
(2002) 03 DEL CK 0052
In the Delhi High Court
Case No : CWP 5451 of 1996

Lt. Col. V.N. Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 15-03-2002

Acts Referred:

Citation : (2002) 64 DRJ 379

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : Yatish Mohan, for the Appellant; U.V. Hazarika and T.V. George, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—The petitioner at all material times was attached with 35 Inf. Brigade. Purported to be on the ground of indiscriminate local purchase of hygiene Chemicals ignoring the instructions laid down Therefore during his tenure as Officiating Commandant, he was charge-sheeted. Proceedings in terms of the Army Act had been initiated on 30th October 1996. Upon investigation, it was concluded:

"3.CONCLUSION:- There has definitely been certain procedural lapses on part of 4 RPD ASC while resorting to local purchases. However, these lapses have been timely intervened into, plugged and various SOP now introduced at various levels so as to avoid future occurrence of such a nature. No financial lapses have been noticed in these local purchase and as such I recommend that this case may please be considered as closed, if deemed fit by the MG ASC.

Sd/-

K.S. Bharucha

Brig.

DDST."

2. However, Court Martial proceedings were initiated wherein certain procedural lapses were recorded. As many as eight charges were leveled against the petitioner. The petitioner was held guilty. An order dated 30th October 1996 was passed to arrest the petitioner. Questioning the said order, the writ petition has been filed.

3. In the said writ petition, inter alia has prayed for the following reliefs:

"(a) This Hon"ble Court may issue a writ order or direction in the nature of certiorari quashing the order No. 5047/A(PC) dated 30.10.1996 invoking Section 123 of the Army Act annexed as Annexure A to this petition.

(b) This Hon"ble Court may direct payment of compensation to the tune of Rs. 50,000/- arrest and detention per day illegal arrest and detention as done by the Hon"ble Supreme Court in Bhim Singh's case.

(c) Issue writ order or direction of appropriate nature striking down the provisions of Section 153, 154 and 160 of the Army Act 1950.

(c-1) Issue writ order and direction of appropriate nature to quash the orders dated 30.10.1996, order 30.10.1996 invoking Section 123 of the Army Act against the petitioner, findings dated 3rd April, 1997, Revision order dated 14.6.1997, Revised order dated 2.7.1997 and confirming order dated 8th April, 2000 and 15.5.2000.

(d) Pass such other order or orders or direction as this Hon"ble Court may deem fit and proper in the facts and circumstances of the case."

4. The learned counsel for the petitioner would submit that provisions of Sections 153, 154 and 160 are ultra virus Articles 44 and 21 read with Article 50 of the Constitution of India inasmuch as by reasons thereof, a judicial authority becomes subservient to the executive. The learned counsel would contend that the procedure adopted in a court martial is vocative of Article 21 of the Constitution of India.

5. In any event, the learned counsel would contend that the impugned order could not have been passed as initiation of the proceedings was bad in law being barred by the law of limitation.

"Section 160 of the Army Act reads as follows:

"160. Revision of finding or sentence.- (1) Any finding or sentence of a court martial which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the confirming authority, may take additional evidence.

(2) The Court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.

(3) In case of such unavoidable absence the cause thereof shall be duly certified

in the proceedings, and the court shall proceed with the revision, provided that, if a general court-martial, it still consists of five officers, or, if a summary general or district court-martial, of three officers.

6. So far as the question as regards virus of the afore-mentioned provisions of the Army act are concerned, this Bench also in Havaladar D.K. Srivastava v. Union of India, CWP No. 6999 of 2001 disposed of on 6th february 2002 has upheld the validity of Section 160 of the Army Act.

