

(1994) 03 DEL CK 0064

In the Delhi High Court

Case No : Civil Writ Appeal No. 3286 of 1991

Mahipal Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-03-1994

Acts Referred:

Army Act, 1950 — Section 116, 120
Penal Code, 1860 (IPC) — Section 465

Citation : (1994) 55 DLT 176

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : V.K. Shall and B.P. Ojha, for the Appellant;

Judgement

C.M. Nayar, J.

(1) The present writ petition under Article 226 of the Constitution of India has been filed for issuance of a writ in the nature of Mandamus and Certiorari for directing the respondents to take back the petitioner in service by declaring the Summary Court-martial proceedings and the resultant impugned order dated 24/11/1988, by which the petitioner was sentenced to be reduced in the ranks, to be dismissed from service and to suffer R.I. for six months as-invalid and for quashing the same.

(2) The facts, briefly stated, are that the petitioner was enrolled on 28/02/1976 and was promoted to the rank of Havildar with effect from 1/01/1984. He was posted on transfer to the Zonal Recruiting Office (for short Z.R.O.) Jabalpur on 9/09/1984 and continued to serve there till 5/08/1987. He was thereafter posted to No. 27 Air defense Regiment (for short 27 A.D. Regiment). The petitioner was called from 27 Ad Regiment on alleged attachment to HQ., Recruiting Zone, Jabalpur where he continued till the date he was removed from the Army by order dated 24/11/1988, as a result of conviction by the Summary Court-martial. On reaching Jabalpur he came to know that there were some allegations against him and impugned disciplinary proceedings were contemplated to be initiated at

Head Quarter Recruiting Zone. The petitioner was served with the "Tentative Charge Sheet" dated 22/09/1986, and the same reads as follows:

TENTATIVEC large Sheet The accused No. 12688139W Hav/Clk Mahipal Singh of Headquarters Recruiting Zone Jabalpur is charged with:-First charge : Committing A Civil OFFENCE. That Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian Penal CODE in that heat Jabalpur, on or around 16 December 85, fraudulently made an application for outsider sanction for recruitment in respect of Shri Nar Singh (now No.15351916H recruit) NarSingh of Imtr, Istc, Jabalpur) furnishing false and fictitious details there in, with intention to obtain sanction for recruitment of said Shri Nar Singh into the Army. Second Charge: Committing A Civil Offence, That Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian Penal CODE. in that he,at Jabalpur, on 16 December 85, fraudulently made .a false letter, bearingNo.70908/Gen dated 16 December 85 purported to be originated and signed by an officer of the rank of Captain/Major of 506 Army Base Workshop, Jabalpur. Third Charge: Committing A Civil Offence, That Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian Penal CODE in that he,at Jabalpur on 14 October 85, fraudulently made an application for outsider -sanction for recruitment in respect of Shri Prem Kumar (now No. 1535058 -recruit Prem Kumar of 4 TTRm I Stc Jabalpur) furnishing false and fictitious details therein with intention to obtain sanction for recruitment of said Shri Prem Kumar into the Army. Fourth Charge: Committing A Civil Offence, "THAT Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian Penal Code in that he, at Jabalpur on or around 22 December 85, fraudulently made an application for outsider sanction for recruitment in respect of Shri Ram Kishan (nowNo.6924478X recruit Ram Kishan of Aoc Centre Secunderabad) furnishing false and fictitious details therein, with intention to obtain recruitment of said Shri Ram Kishan into the Army. Fifth Charge : Committing A Civil OFFENCE. That Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian penal CODE in that he,at Jabalpur on 22 December, 85, fraudulently made a false letter, bearingNo-70478/Inst dated 22 December 85, purported to be originated and signed by a fictitious person named Captain Hn Singh of 506 Army Base Workshop Jabalpur. Sixth Charge : Committing A Civil Offence, That Is To SAY(AA Sec 69) " Forgery, Contrary To Section 465 Of The Indian Penal Code in that he,at Jabalpur on or around 31 December 85, fraudulently made an application for outsider sanction for recruitment in respect of Shri Raj Kumar son of Shri Jagmal Singh of Village Barsana, Mahendragarh (Haryana) furnishing false and fictitious details therein, with intention to obtain sanction for recruitment of said Shri Raj Kumar into the Army. Seventh Charge: Committing A civil Offence, That Is To Say, Sec 69) Forgery, Contrary To Section 465 Of The Indian Penal CODE in that he,at Jabalpur, on 31 December 85, fraudulently made a false letter bearing No.1043/Gen/TS/ dated 31 December 85 purported to be originated and signed by an officer of the rank of Lt. Col of the Grenalders Regimental Centre, Jabalpur. Eighth Charge: Accepting For Himself A Gratification As A(A A Sec 64(e)) Motive For Procuring Sanction For Enrollment of

