
(1999) 09 DEL CK 0139
In the Delhi High Court
Case No : CWP No. 6664 of 1998

Lt. Col. Sudhir Kumar

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 27-09-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Navy Act, 1957 — Section 163(1), 165, 80

Citation : (1999) 82 DLT 183

Hon'ble Judges : A.K. Sikri, J

Bench : Single Bench

Advocate : Narender Kaushik, for the Appellant; Rakesh Tikku, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, J.—The petitioner has filed this writ petition under Article 226 of the Constitution of India with the following prayer :

(a) To quash the charge sheet dated 4.11.1997 being baseless, illegal and result of mala fide from respondent Nos. 4 & 5.

(b) To quash the General Court Martial proceeding & sentence dated 13.12.1997 being violation of principle of natural justice & vitiated by mala fide and arbitrariness.

(c) To reinstate the petitioner w.e.f. 13.12.1997 with consequential benefits with exemplary cost Rs. 2 lakhs for mental agony.

(d) To quash the retrial order dated 18.9.1998 being illegal and contrary to principle of natural justice.

(e) To direct the respondent No. 1 to initiate appropriate disciplinary proceeding against responsible officer to meet the end of justice.

(f) To pass any other order which Hon"ble Court deems fit and proper.

2. Charge-sheet dated 4th October, 1997 was served upon him pursuant to which General Court Martial (hereinafter referred to as "GCM", for short) proceedings were conducted and ultimately petitioner was imposed the sentence of dismissal from service with other consequential penalties involved. However, vide order dated 18th September, 1998 Chief of Naval Staff set aside the penalty order dated 13th December, 1997 and ordered retrial of the petitioner. In fact it is this order of retrial which the petitioner is seeking to quash and arguments were also heard on this aspect as to whether Chief of Naval Staff could order retrial of the petitioner after setting aside the penalty order dated 13th December, 1997.

3. Let me first recapitulate the facts which led to passing of the aforesaid order dated 18th September, 1998.

4. A charge-sheet dated 4th October, 1997 was served upon the petitioner in which he was charged as under :

(1) Did at about 1900 hours on the Eleventh day October, 1996, being a public servant, accept from Shri Basant Kumar Dash owner of Beauty Tailors, Bhubaneswar a sum of Rupees 30,000/- (Rupees thirty thousand) only at Balagan Railway Station for himself, as gratification, other than legal remuneration, as a motive for doing an official act namely getting Shri Prasant Kumar Dash son of Shri Basant Kumar Dash recruited as Metric Entry Recruit in Batch Number 01/97 and thereby committed an offence punishable u/s 7 of the Prevention of Corruption Act, 1988 read in conjunction with Section 77(2) of the Navy Act, 1957.

(2) Did at about 1900 hours on the Eleventh day of October, 1996, was guilty of conduct unbecoming the character of an officer in that he handed over a Xerox copy of question paper pertaining to set B of Artificer Apprentice recruitment examination, Batch Number Artificer apprentice-108, held during April, 1996, to Shri Basant Kumar Dash at Balagan Railway Station, and thereby committed an offence punishable u/s 54(2) of the Navy Act, 1957.

(3) Did at about 1900 hours on the Fourteenth day of October, 1996 being a public servant, accept from Shri Basant Kumar Dash owner of Beauty Tailors, Bhubaneswar a sum of Rupees 30,000/- (Rupees thirty thousand) only at Balagan Railway Station for himself, as gratification, other than legal remuneration, as a motive for doing an official act namely getting Shri Prasant Kumar Dash son of Shri Basant Kumar Dash recruited as Metric Entry Recruit in Batch Number 01/97 and thereby committed an offence punishable u/s 7 of the Prevention of Corruption Act, 1988 read in conjunction with Section 77(2) of the Navy Act, 1957.

