and as such the convening of the General Court Martial is incompetent. Hence, the necessary for the presentation of the present petition.

(14) Respondents controvert the above allegations through a counter affidavit sworn by Group Captain H. S. Grewal, C. O., Air Force Station, Rajokri. According to him, the petitioner is a patient of Manic Depression Psychosis for short ("M.D.P."). It is false and preposterous that the petitioner was ever given any medicine without his consent. He has been provided with best medical aid It is absolutely wrong that he was ever victimised. The petitioner, admittedly, is not a doctor. Thus how he can say authoritatively with regard to the side effects of a particular medicine.

(15) The petitioner while undergoing medical treatment at Minatory Hospital, Delhi Cant. left the hospital without any permission during the period from March 17, 1992 to August 7, 1992. He surrendered on August 8, 1992. Thus he committed an offence u/s 39(a) of Air Forces Act. Even if absence of a person is involuntary it will become an offence u/s 39(a) the moment it becomes a voluntary act. Even if it is assumed that the petitioner was administered certain medicine without his consent, he could have brought this fact to the notice of his

superiors instead of escaping from the hospital without permission. Thus the petitioner is liable to be tried for the said offence by a Court Martial where he would be free to put forward every sort of defence whichever is available. The present petition is thus not maintainable.

(16) A.F.M.S. Form-10 is raised against an individual in service whenever his behavior becomes abnormal and who is mentally disturbed. There, is nothing unusual about it. The surrender of the petitioner to the Air Force Authorities after a lapse of four and a half months is indicative of the fact that his action was deliberate and planned. Writ petition by his wife, being Cr. Writ Petition No. 143192, was dismissed on September, 7, 1992.

(17) After recording the summary of evidence, the C.O. in his discretion moved an application for trial by G.C.M. After a perusal of the same the convening authority has ordered the trial of the petitioner by G.C.M. for an offence of absence without leave.

(18) The C.O. acted as per rules and regulations while conducting an enquiry u/s 107 of Air Force Act. The petitioner was declared a deserter on the basis of the said inquiry on account of his long absence. The proceedings of Court of inquiry are admissible in evidence before the Court Martial. However if the declaration of Court of inquiry is inadmissible in evidence on account of any reason, it is for the Court Martial to consider this point (which is yet to assemble).

(19) The past medical history of the petitioner shows that A.F.M.S. Form 10 which was raised against the petitioner at Rajokri for M.D.P. was not out of any grudge. The medical authorities have given a certificate Annexure-F that the petitioner is fit to undergo trial. Furthermore, each day a certificate is obtained with regard to fitness of the accused by the G.C.M.

(20) The application of the petitioner for being discharged from the service has been forwarded by the C.O. to the higher authorities for their consideration.

(21) The petition is false and frivolous. It is liable to be dismissed.

(22) Learned counsel for the petitioner has contended that the petitioner in the instant case has not committed any offence within the meaning of Section 39(a) of the Air Force Act inasmuch as even according to the respondents, the petitioner was suffering from M.D.P. He did not understand the consequences of his actions. Thus when the petitioner escaped from the hospital and remained absent without permission for a period of four and a half months during the period from March 17, 1992 to August 7, 1992 it cannot be termed as an absence from duty (vide brief facts of the counter affidavit sworn by Capt. H.S. Grewal) since the petitioner did not know as to what he was doing. To make an offence within the domain of Section 39(a) of the Air Force Act, the absence must be voluntary. According to the learned counsel, the absence in the instant case was neither intentional nor voluntary, the petitioner being a patient of MDP. Much stress has been laid by the learned counsel on the averment made by Capt.

H. S. Grewal in his counter affidavit to the effect that the petitioner did not know the consequences of his actions. The contention of the learned counsel. I feel, no doubt, is an ingenious one but can be brushed aside without any difficulty.