A PERSON in that he, at Jabalpur on or around 13 Jan 86, while working as a clerk in the Zonal Recruiting Office accepted a sum of Rs.500.00 (Rupees five hundred only) from Shri Nar Singh (now No. 15351916H recruit Nar Singh of Imtr, Istc, a gratification as a motive for procuring the enrollment of said Shri Nar Singh. Ninth Charge: Accepting For Himself A Gratification AS(AA Sec 64(e)) A Motive For Procuring Sanction For Enrollment Of A PERSON in that he, at Jabalpur on or around in Nov-Dec 85 accepted free services of ploughing and sowing 6 acres of land belonging to his father Shri Banwari Lal from Shri Ram Kishan (Now No.6924478X recruit Ram Kishan Aoc Centre Secunderabad), a gratification as a motive for procuring the enrollment of said Shri Ram Kishan. Sd/- (K.S.Bhandari)

Colonel of Troops Jabalpur Deputy Zonal Recruiting Officer 22 Sep 86 This charge sheet was abandoned by the respondents and no proceedings took place in respect of the same. The second charge sheet, which substituted the offences from Section 69 to Section 63 of the Army Act, was issued vide order dated 61, 1988, which also was a Tentative Charge Sheet and is reproduced as below:

"TENTATIVE CHARGE Sheet The accused No. 126813 N Havildar Clerk Mahipal Singh of 27 Ad Regt Arbiter att to Hq Rtg Zone Jabalpur vide Hq 769 (1) Ad Bde Sig No A4656 dated 02 Feb 86, is charged with:- Jabalpur AASec63 Charge 113 Jan 86 An act prejudicial to Good order and Military discipline in that he at Jabalpur, while-working as a clerk in the office of Ro (HQ) Jabalpur prepared a Ric in respect of Shri Raj Kumar without ascertaining the fact that a Ric has earlier been prepared for the said candidate, after which he had been declared medically unfit. Jabalpur 10 Sep 85 to Aa Sec 63 Charge Ii 28 Dee 85 An act prejudicial to good order and discipline, in that, he at Jabalpur, while working as a dark in the office of Hq Rtg Zone, Jabalpur helped in following pairs in obtaining Fraudulent outsider sponsorship sanction between the period from 10 Sep 85 to 28 Dee 85:- (a) Rect. Prem Kumar (b) Rect. Nar Singh (e) Rect. Ram Kishan (d) Rect. Bhoop Singh"

There was no progress in respect of this charge sheet as well when third charge sheet took its place. The same is dated 8/09/1988 and is filed as Annexure P.3 to the petition. This charge sheet was also not proceeded with and a communication was sent to the petitioner on 16/11/1988, which reads as follows:

"TRIAL By SCM" You will be tried by Scm on 21/11/1988. A copy of the charge sheet and S of E recorded in your case is enclosed along with a copy of the part 1 order Constituting the SCM. Please forward the receipt as appended below."

THE charge sheet enclosed with this Communication is Annexure P.5 to the writ petition and the same reads as follows: CHARGE SHEET The accused. No. 1268139W Havildar Clerk Mahipal Singh of 27AD Rect. (Amritsar) att to Ho Rtg Zone, Jabalpur vide No.769 (1) adobe Sig No. A-4656 dated 02 Feb 88, is charged with: AASec63 Charge I Jabalpur 11 Dee 85. An Act Prejudicial To Good

