
(1984) 09 DEL CK 0023

In the Delhi High Court

Case No : Civil Writ Appeal No. 667 of 1974

J.S. Sidhu

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 04-09-1984

Acts Referred:

Citation : (1986) ILR Delhi 658

Hon'ble Judges : Charanjit Talwar, J

Bench : Single Bench

Advocate : Madan Bhatia and S.S. John, for the Appellant;

Judgement

Charanjitalwar, J.

(1) The petitioner, Capt. J. S. Sidhu, who has been promoted as a Major during the pendency of the petition has challenged the order of General Officer Commanding, 23 Mountain Division convening a Summary General Court-Martial which court after trial sentenced him to forfeiture of five years' past service for the purposes of the promotion as well as turn the purposes of pension and "increased part". The findings and sentence of the Summary General Court-Martial were duly forwarded by the convening officer to the higher authority namely, General Officer Commanding, IV Corps for confirmation. However, by order dated the 13th March, 1973, that authority recommended that those findings be confirmed by a superior authority. The superior authority i.e., the General Officer Commanding, Eastern Command, while confirming the conviction by the Summary General Court-Martial, reduced the sentence from five years forfeiture of past service to that of two years.

(2) The petition dated 1st May, 1973 of the petitioner against the findings and sentence was considered by the Army authorities as a representation u/s 164(2) of the Army Act (hereinafter called "the Act"). After its rejection by the Chief of the Army Staff vide order, copy Annexure "D" to the writ petition, the petitioner led the present writ petition.

(3) It is not necessary to go into the details of the proceedings of that Court-Martial. It is not even necessary for decision of his petition to notice the charges on which the petitioner was tried.

(4) The case of the petitioner is that prior to the impugned convening order of 11th December, 1972, by the General Officer Commanding, 23-Mountain Division, there was in existence a valid convening order directing a General Court-Martial to try the petitioner at Ferozepur. The submission is that during the existence of a valid order passed earlier by a General Officer Commanding at Ferozepur, directing assembly of the Court on 27th October, 1972, at 9.00 hours, the latter order of convening the Summary General Court-Martial, is without jurisdiction.

(5) To appreciate the contention, certain facts which are necessary for decision of this case, may be noticed. The petitioner was commissioned in the Indian Army in December. 1967 and was posted in 5-Dogra Infantry Battalion. At the relevant time during July 1972, this Battalion was stationed at Ferozepur Cantonment. It appears that on the allegation that he had threatened his commanding officer, the petitioner was put under "close arrest."

(6) It appears from the record that during investigation of the case and for "processing his disciplinary trial" the petitioner was attached to another Unit, namely, I/5Gorkha Rifles which was also stationed at Ferozepur. It was thereafter that the convening order as per the provisions of section 109 of the Act read with rule 37 of the Army Rules, 1954, (hereinafter called "the Rules") was made by the appropriate authority. The actual convening order is not on the record. However. Annexure "B" to the writ petition which is a letter issued by the Adjutant's Office on 13th October, 1972, incorporates the same. It is useful to quote it. It reads :

PRIORITY

13Oct. 1972

NO.1021|A|JSS|87|HH

ADJUTANTOFFICE

GCM-IC-193082|Lt. J. S. SIDHU-HANDING Over Of DOCUMENTS. and another

"FURTHER to on letter No. 1021|A|JSS|72|HH dated 7 Oct. 1972.

2.The GM will assemble at 0900 hours on 27 Oct. 1972. The composition of the court is as under:-

(A)Members.

(I)IC 4534 Brig. Pathanla Suram Singh, Hq 65 Inf Bde.

(II)IC-2304 Lt. Col. Sehdev Sahgal, of 1 GUARDS.

(III)IC-14218 Maj. Bakshi Rajendra Nath, 174 Fd. Regt.

(IV)SS-21641 Capt. Karamvir Singh, 7 Inf. Div. Sig. Regt. One Capt. from 3 CAV

(B)Waiting Members.

(I)IC-14947 Maj. Puthoor Kurian Bapen, 9 Sikh III.

(II)IC-17700 Capt. Harpool Singh, 748 Indep Tk T Tptr. P1.

(C)Prosecuting Officer. SS-22627 Capt. Gurnam Singh, SC(L) 7 Inf. Div.

(D)Judge Advocate. Maj. Gulab Singh, Dajag Hq Western Command.