(4) Did at about 1430 hours on the Twenty First day of April, 1997, was guilty of conduct unbecoming the character of an officer in that he asked then Lieutenant now Lieutenant Commander Upender Pratap Singh Bhadoria (03102-2), the Senior Evaluator of answer sheets of Artificer Apprentice 110 Batch and Metric Entry Recruitment 02/97 batch, that let us make some money in recruitment,

people have made lakhs of rupees, why should not we and thereby committed an offence punishable u/s 54(2) of the Navy Act, 1957.

5. A GCM was ordered against the petitioner as a result of which petitioner was found guilty of charge Nos. 1, 3 and 4 and vide order dated 13th December, 1997 he was sentenced to be dismissed from service with other consequential penalties involved. This required prior approval from convening authority under Regulation 194 of the Regulations for the Navy 1965, Part-II (Statutory). On approval of the sentence petitioner was discharged from Naval services w.e.f. from 13th December, 1997.

6. The petitioner filed petition dated 21st June, 1998 for judicial review of the proceedings of trial by Court Martial to the Chief of Naval Staff. In this petition he submitted in detail that there was violation of various provisions of Navy Act, 1957 as well as Navy Regulations, 1965. Accordingly, he challenged the GCM proceedings and resultantly punishment was inflicted upon him on various grounds. It is not necessary to state in detail the averments made in this petition by the petitioner which runs into 28 pages. Suffice is to state that the petitioner alleged that proceedings were not conducted properly and he was not given full opportunity to defend himself. There was violation of principle of natural justice. He even challenged the constitution of the GCM as illegal and in violation of Section 97(10)(a) of the Navy Act. His petition for judicial review was considered by Judge Advocate General (Navy) (hereinafter referred to as JAG, for short) and after going into the entire matter JAG submitted his report dated 16th September, 1998 to the Chief of Naval Staff pointing out the serious defects which had crept in the conduct of Court Martial proceedings and recommended setting aside of the same. Relevant portion of his report is reproduced below :

The petitioner contended that he was not granted sufficient time to hire an Oriya knowing defense Counsel. His request for the same dated 1st November, 1997 was turned down by TJA vide letter dated 15th November, 1997. The Court proceedings were adjourned from 11th November, 1997 to 13th November, 1997. However, he could not manage to engage an Oriya speaking defense Counsel within a short span of two days. The Court Martial proceeded with the trial on 13th November, 1997 in an arbitrary manner, even when he was not provided the Defending Officer or the defense Counsel. The decision of the Court Martial that the prosecution may proceed with examination-in-chief of the prosecution witnesses and that the cross-examination by the petitioner will be deferred till the arrival of the Defending Officer/Defense Counsel is oppressive, arbitrary, bad in law and violates the statutory provisions under the Navy Act.

The Officer representing the prosecution brought out that since the cross-examination of the witnesses was deferred till the arrival of the Defending Officer/Defending Counsel, no prejudice appeared to have been caused to the petitioner, and, Therefore, his contention is not correct.

It is seen from the proceedings (pages 36 to 37) that the examination of the

witnesses was allowed without the presence of the Defending Officer/Defense Counsel and such a state of affairs went on till 15th November, 1997 and two material witnesses, viz. Shri Basant Kumar Dash and Shri Sasikant Nanda were examined-in-chief. This modus operandi followed by TJA and the Court is wholly irregular, illegal and vocative of the statutory provisions. Reg. 172 of Regs. Navy Part II (Statutory) stipulates that an accused for whose trial an application has been made, shall be afforded as full an opportunity as is consistent with the exigencies of service for preparing his defense. Vide Reg. 173(1), Regs. Navy Part II (Statutory), it has been provided that except where the accused defends himself, he shall be defended by an officer who shall be called the Defending Officer or Counsel who is properly qualified who shall be called the defense Counsel. Reg. 173(3), Regs. Navy Part II (Statutory) further provides that the accused may request and shall be afforded at the earliest opportunity the assistance of any officer in his ship whose assistance is reasonably available and in case the accused is unable to obtain such assistance and he desires to have a Defending Officer assigned to represent him, the convening authority shall appoint a suitable officer. The mandate of law on the subject is very categorical and does not admit of any deviation by way of postponing the cross-examination by the accused person. The Defending Officer or the defense Counsel is to be provided to the accused person well before the commencement of the trial so that he has the full opportunity and time to prepare the defense. There can be no excuse for not providing the Defending Officer/Defense Counsel. The petitioner had repeatedly expressed his inability to defend himself, but he was time and again overruled by TJA. Pages 45 and 56 of the proceedings refer. The Defending Officer eventually came on 15th November, 1997, but it was too late in so far as the grave error on this count is concerned. The fool-hardy procedures followed by the Court and TJA of postponing the cross-examination of the witnesses till the arrival of the Defending Officer/Defending Counsel is vocative of Reg. 173, Regs. Navy Part II (Statutory), and, as such, in law, the entire proceedings are liable to be quashed.

