
(2003) 01 P&H CK 0122

In the Punjab And Haryana At Chandigarh

Case No : Criminal Writ Petition No. 1454 of 2000

Mithilesh Kumar

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 22-01-2003

Acts Referred:

Citation : (2003) 2 RCR(Criminal) 585

Hon'ble Judges : K.C.Gupta, J

Advocate : Mr. Vivek Singal, Advocate. Mr. Gurpreet Singh, Advocate, Additional Standing Counsel., Advocates for appearing Parties

Judgement

K.C. Gupta, J.

1. Mithilesh Kumar has filed this Criminal Writ Petition under Articles 226/227 of the Constitution of India for issuance of a writ of certiorari, quashing the proceedings of the General Court Martial, finding and sentence awarded thereon and confirmation thereof, being wholly illegal, arbitrary on the ground that the conviction had been recorded with no evidence on record, besides having been arrived in violation of various statutory and mandatory provisions vitiating the trial and the sentence and further for issuance of a writ of mandamus to restore the rank of the petitioner with all consequential benefits and also not to retire him pending the disposal of present petition.

2. Briefly stated, the fact are that the petitioner was appointed as a Sepoy in December 1979 and later on was promoted as Havildar.

3. On the night of 2.1.1999, 235th Corps day was being celebrated at AMC Central Officers Mess and the petitioner was on duty in the Mess alongwith other Jawans.

4. At about midnight, it is alleged that the occurrence took place, whereby the petitioner caught hold of Captain P.K. Tyagi and DMR Bhai gave him two blows. It is further stated that another OR Jawan, namely, S.S. Rawat had instigated DMR Bhai to assault Captain P.K. Tyagi.

5. Captain P.K. Tyagi moved written complaint of the occurrence. Accordingly, DMR Bhai, Havildar Mithilesh Kumar, petitioner and S.S. Rawat were charged for using force to their superior officer, Captain P.K. Tyagi on the night intervening 2/3.1.1999 in furtherance of their common intention. The chargesheet was served upon them. The GOC directed that they be tried by General Court Martial. Consequently, the Court Martial was constituted consisting of Col. Rajesh Kumar Thaker, Lt. Col. Ved Prakash Shahi, Major Harish Chandok, Major Sanjay Mukharjee and Major Sunil Rampal. Major Paramjit Kaur Saini, Deputy Assistant Judge Advocate General, Headquarters 10 Corps was appointed Judge Advocate. Major Virendra Shukla was appointed as prosecutor. Thereafter, the evidence was recorded. After conclusion of evidence, statements of the delinquents were recorded and the circumstances appearing in evidence were put to them. After trial, the Court Martial found the appellant, alongwith his two companions, guilty and awarded sentence of reducing the appellant in the rank i.e. from Havildar to Sepoy and further awarded rigorous imprisonment of two months and 25 days, besides, his companions were also awarded sentence vide judgment dated 24.5.2000. The said sentence was confirmed by Lt. General vide order dated 16.8.2000 by rejecting the petition submitted by the petitioner as it lacked merit.

6. Aggrieved by the said order of sentence, the petitioner, Mithilesh Kumar, has filed the present Criminal Writ Petition.

7. I have heard Mr. Vivek Singal, Advocate for the petitioner, Mr. Gurpreet Singh, Advocate, Additional Standing Counsel for UOI respondents and carefully gone through the record.

8. It is an admitted fact that the Army Act is a complete code in itself and prescribes the procedure to be followed and also individual has a remedy of filing a petition under Section 161 of the Army Act, 1950. Thus, ordinarily there is a finality to the findings arrived at by the Competent Authority in the Court Martial proceedings. The jurisdiction of this Court is limited to the power of judicial review by invoking the jurisdiction under Article 226 of the Constitution. However, this power is for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing a procedure which has caused grave miscarriage of justice or for finding out whether there has been a violation of the principles of natural justice. The said power of judicial review is not the power of appellate Authority and thus, this Court cannot reappreciate the evidence in coming to the conclusion. It has been observed by the Hon'ble Apex Court in Major General Inderjit Kumar v. Union of India and others, 1997(2) SCT 539 (SC) : (1997)9 Supreme Court Cases 1 that the High Court/Supreme Court cannot sit in appeal over the findings of the General Court Martial and, thus, the merits of the case cannot be examined. It has been further held by the Hon'ble Apex Court in Union of India v. Himmat Singh Chahar, 1999(2) RCR(Criminal) 784 (SC); that High Court has got power of judicial review under Article 226 of the Constitution of India as under :

i) When there has been infraction of any mandatory provisions causing

miscarriage of justice.