Order And Military Discipline in th.at he at Jabalpur while working as a clerk in the office of HQ Recruiting Zone, Jabalpur helped No. 15350588N Sig/M Prem Kumar,4TTR, I Stc Jabalpur of village Gomali Ki Dhani, District Mahendragarh (Haryana) in getting fraudulently enrolled at Ro (HQ) Jabalpur on 11 Dec 85 by calling him from his village and keeping him at his(accused) Government Quarter for the purpose of getting enrolled in the Army at Jabalpur. A Sec63 Charge IIJabalpur21 Dec 85 An act Prejudicial To Good Order And Military Discipline in that he at Jabalpur while working as a clerk in the office of HQ Recruiting Zone, Jabalpur helped No. 15351916 H Rect. Nar Singh of Ittr, I STC. Jabalpur in getting a fraudulent outsiders sponsorships action on 21 Dee 85 for enrolment by Ro (HQ) Jabalpur. A Sec 63 Charge IIIJabalpur28 Dee 85 An act Prejudicial To Good Order And Military Discipline in that he at Jabalpur while working as a clerk in the office of HQ Recruiting Zone, Jabalpur helped No. 6924478X Sep Ram Kishan of 57Mtn Div another Unit in getting a fraudulent outsider sponsorship sanction on 28 Dee for enrolment by Ro (HQ) Jabalpur. A Sec 57 (e) Charge IVJabalpur21 Feb 86OBTAINING For A Person An Advantage By Making A false Entry In A Record in that he at Jabalpur while working asa clerk to assist in preparation of Recruit's inspection Cards (RICs) at RO (HQ) Jabalpur, prepared a Ric No. 11428 in respect of Shri Raj Kumar s/o Shri Jagmal Singh on 21 Feb 86 in his own hand writing and made a false entry for the date on the said Ric as 13 Jan 86, for obtaining an advantage for consideration for recruitment as a fresh candidate for Shri Raj Kumar, who had earlier been rejected on medical grounds on a Ric prepared with the same number 11428 on 13 Jan 86."

(3) The reading of the charge-sheets as referred above, would indicate that the first charge sheet was issued to the petitioner under the provisions of Section 69 of the Army Act,1950, (hereinafter called "the Act"), which was subsequently amended to Section 63 in the second, third and fourth charge sheets. In the last charge sheet of 16/11/1988, the word "Tentative" was removed and it was only termed as charge sheet. The proceedings took place in respect thereof. The petitioner was held not guilty of the third charge but was held guilty of the first, second and fourth Charges and was sentenced to six months R.I., reduction to ranks and dismissal from service. The Confirming Authority by order dated 27/12/1988, further set aside the findings of the Summary Court-martial with regard to the second charge as well, and endorsed the findings in respect of other two charges. The Central Government vide order dated 5/04/1990, upheld the" findings and sentence of Summary Court-martial (SCM) and rejected the plea of the petitioner.

(4) The petitioner has reiterated that the entire proceedings against him are vitiated as all the charges against him pertain to the period prior to his taking over the duties of clerk in Recruiting office. The Court of Inquiry blamed the Zero and Dy Zeros (Brig, Col/Lt. Col) for granting outsider sanction to 189 candidates as against permissible number of 103 and also blamed them for frequently attempting to recruit 22 candidates ,who had been earlier rejected. No action was taken against any of these officers and the petitioner was made a scope goat

on trumped up charges .The Counsel for the respondent has not denied that no one else, apart from the petitioner has been arraigned in any Court-martial proceedings in respect of the alleged incident.

(5) The learned Counsel for the petitioner has,. however ,only questioned the validity of proceedings of the Summary Court-martial and the ultimate punishment on interpretation of law and has not made any submission on the questions of fact, which arise in the case. The first contention, which has been raised before me is with regard to the lack of jurisdiction of the Summary Court-martial, interalia, for the following reasons:

(A)The officer holding the trial was not the Commanding Officer (CO) of the petitioner as he belonged to a different Unit. Section 116 and Note5 appended to the Section is of relevance in this regard.(b) Nco or a Sepoy cannot be attached to another Unit for SCM. This is forbidden by Note 5 to Section 120 of the Act.(e) There was no valid attachment order by which the petitioner was alleged to be attached to another Unit for the purposes of Summary Court-martial.

(6) The second contention, which has been made, is that the petitioner was issued "Tentative Charge Sheet" in the first instance for offences u/s 69 of the Army Act and Section 465 of the Indian Penal Code, which was subsequently changed to Section 63 to vest jurisdiction in Summary Court-martial to proceed against the petitioner, which is not permissible in law.

(7) Section 116 of the Act deals-with Summary Court-martial and the same is reproduced as follows:

"116.Summary Court-martial- (1) A Summary Court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the Court.(2) The proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such be sworn or affirmed."