The petitioner then mentioned that Section 97(10)(a) of the Navy Act, 1957 enjoins that the majority of the Members of the Court Martial, including the President, shall be officers of the Executive Branch of the Naval service. However, in this case there were only two Members out of 5 Members of the Executive Branch of the Navy, hence very constitution of the Court Martial is illegal.

The Prosecutor in his reply admitted this serious error and regretted the mistake on behalf of the convening authority.

From the perusal of the list of the officers next in seniority to the President on pages 4 to 10 of the proceedings, it is revealed that following are the President and Members of the Court Martial :

Capt. R. Datta (01254-Z) of INS Venduruthy Addl. -- President.

Cdr. K.P. Shashidharan (01901-W) of INS Venduruthy Addl. -- Member.

Cdr. P.S. Gehlot (70215-B) of INS Shivaji -- Member.

Gdr. Harphool Singh (50743-Z) of INS Valsura -- Member.

Cdr. KKC Menon (40447-Z) of INS Venduruthy Addl. -- Member.

It may be seen from the above that Capt. R. Datta and Cdr. K.P. Shashidharan only belong to the Executive Branch. In view of this position the very constitution of the Court Martial is defective in that as per Section 97(10)(a) of the Navy Act, 1957 the majority of the Members of the Court Martial, including the President, shall be officers of the Executive Branch of the Naval service. The mandate of this provision of law does not admit of any deviation. The Court Martial proceedings, Therefore, are liable to be quashed on this serious defect also. The constitution of the Court Martial, as such, stands impeached since it has not been constituted as per the mandate of law. Once against Lt. Cdr. A. Swarup, JA, SNC has utterly failed in his primary duty of convening the Court Martial. It was his duty to ensure that the majority of the Members of Executive Branch were included for constitution of the Court Martial at the time of proposing the convening of the Court Martial. From perusal of page 1 it appears that he kept two Executive Officers as the spare Members. Since none of the Members of the Court Martial was objected to, the spare Members could not replace the sitting Members. He could not have gone wrong if he had included only two non-executive officers either as the main Members or the spare Members. This basic mandate/ procedure had been glossed Over by the JA due to sheer callousness, neglect or ignorance of law on the subject. In my reckoning never ever since the inception of the Navy Act, 1957 such a serious defect had taken place in Constituting the Court martial.

In view of the above serious defects I have no alternative but to recommend the setting aside of the Court Martial proceedings. It is accordingly recommended that-

(a) The entire Court Martial proceedings be set aside.

(b) The petitioner be retired in terms of powers conferred in CNS vide Section 163(l)(a) of the Navy Act, 1957.

7. After considering this report the Chief of Naval Staff passed order dated 18th September, 1998 setting aside the findings and sentence of the Court Martial and ordered petitioner to be retried. Against this order of retrial the petitioner has filed the instant petition. It would be useful, at this stage, to reproduce this order :

"Ex-Lt. Cdr. Sudhir Kumar (70244-W), Indian Navy of Indian Naval Ship Chilka was tried by Court Martial, found guilty of Charge Nos. 1 and 3 and sentenced to be dismissed from Naval Service and to suffer consequential penalties involved.

