

(2000) 08 CAL CK 0020

In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 11313 (W) of 1998, W.P. No. 15309 (W) of 1999 with C.P.A.N. No. 1585 of 1999 and 324 of 2000 W.P. No. 18587 (W) of 1999

J.W.O. B.K. Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-08-2000

Acts Referred:

Air Force Act, 1950 — Section 110, 121, 152, 153, 161
Air Force Rules, 1969 — Rule 34, 35, 36, 37, 38
Army Rules, 1954 — Rule 37
Constitution of India, 1950 — Article 14, 21, 226, 227

Citation : (2000) 3 CALLT 528 : 105 CWN 562

Hon'ble Judges : Samarendra Nath Bhattacharjee, J

Bench : Single Bench

Advocate : Mr. Sukumar Ghosh, Mr. Debasis Basu and Ms. Lata Saha, for the Appellant; Mr. Priyanath Mukherjee, Mr. Tapas Chatterjee, Mr. Asish Ganguly and Mr. Soumitra Banerjee, Mr. S.K. Mujibar Rahaman and Mr. Sandip Bhattacharjee, for the Respondent

Judgement

S.N. Bhattacharjee, J.—This judgment disposes of all the three writ applications mentioned above. The writ petitioner, a Junior Warrant Officer, on being posted out from No. 2 Wing Air Force, Pune on 14.10.96 joined No. 4 Bengal/(Tech.) Air Squadron NCC, Jadavpur University Campus, Calcutta as a ground trainee instructor leaving his wife and child at Pune in a service marriage quarter (for short SMQ). At Jadavpur he took possession of one SMQ from JWO Chauhan who vacated the same and handed over the key of the quarter to the writ petitioner. According to the writ petitioner, his allotment of quarter was acknowledged by the commanding Officer of his Unit by an endorsement on an application written by the petitioner to the school authority for admission of his child. Whether such acknowledgement by the Commanding Officer amounts to regularisation of allotment or not has been seriously disputed by the respondents, according to whom the possession was taken by the writ petitioner without any formal prayer

and without any order of allotment. The family of the petitioner was brought on 5.1.97 to the said quarter from Pune. Subsequently, the writ petitioner prayed for regularisation of the allotment but he was directed to vacate the same, the order was, however, not complied with by the writ petitioner. The Air Force Authority again by an order dated 23.12.96 directed the petitioner to vacate the accommodation so that the dilapidated quarter could be repaired. The petitioner having not complied with the order was served with show-cause notice dated 20.1.97 which was replied by the writ petitioner stating that he was permitted by the Commanding Officer himself. Thereafter several communications followed, ultimately an Informal enquiry was initiated by the Group Commander, NCC JPHQ Quarter "B" and the report was submitted to Brigadier R.K. Singh, BSM Dy. Director General, NCC on 11.3.97. On 17.4.97 the said Dy. Director approached the respondent herein to initiate disciplinary action against the writ petitioner and the Court of enquiry was held on 17.4.97. On 28.4.98 the writ petitioner was transferred from first 4 Bengal /(Tech.) Air Sqn. NCC to 6 wing Air Force, Barrackpore with immediate effect and movement order was issued on 12th June, 1998 directing him to report by 13.6.98 but the writ petitioner failed to report and as such he was declared absent without leave.

2. On 19.6.98 the writ petitioner moved the first writ application being W.P.No. 11313(W)/98 praying for various reliefs in the form of regularisation of stay of his family in the JCO quarter No. 2 at Jadavpur, for setting aside the Annual Confidential Report Initiated by the Commanding Officer, respondent No. 5 and other reliefs.

3. He was apprehended by provost and security of Unit Air Force on 27.6.98 and was brought to 6 Wing Air Force Barrackpore. The matter was reported to the Commanding-in-Chief, Eastern Air Command. Disciplinary action was taken and the General Court Martial assembly was convened. The writ Court by its order dated 4.1.99 directed the respondent to produce records reiterating the earlier orders. The respondent filed affidavit-in-opposition informing that the authorities had already initiated disciplinary action against the petitioner for violating the order of respondents and General Court Martial had been convened for trial of the writ petitioner on the basis of charge-sheet.