(23) The aforesaid lines in the affidavit, alluded to above, cannot be read in isolation. They are to be read along with the other lines. Capt. Grewal has stated in the subsequent lines entitled "Brief Facts" "generally in such cases the person has the normalcy period much longer than the period of depression of the maniac phase. Though this is psychotic illness the person is in touch with reality when in normalcy period and full control of his senses. This fact has been supported and corroborated by the team of medical specialists of AIIMS". Thus it is manifest from above that the respondents have nowhere admitted that the petitioner did not know the consequences of his acts when he left the hospital. Furthermore, this is not the case of the petitioner in his petition that he cannot be tried by the Court Martial u/s 39(a) of the Air Force Act as he was not in his senses when he left the hospital. Nay the case of the petitioner as set up in his writ petition is that he left the hospital in order to save himself from the administration of Lithium Carbonate which was proposed to be administered to him on March 17, 1992 by Lt. Col. Sharma (vide para 16, viii of the writ petition) as according to him the administration of the said drug might lead to kidney failure, permanent memory loss, epilepsy, brain damage, cardiac problem (vide para 17). Thus it can be safely inferred from above that the absence of the petitioner was intentional and deliberate.

(24) Learned counsel for the petitioner has then contended that the petitioner did so in order to save his life. Had he agreed to the administration of the said drug, it would have led to serious complications. "the learned counsel in this connection has led me through Oxford Text Book of Psychiatry, 2nd Ban. 1989, (reprint 1991), Chapter 8, "Affective Disorders"

"LITHIUM... So it seems that if lithium has a therapeutic effect in the acute stage of depressive disorders, it is not a powerful effect. Hence there is no justification for asking lithium in this way except perhaps when other measures have failed. Even the latter use is doubtful; there are few reports that lithium is effective in patients who have not responded to antidepressants".

The learned counsel has thus contended that the petitioner left the hospital in order to save himself from the administration of the said drug.

(25) The learned counsel for the respondents, Mr. Shali, on the other hand, has contended that the petitioner was being treated by the specialists. He was not being treated by a layman in order to get scared of the administration of any drug. The learned counsel in support of his contention has led me through a book entitled "Davidson's Principles and Practice of Medicine" edited by John, Macleod (13th Edn.) page 759 . . "Lithium carbonate is effective in controlling manic-depressive states. The patient needs to be in hospital at the start of treatment. It may also prevent the recurrence of manic attacks when used as maintenance

therapy in, daily doses of 750-1500 mg. out-patients returning for weekly estimation of plasma lithium and a check on adverse effects which include hypothyroidism". To the same effect are the observations in a book entitled: "Applied Pharmacology by H.O. S child, Chapter Antidepressants and Stimulants of Mental Activity",, page 269 "Lithium treatment is mainly indicated in patients with recurrent manic episodes". The learned counsel has thus contended that in view of the above, since the petitioner was suffering from acute depression there was nothing strange if the doctors at the military hospital proposed to give Lithium Carbonate. There was nothing to be scared of by the use of the same so as to giving the petitioner an excuse to remain absent for such a long period.

(26) It is crystal clear from above that there is no gainsaying the fact that Lithium Carbonate is one of the medicines which is administered to the patients suffering from depression. He was got treated earlier also at Ahmedabad, Pune, Bangalore and Jamnagar. Further the petitioner himself consulted certain private doctors while on leave from the Air Force particularly Prof. Vohra, Head of Psychiatry at Medical College, Rohtak who opined that this was a case of depression by heavy drugging, (vide para 8(i) and vide Annexures 2A, 4,6,7 and 8 to the writ petition). Besides the above documents, there is a report on the record of a Medical Board who examined the petitioner" under orders of this Court. I am tempted here to cite in extenso the opinion of the said Board. It is in the following.

"THE Board has reached the following conclusions :-

1. There is definite evidence of Sqn. Leader Punia having suffered from Depression in 1991. In addition, there is indirect evidence of his having suffered from hypomania mania in, the last two years. The most probable psychiatric diagnosis for Sqn. Leader Punia is Manic Depressive Psychosis. Bipolar.

2. On the date of this examination there is lack of evidence of any definite Psychiatric abnormality in Sqn. Leader Punia ".