In exercise of the powers conferred by Section 163 of the Navy Act, 1957, I hereby set aside the findings and sentence of the Court Martial and order him to

be retried.

8. The contention of the petitioner is that no such retrial could be ordered as it was not permissible in law or otherwise. He based his contention on various submissions which are noted and dealt with below :

The first submission made is that the petitioner was imposed the sentence of dismissal from Navy service and other consequential penalties, vide order dated 13th December, 1997 and accordingly this sentence was executed and confirmed. Learned Counsel for the petitioner, in this connection, referred to Rule 194 with of the Navy Rules as per which it is the responsibility of the convening authority to take necessary steps to give effect to the sentence. According to him after this order was implemented there could not have been retrial on the same ground. This contention of the petitioner is totally misconceived. It is incorrect that the order dated 13th December, 1997 has been executed. The said order has been set aside vide order dated 18th September, 1998 and Therefore in so far as punishment of dismissal given in order dated 13th December, 1997 is concerned the same is no more in existence. In fact, the effect of order dated 18th September, 1998 is as if punishment dated 13th December, 1997 was not imposed upon the petitioner. If the contention of the petitioner is accepted the effect of that would be that the petitioner is a dismissed officer even today. This is admittedly not the position. Even, petitioner would not like to be in such a position which is prejudicial to him.

9. It was next contended by the petitioner that the impugned order which is passed by Chief of Naval Staff in exercise of powers u/s 163 of the Navy Act, could not have been passed as no such power is given to the said authority to order retrial. This submission is noted to be rejected. It may be stated that after the Court Martial proceedings and sentence is passed on an official, he can seek judicial review by filing a petition u/s 160 of the Navy Act. It is in fact under this section that the petitioner had preferred this petition. Once such petition is filed JAG has to review the case and submit his report on such review together with his recommendations which he may deem just and proper to the Chief of Naval Staff for his consideration. In fact where there is a case of capital sentence imposed upon the official or where Court Martial is ordered by the President of India, Chief of Naval Staff has to transmit the proceedings and report to the Central Government together with his recommendation as provided u/s 165 of the Navy Act. In other cases the Chief of Naval Staff can pass the order including those cases where petition is presented to him. For this purpose, Section 163 comes into play and Clause (a) of Sub-section (1) of Section 163 being relevant is reproduced below :

Section 163 :

(1) Where any person is tried under the provisions of this Act, the Central Government or the Chief of Naval Staff, may in the case of a conviction-

(a) set aside the finding and sentence and acquit or discharge the accused or

order him to be retried, or

10. The aforesaid Clause (a) clearly stipulates that Chief of Naval Staff can set aside the finding and sentence and order retrial of the concerned official.

11. It was next contended that after the punishment of dismissal was given to the petitioner vide order dated 13th December, 1997 he ceased to be subjected to Navy laws. Therefore there cannot be any trial against him at this stage in view of the provisions of Section 80 of the Navy Act, which is as follows :

Section 80 :

Trial after a person ceases to be subject to Naval law--When any offence mentioned in this Chapter has been committed by any person while subject to Naval law and such person has since the commission of the offence ceased to be subject to Naval law, he may be taken into and kept in custody, tried and punished under this Act for such offence in like manner as he may have been taken into and kept in custody, tried and punished if he had continued subject to Naval law :

Provided that he shall not be tried for such offence except in the case of an offence of mutiny or desertion, unless the trial against him commences within six months after he has ceased to be so subject.