Note 5, which is appended to the Section in the publication, "Manual of Military Law ,issued by Government of India, Ministry of defense, reads as follows:"5. See Regulations Army para 381 for the circumstances under which a CO of a different unit may hold the trial by Scm of a person subject to AA. It is, accordingly, contended that the petitioner was transferred to another Unit for the purpose of trial by Scm, which was neither permissible u/s 116 nor by Note 5, as referred above. The only exception, which is made by Note 5, is with regard to trial of Deserters, as stated in paragraph 381 of the Army Regulations. It is admitted that the petitioner was tried by the Commanding Officer of Zero with whom he was placed on temporary duty. Section 120(3) of the Act also provides that "a Summary Court-martial may try any person subject to this Act and under the command of the officer holding the Court, except an officer, junior commissioned officer or warrant officer". The Explanation to this sub-clause is given in Note 5 appended to the Section, which reads as follows:

"5.A Nco or a sepoy cannot be attached to another unit for the purpose of trial by Scm except as provided in Regulations Army para 381."

The petitioner ought to have been tried by the C.O. of his own Unit No. 27ADRegiment, as required by law and the Summary Court-martial of the petitioner for the alleged offences is, Therefore, without jurisdiction.

(8) The learned Counsel for the respondents has contended that the petitioner was properly attached to Head Quarters Recruitment Zone Jabalpur and it is denied that the petitioner was only sent on temporary duty from 27 Ar defense Regiment to which the petitioner belonged. Faced with the argument that the petitioner could not have been tried by C.O. of another unit, as the same will be vocative of Section 116 of the Act supplemented by Note 5, the Counsel has argued that subsequently executive instructions were issued vide order dated 22/05/1985 and reference is made to paragraph 2 of the said office order, which has been signed by one Brig. R.N. Batra, Officiating Additional Dc D&V for Adjutant General .This plea was taken belatedly and it has not been explained as to whether there has been amendment to the provisions of law, referred to above, and as incorporated in the "Manual of Military Law". It seems that this circular was issued to tide over a particular situation arisen out of a particular incident and can not laminate the statutory provisions, as contained in Section 116 and Note 5. The validity of the notes appended to the statutory Rules has been explained in the judgment of the Supreme Court in H.C. Sarin Vs. Union of India (UOI) and Others, . Reference may be made to paragraph 21 at page 1694, which reads as follows:

"THE enquiry was being conducted in accordance with Rule 1730 of the Indian Railway Establishment Code, Volume 1. In the main body of the rule where a procedure for holding a departmental enquiry has been provided for, there is nothing said in relation to the engagement of a lawyer. Certain notes are appended to the rule. They seem to have been appended not on the basis of the executive instructions but as parts of the rule itself. One such note was appended as note 4, which subsequently became note 3, on 25/09/1956 by the President of India who had framed Rule 1730. This note reads as follows: "In a departmental enquiry, the accused railway officer may, if he so desires, be accompanied by another railway officer provided that the officer so nominated as the defense Counsel is approved by the competent authority to act as such, and provided also that the person so nominated shall not be a professional lawyer. The term "professional lawyer includes those persons who are competent to practice in a Court of law". in face of the above note, treating it as a part of the rule, the appellant was not entitled to the services of a professional lawyer. Gottwald, as it appears, was a lawyer in name but actively in business. The services of a professional lawyer were not necessary to cross-examine him. The fact was a simple one as to whether he had paid money to the tune of about 24,000 D.M. to the appellant from time to time. Even if we treat the note aforesaid as one based merely on the executive instructions and not a part of the

rule itself, we see no reason to say that/he authority was obliged not to follow the note but to go against it. At the most it had a discretion in the matter. The question is whether the discretion was rightly exercised or was it exercised so arbitrarily as to lead to the conclusion that principles of natural justice were violated when the services of a professional lawyer were not made available to the appellant. We give the answers against the appellant."

(9) I have, Therefore, no hesitation in holding that the Summary Court-martial as conducted by Co of an outside Unit to which the petitioner did not belong and, therefore ,had no jurisdiction to proceed in the matter and the trial is, accordingly, vitiated .Note 5 as appended to Section 120 further reiterates that a Nco or a Sepoy cannot be attached to another unit for the purpose of trial by Scm except as provided in Army Regulations, para 381.