(27) There is another side of the picture. The petitioner by no strength of imagination can claim himself to be an expert on medicines. It is beyond his forte. Thus he cannot say as to which medicine was detrimental or beneficial for his health. He was being treated by a team of doctors who were experts in their own field. It would be preposterous to term each and everyone inimically disposed to the petitioner. Assuming, arguend, that petitioner was apprehensive that certain medicines were given to him which were detrimental to his health, he could have brought this fact to the notice of the higher ups. Moreover, nobody can be administered a medicine without his consent or that of his relations. The respondents in their counter affidavit on record have very categorically stated that no medicine was given to the petitioner without his consent. In the circumstances the upshot of the above discussion is that there was no excuse for the petitioner to have left the hospital without the prior permission of the authorities and to have remained absent for such a long period.

(28) The next contention raised by the learned counsel for the petitioner is that prior to holding a Court Martial for an offence u/s 39(a) of the Air Force Act a duty has been cast on the shoulders of the Air Force authorities to hold an inquiry u/s 107 of the Air Force Act. It is true that such an inquiry was held. However, it was not done in accordance with law. Since we are concerned with the construction of the said provision of law it would be in the fitness of things to examine- the said Section before proceeding any further in the matter. It reads as under:-

"107. Inquiry into absence without leave; (1) When any person subject to this Act has been absent from his duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be assembled, and such court shall, on oath or affirmation administered in the prescribed manner inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessities, and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof, and the said deficiency, if any; and the commanding officer of the unit to which the person belongs shall enter in the court martial book of the unit a record of declaration.

(2) If the person declared absent does not afterwards surrender or is not apprehended, he shall, for the purposes of this Act, be deemed to be a deserter".

(29) A close scrutiny of the provisions of law alluded to above would reveal that the purpose of the inquiry is two-fold : Firstly, it is held with a view to enquiring in respect of the absence of the person who is absent. The second object behind the said inquiry is to find out with regard to the property of the Government which was entrusted to the said person. After the inquiry is complete the Commanding Officer of the Unit shall in the Court Martial Book of the Unit record a declaration. Secondly, if the person does not turn up in that eventuality he would be declared to be a deserter "According to the learned counsel the said inquiry was not held within the stipulated period (vide Note 3.1). The learned counsel contends that the said inquiry was held after the expiry of 29 days only inasmuch as clear thirty days were not allowed to lapse in between the inquiry and the absence of the petitioner from duty (vide Annexure 44). The petitioner, according to her, was absent from March 17, 1992. The inquiry was held on April 16, 1992, thus, on the 29th day. Hence, according to the Notes 3.2 appended to the Air Force Act the said record of its declaration is not admissible in evidence. Hence no Court Martial can be held on the basis of the said inquiry. I am sorry I am unable to agree with the contention of the learned counsel.

(30) The learned counsel for the respondent Mr. Shali has not seriously disputed the said contention of the learned counsel that the inquiry was not held in accordance with the provisions of the law i.e. S. 107 of the Air Force Act inasmuch as the same was held on the 29th day of the absence of the petitioner. However, according to the learned counsel for the respondent it does not make

any difference to the fate) of the Court Martial.

(31) I find myself in perfect agreement with the learned counsel for the respondent. Admittedly, the Court Martial is yet to see the light of the day. It has as yet not assembled. Thus it is beyond the ken of this Court to visualise at this premature stage as to what would

(32) It is a well established principle of law that minor irregularities would not affect the proceedings before the Court Martial which is as yet to be held in the present case. I am supported in my above view by the observations of their Lordships of the Supreme Court as reported in Major G.S. Sodhi Vs. Union of India (UOI),

"EVEN otherwise, if there are some minor irregularities they do not, in any way, effect the proceedings in the general court-martial during which a regular trial v,"as conducted".

(33) The next contention put forward by the learned counsel for the petitioner is that the proceedings of the Court of inquiry even otherwise are illegal and invalid since the petitioner has raised specific allegations of mala fide against the C.O. Group Capt. B. S. Marwah, respondent No. 4. His wife also filed a writ of habeas corpus impleading Group Captain Marwah as one of the respondents. Admittedly, a Court of Inquiry was held under his orders. Para 783 (j) of the Regulations provides :

"WHERE the subject to be investigated is likely to involve criticism of the station commander the circumstances calling for enquiry will be reported to higher authority who will convene an independent Court".