12. A perusal of the aforesaid section, would clearly show that it will not be applicable to this case. Moreover after the punishment of dismissal was imposed upon the petitioner and he filed statutory petition against the same, it was continuation of proceedings under the Army Act and it is in these proceedings the impugned order is passed. Therefore, petitioner remained subject to the provisions of Army Act. In any case one order of dismissal is set aside by the Chief of Naval Staff the effect of that would be that petitioner remains in service and Therefore would be subject to the Navy law. Not only this it is also to be borne in mind that it was on his petition that against the sentence order dated 13th December, 1997 for which he alleged that the GCM conducted against him was not proper and in accordance with law, that the present order was passed accepting his contention. Once the Reviewing Authority comes to the conclusion that there was certain infirmities in the conduct of GCM proceedings against the petitioner and he sets aside the same, there is no bar in ordering retrial. It may also be borne in mind that the Reviewing Authority did not set aside the first GCM on merits or holding that charges against the petitioner were not proved but it was set aside on the ground that there was procedural flaws in the conduct of the said GCM. If a person challenges enquiry on such grounds even in a Court of law and Court is of the opinion that enquiry was not conducted in accordance with the principles of natural justice, while setting aside the said enquiry Court can always give permission to the concerned authorities to proceed against the delinquent officials again by holding fresh enquiry. What petitioner could achieve from the Court, that he has achieved departmentally. However, once the earlier GCM is set aside on procedural grounds that does not mean that petitioner is

absolved from the charges altogether. Learned Counsel for the respondents relied upon the judgment of Lahore High Court in the case of Bishambar Das Kanujia v. Union of India . In that case accused was charged for accepting illegal gratification however sanction required to prosecute him was not obtained and Therefore trial was set aside as null and void. The High Court held that in such circumstances it cannot be said that there was any conviction or acquittal in force and subsequent trial of the accused after obtaining proper sanction was not barred nor it amounted to double jeopardy. To the same effect is the judgment of Supreme Court in the case of Baij Nath Prasad Tripathi Vs. The State of Bhopal, . The principle stated in the said case is duly applicable to the circumstances of this case. In this case also once earlier GCM is set aside there is neither any conviction nor acquittal of the petitioner Therefore petitioner can be retried.

13. Learned Counsel for the petitioner relied upon the judgment of the Supreme Court in the case of Chief of Army Staff and Others v. Major Dharampal Kukreti, reported in (1985) 2 SCC 413. However, the said judgment is not applicable in the instant case. A perusal of the said judgment would show that this was a case under Army Act and the provisions under Army Act are different from the provisions under the Navy Act. Section 121 of the Army Act specifically prohibits second trial after a person subjected to the said Act has been acquitted or convicted of an offence of criminal nature by Criminal Court. In the instant case Section 163 of the Navy Act specifically empowers Chief of Navy Staff to order retrial. Moreover as noticed above in this case, it cannot be said that there was any conviction or acquittal after earlier conviction has been set aside on technical grounds. Learned Counsel for the petitioner relied upon another judgment of Punjab and Haryana High Court in the case of Major R. Saini v. Union of India and Others, reported in 1991 (5) SLR 495 and drew my attention to paras 8 and 12 thereof. This case is also distinguishable. In this case after GCM of the petitioner, he has awarded the punishment of forfeiture of twenty months service for the purpose of promotion and severe reprimand. This punishment was confirmed under provision of Sections 153 and 154 of the Army Act by the Competent Authority and then on such confirmation the aforesaid punishment came into force and became effective. However, thereafter a show cause notice was issued to the petitioner u/s 19 read with Rule 14 proposing to enhance the punishment. The validity of this show cause notice was challenged and in the aforesaid circumstances question arose as to whether a person, who has been awarded one or more of the punishment contemplated u/s 71 by the GCM be subject to an action as contemplated u/s 19 read with Rule 14 and the High Court held that it cannot be done. That was not a case where earlier punishment awarded pursuant to GCM was set aside. The same was executed and in force when show cause notice was issued u/s 19. In the instant case first punishment has been set aside and that too on procedural grounds and only then retrial is ordered simultaneously.

14. No other contention was canvassed by the petitioner.

15. For the aforesaid reasons, I do not find any infirmity in the order dated 18th September, 1998. Accordingly, the present writ petition is void of merits and is dismissed.

There shall be no order as to cost.