7. Principle of double jeopardy, as enumerated under Clause (2) of Article 20 of the Constitution, in our considered view, is not attracted in the instant case. The power of the revisional authority to revise an order of punishment is in continuation of the same proceedings. Only because the delinquent officer has in the meantime undergone punishment, the same, in our opinion, does not bring about a situation in terms whereof enhancement of punishment in an appeal or revision would be impermissible. What is provided in Clause (2) of Article 20, is prosecution and punishment for the same offence more than once. The same does not prohibit enhancement of punishment in the same proceedings. Even under the Criminal Procedure Code, the High Court, either in exercise of its appellate or revisional jurisdiction may enhance the punishment, subject of course to compliance of the principles of natural justice. The revisional power of the High Court includes initiation of suo moto proceedings.

8. In any case, where the earlier proceedings were nullified fresh trial is not prohibited even though the delinquent officer may have served part of the sentence. The bar of the trial and punishment in a second proceedings, would arise where the first proceedings has come to an end and not otherwise. This aspect of the mater has been considered by a Full Bench of this Court in Gian Chand Vs. Union of India and others, -wherein it while considering Section 160 of the Army Act, observed as under:

"Section 160 empowers the General Court martial to reconsider the same set of facts and if they are so minded, to come to a different conclusion. This is what has happened in the present case. On the same set of facts which existed earlier, the General Court martial has now felt, after taking into account the various facts and circumstances which were on the record that the earlier punishment which it had sought to impose was too lenient and, Therefore, it enhanced the sentence. There can be no judicial review of such a decision which has been arrived at. In the absence of any plea of mala fides against the members of the General Court martial having been taken or proved, we are of the opinion that it is essentially for the General Court Martial to consider as to what sentence should be imposed. A writ court, in our opinion, would not be exercising its discretion properly in interfering with a sentence, which is passed by a duly constituted general Court Martial".

9. We are, Therefore of the opinion that Section 160 of the Army Act cannot be declared ultra virus on the grounds taken in the writ petition.

10. The Apex Court in Capt. Harish Uppal Vs. Union of India (UOI) and Others, observed as under:

"The contention that Brig Bhilla should either have given a hearing to the petitioner or the Chief of Army Staff should have given a hearing to the petitioner before confirming the subsequent sentence by the court martial is not a requirement under the Act. While it can be at least said that there is some semblance of reasonableness in the contention that before the ordered what in effect was an upward revision of the sentence passed on the petitioner, he should have been given a hearing to insist that the confirming authority should give a hearing to the petitioner before it confirmed the sentence passed by the court martial, it a contention which cannot be accepted. To accept this contention would mean that all the procedure laid down by the Code of Criminal Procedure should be adopted in respect of the court martial, a contention which cannot be accepted in the face of the very clear indications in the Constitution that the provisions which are applicable to all the civil cases are not applicable to cases of Armed Personnel. It is not a requirement of the principles of natural justice. Indeed when he was informed t hat the subsequent sentence passed on him had been sent to the Chief of the Army Staff for confirmation it was open to the petitioner to have availed himself of the remedy provided u/s 164 of presenting a petition to the confirming officer i.e. the Chief of the Army Staff in this case. He does not appear to have done so."

11. As by reason of the provisions of the Army Act which is a complete code by itself a detailed procedure as regards holding of different categories of proceedings have been laid down in terms whereof principles of natural justice are complied with and trials can be held in a fair manner., the requirements of Article 21 of the Constitution cannot be said to be violated. It is, thus, idle to contend that the afore-mentioned provisions of the Act are ultra vires. Furthermore, by reason of Section 164 of the Act, and additional protection has been afforded to a delinquent officer and thus, it cannot be said that thereby executive would have a say over the authorities discharging the judicial function.

12. Sections 122 and 123 of the Army Act read thus:

"122. Period of limitation for trial. -(1) Except as provided by Sub-section (2), no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years and such period shall commence,-

(a) On the date of the offence; or

(b) Where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) Where it is not know by whom the offence was committed the first day on

which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.

(2) The provisions of Sub-section (1) shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 37.

(3) In the computation of the period of time mentioned in Sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded.

(4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.