Thus according to the learned counsel the Commanding Officer instead of convening a Court of inquiry should have reported the matter to the higher ups inasmuch as the charge of mala fide are leveled against him. The contention of the learned council does not hold any water. Admittedly, proceeding in a Court of inquiry is in the nature of preliminary investigation. The purpose of the same was to make an inquiry with regard to the absence of the petitioner and with regard to the articles which were entrusted to him and were in his custody. The Commanding Officer has got nothing to do with the Court Martial which is subsequently to be held. Thus the holding of the proposed Court Martial cannot be stayed on the said ground. The above view was given vent to by their Lordships of the Supreme Court as reported in Major G. S. Sodhi's case (supra). .. . " In any event, Lt. Col. S, K. Maini was concerned with the preliminary enquiry and it was for the court-martial to try the case and give verdict. Therefore, the mere allegations of bias, and mala fides against Lt. Col. S. , Maini do not effect the court-martial proceedings. The learned counsel in this context relied on a judgment of this Court in Ranjit Thakur Vs. Union of India (UOI) and Others, . It is observed therein that the test of real likelihood of bias is whether a reasonable person, in possession of relevant information would have thought that bias was likely and is whether respondent 4 was likely to be

disposed to decide the matter only in a particular way.As mentioned hereinbefore the enquiry conducted by him is only a preliminary one and he Was not the concerned authority for determining the guilt of the petitioner.

(34) The next limb of the argument advanced by the learned counsel for the petitioner is that a charge sheet dated September 10, 1992 was framed against the petitioner in accordance with Rules 34 to 38 of the Air Force Rules and was served on him. In the case of absence without leave; there is no question of any preliminary investigation under Rule 24 .since the preliminary investigation in such a case is conducted in accordance with. Section 107 of the Air Force Act. The evidence under the said enquiry is recorded in accordance with Rule. 155 of the Air Force Rules. The said charge sheet according to the learned counsel was a final one. and could have formed the basis of the Court Martial, if any, subsequently. The said charge sheet could not have been amended except in accordance with Rule 58 during the Court Martial proceedings. The petitioner to his dismay and horror later on found that another charge sheet was. placed on record wherefrom the words medical treatment have been deleted. Furthermore, both the charge sheets bear the signatures of Group Captain H. S. Grewal and both the charge sheets are of the same date i.e. September .10, 1992. Thus according to the learned counsel the said charge sheet has been tampered with. Hence no Court Martial can be held.

(35) Learned Counsel for the respondents on the other hand, has contended that the earlier charge sheet was prepared in connection with the recording of summary of evidence and duly served on the petitioner. It contains simply an accusation against the petitioner in accordance with Rule 24 of the Air Force Rules. According to the learned counsel, strictly speaking, the said charge sheet is not a charge sheet in the true sense of the word. The said charge sheet was prepared in connection with the investigation of the charge leveled against the petitioner and for the purposes of recording of summary of evidence. The subsequent charge sheet which also bears the same date i.e. September 10, 1992 is is the real charge sheet prepared in accordance with Rules 34 to 38 of the Air Force Rules and the petitioner herein was proposed to be tried on the basis of the said charge sheet. The fact that the subsequent charge sheet also bears the same date is nothing but a laps us claim on the part of the Commanding Officer.

(36) The learned counsel has further contended that the convening officer has ample power to amend the charge sheet as and when he thinks to do so. He has in this connection led me through Rule 34, Note I.I which provides that the charge sheet referred to in this rule is the formal written charge-sheet upon which the accused is to be "tried as distinct from the charge or complaint mentioned in S. 102 Afa and R. 24 Afr which gives rise to the preliminary investigation. It would also be noteworthy over here to examine the provisions of Rule 43, which deal with the convening of the general and district court martial. It envisages

"AN officer before convening a general or district court-martial shall first satisfy himself that the charges to be tried by the court arc for offences within the meaning of the Act, and that the evidence justifies trial on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to superior authority. Note 1.3 appended thereto lays down "While complying with R. 43(1) Afr, the convening authority has inherent powers to reframe the charge or to include additional alternative charge(s). provided by doing so no prejudice is caused to the accused in his defense".