ii) When there has been violation of principles of natural justice.

iii) When Authority exercising the jurisdiction had not been vested with jurisdiction.

iv) High Court cannot reappreciate evidence.

Thus, judicial review of High Court cannot be higher than the jurisdiction of High Court exercised under Article 227 against the order of an inferior Tribunal. It has been further observed by the Hon"ble Apex Court in *Union of India v. Major A. Hussain* (IC14727), 1998(1) RCR(Criminal) 300 that a Court Martial has also the same responsibility as any Court to protect the rights of accused charged before it and to follow the procedural safeguards. Procedure prescribed for Court Martial is equally fair if not more than a criminal court provides to the accused. It has been also stated in Para No. 22 of the said judgment that though courtmartial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the courtmartial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a courtmartial 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. Proceedings of a courtmartial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provision of law. It has been rightly said that the courtmartial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person object to Army Act is tried by courtmaterial for an act which is an offence under the Act. Courtmartial discharges judicial function and to a great extent is a court where provision of Evidence Act are applicable. A courtmartial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to courtmartial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provided to the accused.

9. In the present case, there is no allegation that the courtmartial was not properly convened. In fact, there is no challenge to its composition. The proceedings had taken in accordance with the procedure prescribed. There is also no allegation that the principles of natural justice have been violated. The witnesses have been examined in the presence of the petitioner and his coaccused and they were given opportunity to crossexamine them. Even the courtmartial had put questions to elicit proper answer from the witnesses. There is also no allegation that any mandatory provisions had been violated which resulted in causing miscarriage of justice.

10. Counsel for the petitioner contended that it is a case of no evidence against the petitioner and he had been convicted and sentenced on no evidence and in fact, his presence at the spot is doubtful. In my opinion, the contention of learned counsel is not tenable. The complainant, Sh. P.K. Tyagi had given complaint, Annexure P3, dated 5.1.1999 about the occurrence which took place on 2/3.1.1999 night approximately at 12.30 A.M. to the officiating Commanding Officer. However, he has not named any person in it but he stated that he was caught from behind and then two blows were given to his face by O.R. Bhai. He was examined as PW1 and his statement is Annexure P4. He had recognised all the three accused, including the petitioner, in the Court. He next stated that he was playing music at about 11.30 P.M. and then incident took place and he saw that Sepoy DMR Bhai (accused No. 1) holding Captain Aniruddha Hazra by collar, at which Aniruddha Hazra gave a blow to him and he fell on the ground and then Captain Aniruddha Hazra left the dancing room followed by Major S. Aggrawal and Mrs. V.K. Sharma. He further stated that he took DMR Bhai to one of the staff rooms, where Lt.Col. R.S. Dahiya, Medical Officer, also came there and by that time accused No. 1 regained full consciousness. He next stated that he enquired from him his name but he was agitated and did not tell his name and handed over his name plate. He also stated that DMR Bhai presumed that he had given the blow. In the meantime, Lt.Col. R.S. Dahiya had gone outside and there was sound of abusive language (MADHARCHOD, BAHANCHOD) coming from outside and after Lt.Col. R.S. Dahiya had gone out, the abusive sound had decreased. He further stated that when he started going outside the room, then an altercation took place with Havildar Mithilesh Kumar, petitioner, who was shouting that "PEHLE CAPT. P.K. TYAGI NE UDHAR MARA HAI SEPOY DMR BHAI KO AUR ABHI IDHAR BHAI MAAR RAHE HAIN" (first Cap. P.K. Tyagi has hit Sepoy DMR Bhai there and now he is hitting here also). Then PW1 asked the petitioner whether he knew as to who had hit DMR Bhai. He further stated that immediately Lt.Col. R.S. Dahiya took hold of his left wrist in his hand and took him out and when they were half way through the corridor, then he saw that DMR Bhai, to whom he had helped on humanitarian grounds, gave him a blow on his left side of face and further he was caught from behind and there was somebody who was shouting from his backside "IS BAHANCHOD KO AUR MAAR" (beat this bastard more). Thereafter, DMR Bhai, accused No. 1, gave him another blow and he was held from behind by the same man who shouted as above. Thereafter, he went forward and turned and identified that man who had instigated him as Havildar Mithilesh Kumar, petitioner. He further stated that there was somebody who was trying to jump from behind and catch hold of his neck and at that time 67 other ranks were surrounding him. He next stated that he saw Col. R.S. Dahiya had made an attempt to catch hold of DMR Bhai, accused No. 1, but he managed to get out of Officers Mess through the back door.