123. Liability of offender who ceases to be subject to Act.- (1) Where an offence under this Act had been committed by any person while subject to this Act, and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such persons shall be tried for an offence, unless his trial commences within a period of three years after he had ceased to be subject to this Act; and in computing such period, the time during which such person has avoided arrest by absconding or concealing himself or where the institution of the proceedings in respect of the offence has been stayed by an injunction or order, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded:

Provided that nothing contained in this Sub-section shall apply to the trial of any such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 37 or shall affect the jurisdiction of a criminal court to try any offence triable by such court as well as by a court-martial.

(3) When a person subject to this Act is sentenced by a court-martial to transportation or imprisonment, this Act shall apply to him during the term of his sentence, though he is cashiered or dismissed from the regular Army, or has otherwise ceased to be subject to this Act, and he may be kept, removed, imprisoned and punished as if he continued to be subject to this Act.

(4) When a person subject to this Act is sentenced by a court-martial to death, this Act shall apply to him till the sentence is carried out."

13. It appears that a show cause notice was issued to the petitioner in June 1993 wherein it was alleged:

"Mukhyalaya Delhi Area

Headquarters Delhi Area,

Delhi Cantt-10

627011/RC/ST9

Dated: June '93

Lt Col. V.R. Singh

Office Comdt.

4 RPD ASC

Delhi Cantt-10.

INVESTIGATION OF LP OF HYG CHEM AND OTHER FOL ITEMS

1. Ref to our letter No. 627011/RC/ST9 dated 05 May '93

2. It has been observed from the investing at report relating to LP of hyg chem. Items that you have worried but LP in gross violation of all orders and instars on the subject. A few of the glooming lapses and omissions are as under:-

(a) The flagrant local purchase of hyg chem items has been carried out for almost two years without regards to the existing instars on the subject.

(b) Detailed procedure for LP of hyg chem items as laid down vide torch instr No. 16 dt. 30 Nov '88 05/90 and Army HQ letter No. P/72002/92-93/ST9/xviii/Cell-I dated 30 Dec '92 has not been followed.

(c) As is evident from the periodicity and quantities purchased, the requirements have been deliberately split to bring them with financial power of DDST.

(d) Purchases have been made even when adequate ground balances were available in the depot.

(e) No food back reports on the LP have been fwd as laid down.

(f) Neither rates of purchase as indicated by Army HQ have been adhered to, nor the same got approved by this HQ/HQ. Western command as stipulated.

3. In view of the above, you are requested to fwd the detailed Explanation relating to the above irregularities in the local purchase of hyg chem items during the period of Jul '91 to Mar '93. The Explanation should reach this HQ by 19 Jun '92.

Sd/-

(K.S. Bharucha)

Brig

DDST"

14. A Division Bench of Supreme Court in Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Usha Ranjan Roy Choudhury and Another, wherein it was noted that it cannot be said that even if the rules are applicable, having regard to the fact that more than three years have expired from the date of commission of the alleged offence, the trial is not vitiated. It was held:

"8. The next point which was unsuccessfully urged before the High Court was in the context of Section 122 of the Army Act of 1950 which prescribes a period of limitation of three years. The High Court did not accede to the submission in this behalf having regard to the law enunciated by this Court in Delhi Special Police Establishment, New Delhi Vs. Lt. Col. S.K. Loraiya, . We are of the opinion that the High Court was right. This Court in the aforesaid case has taken the view to the effect that the question being essentially one of the initial jurisdiction of the ordinary criminal Court on the one hand and the Court-martial on the other, unless the procedure prescribed by the rules is complied with the ordinary criminal court would not have initial jurisdiction in regard to the matter, as is evident from the following passage:-

"It is an admitted fact in this case the procedure specified in Rule 3 was not followed by the Special Judge, Gauhati before framing charges against the respondent. Section 549 (1) Cr. P.C. and Rule 3 are mandatory. Accordingly the charges framed by the Special Judge against the respondent cannot survive. But counsel for the appellant has urged before us that in the particular circumstances of this case the respondent is not "liable to be tried" by a Court-martial.