4. On 2nd August, 1999 the petitioner moved the second writ application being W.P. No. 15309 (W) of 1999 challenging the order convening the General Court Martial (for short GCM) on 5.8.98 and for staying further proceeding. The writ Court directed that GCM may proceed but the authorities shall not give effect to the decision without the leave of the Court. The respondent completed the proceeding of GCM on 31.8.99. The writ petitioner moved his 3rd writ application being W.P. No. 18587(W)/99 challenging the convening order as also the decision dated 31.8.99 whereby the writ petitioner was dismissed from his service and sentenced to suffer Imprisonment. The order of dismissal passed in GCM has to be confirmed by the Central Government or by any officer empowered for that behalf by warrant of the Central Government u/s 153 of the Air Force Act. 1950

(for short "the Act"). The respondent has moved CAN No 7513 of 1999 for vacating and/or recalling the interim order to enable the respondents to proceed further u/s 153 of the Act.

5. Evidently, the first two writ applications have been rendered infructuous by the instant 3rd writ application. The allegations of writ petitioner made out in the three writ applications may be summed up as follows :--

(i) The charges levelled against the writ petitioner are false and frivolous and no General Court Martial can be convened on the basis of those charges;

(ii) the General Court Martial was not convened lawfully in accordance with the Air Force Act, 1950;

(iii) the Commanding Officer of his own Unit at 4 Bengal/(Tech.) Air Sqn. NCC should have held the trial of the petitioner and not by the Commanding Officer of an outside Unit of 6 Wing Barrackpore who has no locus standi to hold the trial in respect of offences committed at 4 Bengal/(Tech.) Air Sqn. NCC.

6. It is well-settled that the Air Force Act is a self contained code specifying the procedures of disciplinary action against delinquent officer and in exercising the writ jurisdiction the High Court only exercises the power of judicial review. In exercising that limited power of judicial review the High Court only considers whether the procedures established by the law have been completely followed and if there was any violation of the rules of natural justice. It is also a settled principle of law that while the Act itself provides for as equally efficacious alternative remedy the High Court in its discretion may or may not invoke the writ jurisdiction. The existence of an alternative remedy is no bar for entertaining the writ application even if an equally efficacious remedy is prescribed in the statute. The judicial review is not directed against the decision but against the decision-making process. *Ranjit Thakur Vs. Union of India (UOI) and Others*,).

7. In this writ petition the writ petitioner challenged the charges drawn up by the Court of enquiry as false and frivolous. In exercising the writ jurisdiction this Court cannot go into the merit of the charges but from the averments in the writ petitions and the affidavits-in-opposition it appears that the writ petitioner got into possession of the quarter from J.W.O. Chauhan who was directed to vacate the same for the effecting repairs of the dilapidated quarters and for this Mr. Chauhan was posed out. There is nothing on record to show that the quarter was allotted to writ petitioner by the competent authority. He was under the belief that being a married officer he was entitled to SMG despite the fact that such SMG cannot be allotted to him unless the SMG of Pune is vacated by his family and that an allotment of quarter is not a vested right of the petitioner. There is no rule entitling him to take possession of any vacant quarter without the authority and permission of the competent officer. It is not disputed that the petitioner never applied for quarter nor was granted any allotment before — taking into possession of the SMG vacated by Mr. Chauhan, annexure "A" in the affidavit-in-opposition to the first writ application shows that the petitioner

himself application for permission to leave out "under his own arrangement at Behala and such permission was granted. The Commanding Officer made endorsement on the application for admission of his child before School Authority that the writ petitioner" was in possession of the SMG. vacated by Chauhan only to accommodate the writ petitioner and such accommodation was interpreted by him as permission or approval for such occupation. The petitioner did not come to sense even when he was directed to vacate the quarter. He disobeyed the order of the superior authority under different pretext forgetting that he was a member of discipline service and such disobedience to superior's order would expose him to severe consequences. Annexures "B" P. 33 "D" p. 34, "E" p. 36, "F 44 "L" p.49 of A.O. clearly show that the respondents have granted enough opportunities to the writ petitioner to settle and comply with the order. It is for the respondent authorities to decide as to how the conduct of the writ petitioner would be viewed by them and the writ Court cannot substitute its own opinion about the seriousness or otherwise of such conduct. In this particular case the respondent Initiated the disciplinary action and I am of the opinion that no exception can be taken to this decision by the writ Court. Accordingly, this writ Court passed an order that the disciplinary proceedings in the form of summary Court martial may proceed without giving effect to the decision without the leave of the Court.