(E)Defending Office. will be intimated later.

3.Name of defending officers as asked for vide our No. 1021|A|JSS|58|HH of 2 Oct. 72 and 1021|A|JSS|HH dated 7 Oct. 1972 have not been received so far. Please forward the same without any further delay.

(DALIPSINGH)

MAJORAdjt.

IC-193082/Lt. Js Sidhu, 5 DOGHA

BATT.to 115 Gr (FF).

IN the counter-affidavit it is submitted that on -14th August, 1972, i.e., almost two months prior to the issuance of the above order, the petitioner's parent Unit, i.e., 5-Dogra Infantry Battalion was moved out of the Western Sector to the Eastern Sector at Thakarbari. This, according to the respondents necessitated the petitioner's attachment to another Union stationed at Thakarbari for the purposes of his trial. Thus the petitioner was moved from Ferozepur and attached to another Infantry Battalion, namely, 14-Kumaon at Thakarbari on 20th November, 1972. It is not explained in the counter affidavit as to why the General Court-Martial which had been convened to assemble on 27th October, 1972, did not assemble when the petitioner was still attached to 115 Gorkha Regiment at Ferozepur. The petitioner also does not throw any light on this aspect in his petition.

(7) The only question which has arisen for consideration in this case is whether the earlier convening order made by the General Officer Commanding at Ferozepur could or did become inoperative without there being an actual order by that very convening authority cancelling the said letter or dissolving the Court-Martial. The power to dissolve a Court-Martial is contained in section 117 of the Act. it reads :-

"117.Dissolution of court-martial.-(1) If a court- martial after the commencement of a trial reduced below the minimum number of officers required by this Act, it shall be dissolved.

(2) If, on account of the illness of the judge advocate or of the accused before the finding, it is impossible to continue the trial, a court-martial shall be dissolved.

(3) The Officer who convened a court-martial may dissolve such court-martial if it appears to him that military exigencies or the necessities of discipline render it impossible or inexpedient to continue the said court-martial.

(4) Where a court-martial is dissolved under this section, the accused may be tried again."

(8) A bare reading of this provision shows that dissolution of court-martial as per sub-section (1) and (2) can only arise after the commencement of the trial. The relevant sub-section, as far as this case is concerned is sub-section (3). It is open to the officer who convened a court-martial to dissolve it "if it appears to him that military exigencies or the necessities of discipline render it impossible or inexpedient to continue the said court-martial". It is admitted by the learned counsel appearing on behalf of the respondents that no such order was passed under sub-section (3) of section 117 of the Act. It is submitted that it was not incumbent on the Convening Officer to have done so in the circumstances of this case. The circumstances being that the petitioner after the convening order was passed and the General court-martial had been directed to assemble on 27th October, 1972, was transferred to a Unit in the Eastern Sector and as such he was no longer within the territorial jurisdiction of the convening authority. The argument seems to be that after his transfer it was not considered expedient by the General Officer Commanding of 23-Mountain Division, Eastern Sector to hold a general court-martial to try the petitioner. It is strenuously urged by counsel for the respondents that after the petitioners transfer it was within the power of Major General Bhattacharjee, General Officer Commanding of 23-Mountain Division, in view of exigencies of service to disregard the earlier convening order and to pass a fresh convening order directing the trial to be held by Summary General Court-Martial. In the counter affidavit it is averred that the discretion vests in the convening authority either to hold trial of an officer by a general court-martial or by a summary general court-martial. It is submitted by counsel that the discretion can be exercised any time before the conclusion of trial. In this case it is urged that as the trial by General Court-Martial had not commenced Therefore Major General Bhattacharjee was competent to direct that instead a Summary General Court-Martial be held.

(9) There is no difference of opinion between the learned counsel for the parties that the convening order passed under the Act and the Rules for convening a court-martial is a judicial order. I agree with them. A reading of the decision by the Supreme Court in *Lt. Col. Prithipal Singh Bedi v. Union of India*, Air 1981 Sc 1413, highlights the proposition that the procedure prescribed under the Act and the Rules for trial by a court-martial is a judicial process. The initiation of that judicial process is by passing a convening order whether it be for General Court-Martial, District Court-Martial, Summary General Court-Martial or a Summary Court-Martial. The satisfaction of the officer convening a general or a district

court-martial provided under rule 37 of the Rules also goes to show that the order to be passed for convening such a court-martial is a judicial order. That rule reads as under:-

"37. Convening of General and District Court-Martial :-

(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 justifies a trial on those charges, and if not so satisfied, shall order the release, 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.