Section 122(1) of the Army Act, 1950, provides that no trial by court-martial of any person subject to the Army Act for any offence shall be commenced after the expiry of the period of three years from the date of the offence. The offences are alleged to have been committed by the respondent in November-December, 1962. So more than three years have expired from the alleged commission of the offence. It is claimed that having regard to Section 122(1), the respondent is not liable to be tried by court-martial.

This argument is built on the phrase "is liable to be tried either by the Court to which this Code applies or by a Court-martial" in Section 549(1). According to counsel for the appellant this phrase connotes that the ordinary criminal Court as well as the court-martial should not only have concurrent initial jurisdiction to take cognizance of the case but should also retain jurisdiction to try him up to the last stage of conviction or acquittal. We are unable to accept this construction of the phrase.

As regards the trial of offences committed by Army men, the Army Act draws a threefold scheme. Certain offences enumerated in the Army Act are exclusively triable by a Court-martial; certain other offences are exclusively triable by the ordinary criminal courts; and certain other offences are triable both by the ordinary criminal court and the court-martial. In respect of the last category both the Courts have concurrent jurisdiction. Section 549(1) Cr.P.C. is designed to

avoid the conflict of jurisdiction in respect of the last category of offences. The clause "for which he is liable to be tried either by the Court to which this Code applies or by a court-martial" in our view, qualified the preceding clause "when any person is charged with an offence" in Section 549(1). Accordingly the phrase "is liable to be tried either by a Court to which this Code applies or a court-martial" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal Court as well as a court-martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two Courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal Court and the court-martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, Section 549 and the rules made there under are attracted to the case at hand."

9. Having regard to the enunciation of law to this effect it is evident that the ordinary criminal Court would have no jurisdiction to take cognizance of the case and to try the accused in a matter where the procedure prescribed by the Rules had not been complied with. The initial lack of jurisdiction to take cognizance and try the case would of logical necessity vitiate the trial and order of conviction and sentence would be liable to be quashed as a result thereof. We are Therefore unable to accede to the submission urged on behalf of the appellant State that even if the rules are applicable, having regard the fact that more than three years have expired from the date of the commission of the alleged offence, the trial is not vitiated."

15. The period of limitation would start from the date of knowledge. The three years period, Therefore, expired on 4th May 1996. The petitioner had been directed to be arrested on 30th October 1996.

16. The learned counsel appearing on behalf of the respondent accepted that the irregularities pertaining to the local purchase came to the notice of the competent authority in June 1993 and technical court of enquiry was ordered. Allegedly, the technical court enquiry recommended examination of certain essential witnesses and bringing into light the correct details and the persons responsible for the irregularities. The staff court of enquiry was convened pursuant thereto which, upon examination of the witnesses was concluded on 31st April 1994 and blamed the petitioner along with other for irregularities in local purchase in hygiene Chemicals.

17. For the purpose of Section 122 of the Army Act, if the offender is known either to the person aggrieved or to the competent authority, the date of offence would be relevant for reckoning the period of limitation. It is not the contention that Brig. DDST is not the person aggrieved. He had issued a show cause notice asking for Explanation from the petitioner relating to the irregularities in the local purchase. Thus, as the offence committed by the petitioner was in the knowledge of the person aggrieved or the competent authority, it cannot be said to be a

case where the identity of the offender was not known. Only in a case where identity of the offender is not known, the date on which the identity of the offender is known definitely would be the date for the purpose of commencement of limitation. No such allegation has been made in the counter affidavit. Only a vague statement has been made that a detailed enquiry was required for the purpose of ascertaining as to whether others are also involved or not. No material has been placed on record to show that the involvement of the petitioner at any stage was doubted.

18. In *Major Radha Krishan Vs. Union of India and Others*, , it has been held that Section 122 of the Army Act is a complete code in itself for it not only provides period of limitation by court martial but specifies in Sub-section (2) thereof offences in respect thereof, the limitation clause would apply in support of offences contemplated u/s 37 of the Act.