8. Therefore, in the facts and circumstances of this case, the decision of the respondent to convene the General Court Martial on the basis of the charges framed after enquiry in accordance with the procedures of the Air Force Act cannot be the subject of Judicial review by this writ Court. But the decision-making process is definitely a subject matter of judicial review by this Court depending upon the facts and circumstances of the case.

9. In *Ranjit Thakur v. Union of India* (supra) the Apex Court held,

"The Act and the Rules constitute a self-contained Code, specifying offences and the procedure for detention, custody and trial of the offenders by the Courts-martial. The Act must be considered in the context of and corresponding to the plentitude of the summary jurisdiction of the Court-martial and the severity of the consequences that visit the person subject to that Jurisdiction. The procedural safeguards should be commensurate with the sweep of the powers. The wider the power, the greater the need for the restraint in its exercise and correspondingly, more liberal the construction of the procedural safeguards envisaged by the statute."

10. The respondent produced the records before this Court. It appears from the record that the Chief of the Air Staff of Eastern Command ordered that the writ petitioner be tried by general Court martial but the order convening Court martial was passed by another officer who was not authorised in accordance with the section 110 of the Act. He has also not recorded his own satisfaction that the case was a proper one to be tried by the description of Court martial he proposes to convene. The order of convening by another officer was, however,

subsequently approved by the Chief of Air Staff but that was not in accordance with the procedure established by the Act. The authorisation will precede as that would give jurisdiction to the officer to convene general Court martial but subsequent approval does not amount to authorisation as the authorisation must be by virtue of warrant. The argument of the learned counsel for the respondent (as also in the written argument) that approval was subsequently accorded and that such approval cures the defect is not acceptable by me as it is not mere procedural error but it is a jurisdictional infirmity. Section 110 lays down,

"Power to convene a general Court-martial.--A general Court-martials may be convened by the Central Government or (the Chief of the Air Staff), or by any officer empowered in this behalf by warrant of (the Chief of the Air Staff)." Rule 43 has amended by S.R.6. 127 dated 27.7.1995 lays down.

1. An officer before convening a general or district Court-Martial shall first satisfy himself that the charges to be tried by the Court-Martial are for offence within the meaning of the Act framed in accordance with law and that evidence justifies a trial on those charges he may amend the charges if he deems fit, and if not so satisfied order 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 description of Court-martial 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. "After the convening officer has appointed or detailed the officer to form a Court-martial under sub-rule (3), convening order of the Court-Martial and endorsement on the charge-sheet for trial of the accused by Court-martial may either be signed by convening officer or by a staff officer on his behalf. The charge-sheet on which the accused to be tried, the summary of evidence and the convening order for assembly of Court-Martial shall then be sent to the senior officer of Court-Martial and the Judge Advocate, if appointed."

11. It does not appear from the record that the Convening Officer had applied his mind at all for arriving at the satisfaction that the case was proper one to be tried by the description of Court-martial he proposed to convene.

12. In *Sohad Dayal Sharma v. Union of India* reported in 1987 (1) Lab IC 843, the records of the respondent showed that no decision was taken by the convening officer under Rule 43(8) with regard to officers who have to be appointed to be the members of the district Court martial. It was held,

"If the Court martial has not been validly convened, then it had no jurisdiction to proceed with the trial and consequently its decision and the subsequent action taken thereon has all to be regarded as being without jurisdiction. This jurisdictional infirmity can always be challenged by filing a writ petition under

Article 226 of the Constitution. The reading of the aforesaid provisions of the Act and the Rules leaves no manner of doubt that the District Court Martial was not properly constituted as the mandatory provisions of rule 43(3) had not been complied with and because of the Invalidity in the order convening that Court, the decision of the said Court and the punishment which has been ultimately imposed on the petitioner by respondent 3, and upheld by the Central Government, has therefore, to be quashed."

13. In *Union of India and Others Vs. Harish Chandra Goswami*, the apex Court had occasion to consider the similar provision in Rule 37 of Army Rules. In paragraph 7 of the judgment the said Rule has been quoted by Their Lordships. The apex Court affirmed the decision of the High Court setting aside the decision in general Court martial by holding,

"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 charge to be tried by the Court are for offences within the meaning of the Act and that evidence justifies 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 contends that sub-rule (3) of Rule 37 is only procedural in nature and there is no need for application of mind by the commanding officer in the matter of appointment of the personnel of Court-martial. The 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 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 initial 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 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."