Thus it is amply clear from above that earlier charge sheet was prepared for the purposes of investigation under Rule 24. Subsequent charge sheet is the charge sheet which came into being in accordance with Rule 34 of the Air Force Rules and which is to form the basis of the trial by Court Martial. Thus if certain words i.e. the words medical treatment do not find a mention in the subsequent charge sheet, which is yet to be served, the petitioner cannot have any quarrel on the said score. To my mind, it is not going to vitiate the proceedings of the Court Martial which is proposed to be held against the petitioner.

(37) There is another side of the picture. The petitioner very well knows that he is to be tried for absenting himself without leave. This is the core of the charge. It is further well within the knowledge of the petitioner that he absented himself from the hospital without the permission which is the basis of the charge. Thus, the omission of the words "medical treatment" is in no way prejudicial to the petitioner and the same cannot form the basis of his contention that the convening of the Court Martial on the -basis of the said charge would be bad in law. I am fortified in my above view by the observations of their Lordships of the Hon"ble Supreme Court as reported in Union of India (UOI) and Others Vs. Naik Subedar Baleshwar Ram and Others, . (3)". An inquiry under R. 22 was conducted against Respondent I relating to an offence which came under S. 63 of Army Act, namely, conduct prejudicial to good order and military discipline. However, the charge he was called upon to face in the General Court Martial was one of theft punishable u/s 42(a) of the Army Act.

(38) Held that no doubt the allegation at the stage of inquiry under Rule 22 was described as prejudicial to good order and military discipline but the basic facts said to constitute that allegation were nothing else than removal of the foodstuff which constituted the charge of theft. It is Therefore, clear that no prejudice has been caused to respondent I and the inquiry under Rule 22" and the trial before General Court Martial were over the self same fact.

(39) It would also not be out of place to mention here the observations of their Lordships of the Supreme Court as reported in Major G. S. Sodhi's case (supra)

"A combined perusal of all these Rules would go to show that what all that is required is that the delinquent should be apprised of the charges that he has to answer so that he is not caught unaware and handicapped in preparation of this

defense. The main question is one of prejudice but in this case the charge-sheet shows that all the details are mentioned and the trial went on and that the petitioner participated in the trial duly. The next grievance is that these charge-sheets were not duly signed. We are mainly concerned with the final charge-sheet dated 5th October, 1985. In that we find that all the details are mentioned elaborately and it is signed by Commanding Officer as well as Col. (Admn.) for the General Commanding Officer. Therefore, even if the tentative charge-sheet is not signed it does not make any difference",

(40) The next point raised by the learned counsel for the petitioner is that the Commanding Officer and other officers are prejudiced and inimically disposed towards the petitioner as the petitioner has been complaining against them. Thus the petitioner expects a just and fair treatment at their hands. "Hence she wants this Court to restrain that Air Force authorities from holding the Court Martial. The contention of the learned counsel, I feel, is devoid of any force. The names of the officers who are to preside over the Court Martial proceedings are as yet not known to anyone. Thus the petitioner I think is not justified in making allegations of mala fide against those whose names are as yet not known. In any case it is a well settled principle of law that in case the petitioner objects to the presence of any officer as presiding officer of the Court Martial cannot preside over the Court Martial proceedings.