19. In *Delhi Special Police Establishment, New Delhi Vs. Lt. Col. S.K. Loraiya*, , it was held:

"...On a conjoint reading of Sub-sections (1) and (3) of Section 122, it is evident that the Court Martial and not the ordinary criminal Court has got jurisdiction to decide the issue of limitation. There is nothing on record before us to indicate that the respondent had not been evading after commission of the offence. As the Court Martial has initial jurisdiction to enter upon the enquiry in the case, it alone is competent to decide whether it retains jurisdiction to try the respondent in spite of Sub-section (1) of Section 122. The issue of limitation is a part of the trial before it. If the Court Martial finds that the respondent cannot be tried on account of the expiry of three years from the date of the commission of the offence, the respondent cannot go scot free. Section 127 of the Army Act provides that when a person is convicted or acquitted by a Court Martial, he may, with the previous sanction of the Central Government, be tried again by an ordinary criminal Court for the same offence or on the same facts. So it would be open to the Central Government to proceed against the respondent after the Court Martial has recorded a finding that it cannot try him on account of the expiry of three years from the date of the commission of the offence.

(emphasis supplied)"

20. Who would be a "person aggrieved", has been considered by the apex court in *Registrar of Companies Vs. Rajshree Sugar and Chemicals Ltd. and Others*, wherein it has been held that when a misconduct allegedly is said to have been committed the officer in command is required to take any action for charges and trial by the court martial as per Section 1 Chapter V of the Rules or order a court of enquiry. It was further held in *Colonel D.D. Pawar, C-25415-A Vs. Commander HQ Andhra Sub-Area, Secunderabad and another*, :

"19. Applying the test laid down in *Registrar of Companies Vs. Rajshree Sugar and Chemicals Ltd. and Others*, , we need to examine question as to who is the "person aggrieved" for the purpose of Section 122(1)(b) of the Act. When any

misconduct or offence is alleged to have been committed the Officer in Command is required to take action for investigation of charges and trial by the Court Martial as per Section 1 Chapter V of the Rules or order Court of Inquiry u/s 2 Chapter VI of Rules. Section 1 of the Chapter V deals with such investigation. Rule 22 of the Rules provides that the Commanding Officer has to hear the charged army person, record summary of evidence and after completing the investigation if the Commanding Officer is of the opinion that the charged ought to be proceeded with, he may refer the case to the proper superior authority or take such other action as contemplated in Rule 122(3). Under Rules 177 to 185 Court of Inquiry may be assembled by Officer in Command of anybody of troops. Chapter XII of the defense Service Regulations of the Army also deal with Court of Inquiry. In this context we may also refer to Chapter II of Army Regulations, which deals with the powers and duties of General Officer Commanding in Chief, Core Commander, Divisional Commander, Area Commander and Independent Sub Area Commander. The duties, functions and responsibilities of the Independent Sub Area Commander are analogous to those of Area Commander which are provided in Regulation 16. Command, discipline and administration in his area are the responsibilities of the Area Commander or Independent Sub Area Commander as the case may be."

21. Law of limitation in the context of court martial proceedings must be interpreted strictly. The criminal justice system necessarily interferes or encroaches upon the Fundamental Rights guaranteed under Part III of the Constitution of India and thus, in case of doubt or dispute, the interpretation must lean in favor of the accused.

22. Although in a given case, plea in bar in terms of Rule 53 of the Army Rules may be taken before the court martial itself, having regard to the facts and circumstances of this case, we are of the opinion that as the petitioner has already been held guilty, there is no possibility for him to take recourse to plea in bar as provided in Rule 53 of the Rules.

23. If a proceedings is initiated at the expiry of the period of limitation, the same could be without jurisdiction. A sentence and order passed without jurisdiction would be non-est in the eyes of law.

24. In this view of the matter, we are of the opinion that the impugned order cannot be sustained. It is set a side accordingly. This writ petition is allowed with costs.