(10) The next contention which has been raised is that the initial charge-sheet specified the charges u/s 69 of the Act read with Section 465 of the Indian Penal Code and this was subsequently abandoned and the charge-sheet was issued u/s 63 of the Act to bring the petitioner within the purview of Summary Court martial. This was not permissible in law. Section 120 of the Act is cited in this regard :

"120.Powers of summary Court-martial- Subject to the provisions of Sub-section (2),a summary Court-martial may try any offence punishable under this Act.(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district Court-martial or on active service & summary general Court-martial for the trial of the alleged offender an officer holding a summary Court-martial shall not try without such reference any offence punishable under any of the Sections 34,37 and 69, or any offence against the officer holding the Court.(3) A bare perusal of Sub-section (2) of Section 120 would clearly indicate that when there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district Court-martial or on active service a summary general Court-martial for the trial of the alleged offender an officer holding a summary Court-martial shall not try without such reference any offence punishable under any of .the Sections 34,37 and 69 or any offence against the officer hold ing the Court. It is indicative that in the present case, the charge u/s 69 was replaced by charge u/s 63 primarily with a view to vest powers in the Authorities to proceed against the petitioner by means of Summary Court-martial. 11. Mr. V.K. Shali appearing for the respondents, however, has contended that the amendment to the charge is permissible under Rule 113 of the Army Rules,1954. This Rule reads as follows:"113. Amendment of charge- (1) At any time during the trial if it appears to the Court that there is any mistake in the name or description of the accused in the charge-sheet, it may amend the charge-sheet So as to correct that mistake.(2) If on the trial of any charge it appears to the Court at any time before it has begun to examine the witnesses, that in the interests of justice any

addition to, omission from, or alteration in, the charge is required, it may amend such charge and may, after due notice to the accused, and with the sanction of the officer empowered to convene a district Court-martial or on active service a Summary General Court-martial for the trial of the accused if the amended charge requires such sanction, proceed with the trial on such amended charge."

(11) On a closer look to the provisions of this rule, it would indicate that the amendment can only be made when there is any mistake in the name or description of the accused in the charge-sheet or during the course of the trial and covers no other situation. The Counsel has not stressed this point any further.

(12) Reference may be made now to the judgment of the Supreme Court reported as Ex-Havildar Ratan Singh Vs. Union of India (UOI) and Others, . Basing his argument on the law settled by the Supreme Court in this case, the Counsel for the petitioner has contended that the petitioner would have been entitled to a qualitative better right of defense before a Court-martial other than Summary Court-martial which was denied to him on a wrong assumption that the case was covered by Section 63 and not by Section 69. Similar submission was made before the Supreme Court in the case of Ex-Havildar Ratan Singh (supra) where the Court interpreted the provisions of Section 120 of the Act. Paragraph 4 of the judgment reads as follows:

"THE charge-sheet states that when fired upon by a group of terrorist-militants during an armed operation against them, the appellant quitted his place without orders from his superior officer. Section 120 of the Act state that subject to the provisions of Sub-section (2) of the Section a Summary Court-martial may try any offence punishable under the Act, Sub-section (2) reads as follows:-(2) When there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district Court-martial or on active service a summary general Court-martial for the trial of the alleged offender, an officer holding a summary Court-martial shall not try without such reference any offence punishable under any of the Sections 34, 37 and 69, or any offence against the officer holding the Court. "The position, thus, is that if the offence is covered by Section 34 and immediate action for the specified reasons is not warranted, the Summary Court-martial shall not have jurisdiction to hold the trial."

Similarly, in the present case, there is no dispute that the petitioner is governed by the provisions of the Act. Section 69 of the Act is of wider import where as the scope of Section 63 is limited. The allegations against the petitioner are of a serious nature relating to recruitment and grant of outsider's sanction against the permissible limits. The record has been produced before me and I have carefully gone through the same. The record indicates that large number of officers, including senior personnel of the ranks of Brigadier and Colonel were also held responsible for administrative lapses with regard to irregular outsider's sponsorship sanctions. It is conceded by learned Counsel for the respondent that no Court-martial took place in respect of these officers on the ground that some

of them had already retired and an administrative action was taken against others. The petitioner was alone tried by Summary Court-martial for similar offences. In this view of the matter, it would have been more appropriate if the petitioner was proceeded against by a regular Court-martial so that he was afforded a better right of defense. There was no warrant and legal justification for the respondents to frame successive charge-sheets and from changing the application of Section 69 to the one u/s 63 of the Act, which only indicates that the petitioner was sought to be tried by Summary Court-martial, although no such immediate action was warranted.

(13) It is not necessary to deal with any other contention of the petitioner. The impugned trial of the petitioner by Summary Court-martial and the decision, therefore, is without jurisdiction and has to be quashed. The writ petition, as a consequence, is allowed. The Rule is made absolute. The impugned order of punishment dated 24/11/1988, is set aside. There will be no order as to costs.