14. It appears from the annexures of the writ petition No. 18587 (W) of 1999 at page 164 and 166 the allowed chargesheet was prepared on 9.7.99 by the Group Captain/Commanding Officer of 6 Wing A.F. and the copy of the fresh charge-sheet was enclosed with the letter dated 26.7.99 although the GCM was scheduled to be held on and from 5.8.99. It is very clear from the annexures "L" and "M" that the charges were altered long after the decision about the assembly of the general Court Martial was taken. This will be evident also from the statement at paragraph (11) of the affidavit-in-opposition filed by the respondent at page 20. Paragraph 11 reads as follows :--

"As aforestated the section Commander of the petitioner was informed that the General Court Martial was scheduled to be assembled as per the information received. In terms of Rules 34 to 38 of Air Force Rules, 1969, the Commanding Officer of the accused in terms of section 4(XV) of Air Force Act, 1950 is to frame the charge-sheet, when the offences fall under any of the sections 34 to 71 of the said Act in so far as the restriction contained in section 121 of the said Act. The summary of Evidence does not contain any "Findings" Warning Order and Convening Order are Issued 15/20 days prior to assembly of a Court Martial. Prior to this, preparation for Court Martial for a schedule day fixed by the Convening Officer commences. In the present pretext the Convening Officer as early as on 29th June, 1999 intimated regarding the plan of date and place of assembly. It is a fact that the petitioner was informed by the officer recording the Summary of Evidence on 6th August, 1998 Itself that "after the Summary of Evidence considered by the Commanding Officer and Superior authorities, the charges may be dismissed, altered and new charges preferred". Accordingly amended charges have taken place and the petitioner was provided with the copy of the charge sheet in terms of Rule 40 of the Air Force Rules. 1969."

15. The writ petitioner's prayer for Immediate Interview with AOC-in-C was rejected by a letter dated 7.7.99 annexure "K" to the writ application. Paragraph 2 of the letter states, "6462788 JWO BK Singh GTI may be informed that the General Court Martial for trial of the JWO in respect of all the charges framed against him, has been scheduled to be assembled at this Wing on 05 Aug. 99. As such, the grounds brought forward by the JWO in his application for Immediate Interview with AOC-in-C. EAC IAF during visit at this Wing, do not merit any consideration."

16. It is evident that GCM was convened on 5.8.99 before the final charges were framed on 9.7.99. This is in derogation to Rule 43(2) of the Act.

17. In paragraph 22 of the writ petition the petitioner has alleged, the Station Adjutant of No. 6 Wing AF for and on behalf of the Station Commander published the Station Routine Orders (S.R.O.) on 26th July. 1999, wherein the said SRO in item No. 11, it has been published that a General Court Martial to try 6462788 Sgt.(Actg. JWO paid) Singh B.K. GTI of No. 6 Wing AF will assemble at 10.00h on

05 August '99 at G Wing AF as per the details mentioned therein and it is also pertinent to mention that the said Station Adjutant also published the charges framed against the Petitioner and the composition of the Court, with full inclusive of Presiding Officer, Members, Waiting Members, Judge Advocate, Defending Officer, Prosecutor, Officers under instructions, Court orderly, Court Runner, Court Chaprasi, Computer Operators, Court Typists, and Liason Officer and also the witnesses for the prosecution also regarding the dress of the Court Martial, (annexure "M" to the writ petition)"

18. This allegation of writ petition in paragraph 22 has been replied by the respondents in paragraph 11 at page 20 of the Affidavit-in-Opposition but the factual aspect has not been controverted.

19. It is, therefore, evident that the officer convening general Court martial was not in a position to comply with the requirements under Rule 43 of the Air Force Rules, 1969 and the decision was arrived at before the alteration of and preparation for the fresh charges. In the warning order dated 26th July, 1999 the petitioner was directed to report to the fit. Lt. R. Singh at 7.00 hour every working day for further Instruction and also to report to SWO at 1345 hours on 02.08.1999 and to be under the disposal of SWO. The petitioner, therefore, got only 4 days to consider his defence against the altered charges on the basis of which he would be tried at GCM.

20. Rule 40(1) of Air Force Rules lays down,

"The accused before he is arraigned shall be informed by an officer of every charge on which he is to be tried; and also that, on his giving the names of witnesses whom he desires to call in his defence, reasonable steps will be taken for procuring their attendance, and those steps shall be taken accordingly.