(4) The officer convening a court-martial shall furnish to the senior member of the court with the original charge-sheet on which the accused is to be tried and, where no judge-advocate has been appointed, also with a copy of the summary or abstract of evidence and the order for the assembly of the court-martial. He shall also send, to all the other members, copies of the charge-sheet and to the judge-advocate, when one has been appointed, a copy of the charge sheet and a copy of the summary or abstract of evidence".

(10) At this stage I may notice that in the writ petition the grievance is that on issuance of the order convening general court-martial the petitioner could not have been thereafter tried by a summary general court-martial. This contention however, was, not pressed during arguments by Mr. Bhatia, learned counsel for the petitioner, as according to him the respondents admit that there is no order passed u/s 117 of the Act by the convening officer or by any other superior army authority either dissolving the court-martial or recalling the convening order, which was admittedly a judicial order.

(11) It is averred in paragraph 5 of the writ petition that the composition of various court-martials and the procedure to be followed by them are different. The respondents in reply to this paragraph have averred, "5. Conceded". To appreciate the main contention of the petitioner that the impugned order convening the summary general court-martial was without jurisdiction and the rival contention that the earlier convening order as of no consequence it is advantageous to notice briefly the main difference between the general court-martial and summary general court-martial. Section 113 of the Act provides that a general court-martial "shall consist of not less than five officers." each of whom has held a commission for not less than three whole years and of whom not less than four are of a rank not below that of captain". Section 115 provides for composition of summary general court-martial. It is to be composed of not less

than three officers. There are no restrictions laid down such as those in section 113, although powers of both to try any person subject to the Act, for any offence punishable there under and to pass any sentences authorised therein, are the same as per section 118. The general court-martial is mandatorily to be attended by a judge-advocate whereas in a summary general court-martial his attendance is optional as per section 129 of the Act. At general court-martial an accused person can be represented by a defending officer and in some cases by a counsel where as in summary general court-martial defense is to be conducted by the accused himself. However, "he may be allowed to have any person to assist him during trial whether legal adviser or any other person". Further, in a case tried by summary general court-martial only a brief record of the evidence of the witnesses is to be recorded as per sub-rule (1) of Rule 160. However, under sub-rule (2) the convening officer if it appears to him that military exigencies or other circumstances prevent compliance with sub-rule (1) "he may direct that the trial will be Carried on without any such brief record being taken down". In the general court-martial record of evidence has to be maintained.

(12) The above salient features show that by ordering summary general court-martial without recalling or dissolving the order convening general court-martial it was not only the venue of the trial or composition of the court-martial which were changed, but the very procedure which had to be adopted by the general court-martial was altered. I am not called upon to decide the question whether after cancellation of the earlier convening order and/or after dissolution of a general court-martial by a valid order such a trial by summary general court-martial could be held. The difference between the procedure of the two court-martials is to be kept in mind to analyze the contention of the respondents that the earlier convening order not having been executed, i.e., the court not having assembled, it was of no consequence. I do not agree with that submission. A valid and legal order cannot be over-looked or by passed in this manner. Further argument of the learned counsel for the respondents that the petitioner and at no stage prior to the filing of the present writ petition objected to the procedure adopted and Therefore cannot object to it now in these proceedings is also of no consequence as the illegality, pointed out by the petitioner is the wrong exercise of jurisdiction and not merely an irregularity which can be over-looked. In my view the convening authority which had directed the assembly of general court-martial on 27th October, 1972, was competent to pass further order u/s 117(3) of the Act. rescinding the convening order thereby dissolving the court-martial which was yet to assemble, it was not open to another authority, although of concurrent jurisdiction, to direct on its own on the ground that military exigencies or the interests of discipline required convening of a summary general court-martial without there being a valid order cancelling the earlier order convening the general court-martial.

THE result is that the writ petition is allowed and the impugned orders convening; summary general court-martial dated 11th December, 1972, and the one contained in Annexure "C" by the superior authority confirming the finding

and sentence which order was promulgated on 23rd April, 1972, are quashed. In the circumstances of the case, however, the parties are left to bear their own costs.