(41) Furthermore, the persons against whom the charges of mala fide are leveled must have been arrayed as respondents. As the things are, the petitioner has arrayed only two persons by name. They are Group Captain Marwah and Lt. Col. C. S. Sharma, respondents Nos. 4 and 5. Group Captain Marwah has done nothing to bring the criminal justice machinery into motion. Thus he is not one of those persons who are to adjudicate upon the charges leveled against the petitioner. Lt. Col. C. S. Sharma is simply a doctor. He, too, has got nothing to do with the Court Martial proceedings. Admittedly the fate of the petitioner would be decided by the Court Martial has not been convened as yet. Thus to level charges of mala fide against them is nothing but a sheer travesty. I am tempted hereto cite a few lines from the observations of his Lordship, (Hon'ble Mr. Justice Krishna Iyer), as he then was, as reported in *Gulam Mustafa and Others Vs. The State of Maharashtra and Others*,

"STRIKING down any act for mala fide exercise of power is a judicial reserve power exercised lethally, but rarely. The charge of mala fides against public bodies and authorities is more easily made than made out. It is the last refuge of a losing litigant. .".

(42) Learned counsel for the respondents Mr. Shali, on the other hand, has argued that the present petition is not maintainable and as such is liable to be dismissed on this short ground alone. According to the learned counsel the petitioner through the present petition seeks two reliefs i.e. (a) He wants a direction to be issued to the respondents to release him from the Air Force; and (b) a restraint order to be issued against the respondents not to convene the

Court Martial.

(43) I would like to deal with first of all with the second relief which relates to the issue of a writ of prohibition. The learned counsel has contended that a writ of prohibition can be issued only when the petitioner is in a position to show that (i) an interior court or Tribunal has usurped the jurisdiction which is not vested in it, or (ii) when it has exceeded its jurisdiction and (iii) when the inferior court or tribunal has departed from the rules of natural justice. According to the learned counsel this is not the case of the petitioner that the Court Martial in the instant case has no jurisdiction to try him. It is also not the case of the petitioner that he Court Martial is trying to exceed its jurisdiction while attempting to try the petitioner. The instant case is also not a case of the departure from the principles of natural justice inasmuch as the Court Martial is yet to be convened. It was as yet not seen the light of the day. Thus the present petition is premature and is liable to be flung to the winds on this short ground alone. The learned counsel for the petitioner has urged to the contrary.

(44) The Hon"ble Supreme Court while dealing with a writ of prohibition in a case entitled Govinda Menon Vs. Union of India (UOI), has laid down the following guidelines:-

"THE jurisdiction for grant of the writ of prohibition is primarily supervisory and the object of that writ is to restrain Courts or inferior tribunal from exercising a jurisdiction which they do not possess at all or else to prevent them from exceeding the limits of their jurisdiction. In other words, the object is to confine Courts or tribunals of interior or limited jurisdiction within their bounds. The writ of prohibition lies not only for excess of jurisdiction or for absence -of jurisdiction but also in a case of departure from the rules of natural justice, (See Halsbury's Laws of England, 3rd Edn. Vol. 11, p. 114). It Was held for instance by the Court of Appeal in The King v. North, 1927 1 Kb 491 that as the order of the Judge of the) consistory Court of July 24, 1925 was made without giving, the vicar an opportunity of being heard in his defense, the order was made in violation of the principles of natural justice and was Therefore, an order made without jurisdiction and the writ of prohibition ought to issue".

(45) It can be safely inferred from above that a writ of prohibition may be issued in the cases enumerated below :-

(A)when there is usurpation of jurisdiction:

(B)when the inferior court proceeds in cases wherein, it is prohibited by the statute;

(E)when the inferior court exceeds its jurisdiction;

(D)when the inferior courts have no power to act in the way they did;

(E)when the inferior court commits an error in procedure which is contrary to the general law of the land or it is so vicious as to violate the principles of natural

justice.

The present case of the petitioner does not fall within the domain of the categories adverted to above inasmuch as the Court Martial is yet to assemble to try the petitioner.

(46) It has next been urged for and on behalf of the respondents that the petitioner has got an alternative efficacious remedy. It is a well established principle of jurisprudence that in case an alternative efficacious remedy is available then the Court will decline to issue a writ and would direct the petitioner to avail of the said remedy, at the first instance. Admittedly, the petitioner is to be tried before a Court Martial on account of his absence from duty without permission (AWL). All the points which have been raised by the petitioner before this Court can be raised by him before the Court Martial. I find myself in perfect agreement with the learned counsel for the respondents, to the same effect are the observations of their Lordships of the Supreme Court as reported in *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes,* :

"ORDINARILY the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The Court does not Therefore act as a court of appeal against the decision of a court or tribunal to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy, provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally Will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be passed, and will leave the party applying to it to seek resort to the machinery so set up."