The interval between his being so informed of the charges against him and his arraignment must be such as to allow him to have his witnesses present, and to consider his defense"

21. The warning order dated 26.7.99 was, therefore, not in accordance with the spirit of Rule 40 as the interval is not such as to allow the charged officer to consider his defence.

22. The argument of Mr. Sukumar Ghosh. the learned counsel for the petitioner that the Commanding Officer of the Unit at 4 Bengal/(Tech.) Air Sqn. NCC should have held the trial and such trial should not have been held by the Commanding Officer of an outside unit of 6 Wing Barrackpore is not tenable in view of the section 4(XV) whereby the Commanding Officer has been defined as the officer for the time being in command of the Unit or detachment to which such person belongs or is attached. At the relevant time the petitioner by order of detachment was stationed in Barrackpore after being apprehended by provest-marshall.

23. The learned counsel for the respondent cited a decision in Jagdish Prasad and

others Vs. M.C.D. through Commissioner and Others, wherein Their Lordships held that allotment of quarter to low Income group employees of Delhi Electricity Supply undertaking, a local body, cannot be claimed as a matter of right by the employees under housing scheme. Apart from the fact that this decision is not applicable to the present case, I have not held that the petitioner is entitled to get the quarter without allotment from the competent authority.

24. Mr. Mukherjee has also cited a decision reported in Mrs. Shilpi Bose and others Vs. State of Bihar and others, wherein it was held by the apex Court that where a competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered with by the Court merely because the transfer orders were passed on the request of the employees concerned. This case has no application in the facts and circumstances of this case nor anything has been held by me in contradiction to the said decision.

25. Mr. Mukherjee again cited a decision in Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), The apex Court has laid down the law as under :--

"Though Court-martial proceedings are subject to Judicial review by the High Court under Article 226 of the Constitution, the Court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a Court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any Court must stay its hands."

26. The finding above is quite consistent with the aforesaid decision of the apex Court.

27. The decision reported in Union of India (UOI) and Others Vs. Naik Subedar Baleshwar Ram and Others, also has little bearing to the facts and circumstances of this case, similarly, the decision reported in 1999 SC page 1980 relied upon Mr. Mukherjee lays down the law as under,

"It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial proceeding the High Court is entitled to exercise its power of judicial review by invoking Jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been Infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceeding or that the authority exercising the jurisdiction had not been vested with jurisdiction under the Act. The said power of Judicial review cannot be a power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is Insufficient for the conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior Tribunal."

28. No such finding which is in derogation to the law stated above has been arrived at by me in this Judgment.

29. On the other hand, my finding is supported by the recent Judgment of the Supreme Court in Union of India and Others Vs. Harish Chandra Goswami, wherein the apex Court has set out the punishment even after the confirmation on the grounds that the order convening Court martial was neither signed nor initialed by the Lieutenant General and there was no application of mind as to whether the case is a proper one to be tried by the description of Court martial he proposes to convene.

30. It was argued by Mr. Mukherjee appearing for the respondent that section 152 of the Air Force Act itself provides that no finding or sentence of general Court martial shall be valid except so far as it may be confirmed as provided by this Act by the appropriate authority u/s 153 and there is also provision for appeal against the order of confirmation u/s 161 of the Act and as such, the learned counsel contends, the 3rd writ petition challenging the decision of the general Court martial is premature and not entertainable by the writ Court. I have already expressed my opinion on this point in the aforestated paragraphs and I am not Inclined to reiterate the same in order to avoid prolixity.

31. Accordingly, the decision and order passed by the general Court martial is hereby set aside. This will, however, not debar the respondents from convening GCM once again for consideration of the charges in accordance with the provisions of the Air Force Act, if not otherwise barred by the Act itself or under the Rules framed thereunder. All the three writ petitions are disposed of accordingly without any order as to costs. The petitioner's application for contempt does not merit adjudication by this Court as such violation did not arise out of the order passed by me. The application filed by the respondent now having become infructuous is also dismissed.

Later :

If the petitioner is under the custody of the respondents, he may be released, if not barred under the law, with liberty to take further action in accordance with the procedures.

Let plain copy of the ordering portion of the judgment be given to the learned Advocate for the petitioner.

32. Order accordingly