11. PW6 Lt.Col. R.S. Dahiya corroborated his version. He stated that he followed Captain P.K. Tyagi while he was escorting accused No. 1 and then in the Mess Staff Room, accused No. 1 was made to sit on a chair and Captain P.K. Tyagi

enquired from him as to whom had hit him but he expressed his ignorance and in the meantime, Havildar Mithilesh Kumar, petitioner and cook R.P. Singh entered that room and there was a lot of noise of "MARO MARO, OFFICERS NE MAAR DIYA HAI" (Officers have beaten, beat them). Then he went out and shouted as to who is making noise, come forward. Then he again went to the room and saw that Captain P.K. Tyagi had enquired about the name of accused No. 1, who took out his name place and handed over it to P.K. Tyagi saying that it contained his name. He further contended that on assessing the situation, which was very tense, he started taking Cap. P.K. Tyagi out and when he was just 23 meters out of the room from the door, then accused No. 1 hit Captain P.K. Tyagi with a blow on the back and he also aimed second blow on Captain P.K. Tyagi but he ducked a bit and blow hit him on his chest. He further stated that he left Captain P.K. Tyagi and pushed accused No. 1 back and tried to extricate Captain P.K. Tyagi and when he was pulling him forward, then 23 men were pulling him backward but he could not identify those men. Thus, according to him 23 persons were pulling Captain P.K. Tyagi backward when accused No. 1 was hitting him and Captain P.K. Tyagi had stated that the petitioner was one of them. He further stated that one of the persons in civil clothes was making noise and later on, he came to know that he was cook S.S. Rawat of 174 Military Hospital i.e. accused No. 3.

12. PW12 DS Baburao stated that when he was going towards the cook house, then he saw few men standing around and there was fight going on between Captain P.K. Tyagi and accused No. 1 and Lt.Col. V.K. Sharma was trying to disengage them and he also helped in disengaging.

13. PW13 Lt.Col. V.K. Sharma stated that the petitioner had told Captain P.K. Tyagi that he had beaten accused No. 1, at which Captain P.K. Tyagi asked him whether he had seen him beating accused No. 1 and due to this reason, altercation took place between them. He further stated that accused No. 1 had hit Captain P.K. Tyagi and all other 812 ranks standing outside caught hold of Captain P.K. Tyagi and started beating him and further Lt.Col R.S. Dahiya was also hit. Captain P.K. Tyagi has categorically stated that when he turned backward and saw that it was the petitioner who had caught hold of him. Thus, the petitioner had common intention alongwith DMR Bhai and S.S. Rawat to hit Captain P.K. Tyagi. Hence, it cannot be said that it is a case of no evidence. Thus, the petitioner has rightly been convicted and sentenced by General Court Martial. There is no violation of principles of natural justice. Therefore, the proceedings of the General Court Martial, its findings and sentence awarded therein and confirmation thereof cannot be quashed in the exercise of jurisdiction under Article 226/227 of the Constitution of India.

The Criminal Writ Petition is, therefore, dismissed.