(47) The petitioner in the instant case has raised certain issues such as with regard to the non-compliance with the provisions I of Section 107 of the Air Force Act, tampering with the chargesheet, mala fides on the part of Commanding Officer. All the above points can be gone into during the Court Martial proceedings. In case the contention of the petitioner is accepted and a writ of prohibition is issued as sought for by him in that eventuality it would tantamount to throttling and doing away with the provisions of the Air Force Act which provide for holding and convening of a Court Martial to try an offence alleged to have been committed by an Air Force Officer.

(48) Learned counsel for the respondents has then drawn my attention to a well settled principle of law that the High Court would decline to issue a Writ in its Extraordinary Jurisdiction under Article 226 of the Constitution of India when it is shown that the case involved disputed question of fact which for their

adjudication require the recording of evidence. Admittedly, the case of the petitioner is that he left the hospital without any permission because the medical authorities wanted to administer to him Lithium Carbonate without his consent. The second point raised by the petitioner is with regard to the mala fides on the part of the A:r Force authorities. All these questions to be settled. I feel. would require the recording of the evidence. Hence, this Court feels that the said points cannot be gone into by this Court while exercising extraordinary powers under Article 226 of the Constitution. I am fortified in my above view by the observations of their Lordships of the Supreme Court as reported in Thansing's case (supra). ..

"THE High Court does not generally enter upon determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed.

(49) The, next point urged by Mr. Shali is that the scope of Judicial review relating to proceedings before a Court Martial is very much limited. The learned counsel in this connection has led me through the observations of their Lordships of the Supreme Court as reported in S.N. Mukherjee Vs. Union of India, . "This Court under Article

"32 and the High Courts under Article 226 have however the power of judicial review" in respect of proceedings of courts martial and the proceedings subsequent thereto and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part 111 of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record."

(50) I find myself in perfect agreement with the learned counsel for the respondents. It is a well established principle of law as enunciated by the Hon'ble Supreme Court and by the different High Courts that a High Court can interfere with the proceedings of the Court Martial only in those discerning few cases where it comes to the conclusion that the Court Martial has over stepped its jurisdiction or has acted without jurisdiction. The Courts can also interfere when they come to the conclusion that there is a violation of the principles of natural justice. I am tempted here to cite the observations of a division Bench of this Court as reported in R. S. Ghalwat v. The Union of India, 1981 Cri. L.J. 1646 (9). . . "The jurisdiction of the High Court is limited, to only finding out whether there is error of jurisdiction. or it is a case of total lack of evidence. The High Court cannot sit as a Court of Appeal. If there was legal evidence available on which a finding could be given, the sufficiency or otherwise is for the authority to decide and the High Court cannot substitute its opinion for that of the Court Martial." To the same effect are the observations of a Division Bench of the Patna High Court as reported in Guru Villi Bhima Rao Vs. Union of India (UOI) and Others, , and the observations of a Full Bench of this Court in S. Sundarajan Vs. Union of India and Others, .

(51) Coming to the case in hand in the light of the principles of law enunciated above, admittedly this is not the case of the petitioner that the Court Martial does not have the necessary jurisdiction, to fry the petitioner. In fact, as observed above, the Court Martial is yet to assemble to try the petitioner. It has not been possible because of the interim stay granted by this Court.

(52) This brings me to the next relief claimed by the petitioner. The petitioner wants this Court to issue a direction to the Air Forced authorities to release him from the service. A writ of mandamus, it is Well established, can be issue in the following cases :-

(1)There must be in the applicant a legal right to compel the opposite party for the performance of the duties.

(2)The said duty must be of a public, nature.

(3)It must be mandatory and not discretionary in nature.

(53) Learned counsel for the petitioner, thus for the issue of a writ of mandamus, has to prove the above mentioned ingredients. Learned counsel for the petitioner has failed to show me that the petitioner has got a vested right to be released from the service. Nc has also failed to show me that there, is any corresponding duty on the part of the respondents to release him from the service. Thus I feel that the petitioner is also not entitled to the said relief.

(54) Before parting with this judgment I would like to observe that the petitioner in the instant case. as pleaded by him left the hospital v. without prior permission from the Air Force authorities on the ground that certain drugs with side effect were being administered to him. The petitioner while doing so acted in utter disregard of all the rules and norms and put an end to the army discipline. Discipline is a sine qua non to the existence of any organisation. It is all the more so in the case of an officer in the army. It is inconceivable to think of an organisation in the absence of discipline in the same. It is so to say the very breath of life for the existence and smooth functioning of an organisation. I am tempted here to cite a few words from Blair :

"THE discipline which corrects the baseness of worldly passions, fortifies the heart with virtuous principles and enlightens the mind with useful knowledge and furnishes it with enjoyment from within itself is of more consequence to real felicity than all the provisions we can make of the goods of fortune".

In view of the above., I feel that the petitioner should not have any grudge on being tried by a Court Martial.

(55) Learned counsel for the petitioner in support of his case has cited quits a good number of authorities which have got no bearing on the facts of the present case.

1. A.S. Gahlout and Others Vs. Lt. Governor of Delhi and Others, . It Was held that the Court had got the power to mould the relief to the facts and

circumstances of a particular case.

2. L.V. Veeri Chettiar and Another Vs. Sales Tax Officer, Bombay, . It was held if a taxing authority acts without the jurisdiction the assessed need not exhaust the statutory remedies before approaching the High Court under Article 226 of the Constitution of India.

3. Shyam Kishore v. M.C.D. & Ors., .

"If the court comes to the conclusion that the alternative remedy provided under the Act is not adequate or cannot inspire confidence inasmuch as it would amount to an appeal from "Caesar to Caesar" than the existence of an alternative remedy is no bar to the exercise of writ jurisdiction under Article 226 of the Constitution".

4. Harbans Singh & Ors. v. Union of India & Ors.. 1985 Lab .I.C. 269... (15). "Charge can be amended only by the Court and not by an officer who is not holding the Court".

5. Ranjit Thakur Vs. Union of India (UOI) and Others, . "months proceedings of the Court-Martial do not indicate that (he appellant delinquent was asked whether he objects to be tried by any officer sitting at the Court-Martial. This imparts a basic infirmity to the proceedings and militates against and detracts from the concept of a fair trial".

6. Sri Lakshmindra Theertha Swamiar of Sri Shirur Mutt and Another Vs. The Commissioner, Hindu Religious Endowments, Madras and Others, . "In deciding the question whether a writ of prohibition should issue or not, the existence of an alternative remedy is an irrelevant consideration when the complaint is that an inferior tribunal is exceeding its jurisdiction or is assuming a jurisdiction not vested in it by law".

7. Devilal Vs. Ganpat, "Prohibition lies not only for excess of or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law".

8. The State of U.P. and Another Vs. Duli Chand Kashi Prasad, . "A writ in the nature of Prohibition issues to restrain a quasi-judicial authority from exceeding the bounds of its jurisdiction. It may be issued at the threshold of the enquiry, before it soon after it has given a decision on the issues of its jurisdiction. It issues at the threshold of the enquiry before it if there is patent want of the jurisdiction".

9. Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, . "Art. 32 gives the Court very wide discretion in the matter of framing their writs to suit the exigencies of particular cases".

GHULAM Nabi Teli v. Superintendent of Police, Baramulla, 1987 LAB.I.C. 505(21).

"POWER to prosecute constable for absence without leave-it does not debar

authority to hold departmental enquiry".

Nb/sub Avtar Singh Vs. Union of India and others, .

"HELD on acts that the judgment and order of the General Court Martial passed on proceedings stand vitiated by virtue of non compliance with the provisions of mandatory rule 22 as also the order of the Confirming Authority passed in exercise of the power under Rule 160 of the Rules".

(56) In the circumstances stated above I do not see any force in. the present writ petition. It is hereby dismissed.