
(2001) 07 AHC CK 0018

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 20214 of 1994

Narendra Pal Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-07-2001

Acts Referred:

Army Rules, 1954 — Rule 22(1), 22(2), 22(3)

Citation : (2001) 3 UPLBEC 2253

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.R. Singh, J.—The petitioner while borne in the books of 13 Garhwal Rifles as a Rifleman holding the rank of Acting Lance Nayak was chargesheeted vide charge-sheet dated 18.6.1993 u/s 52 of the Army Act, 1950 for having committed theft in respect of Carbine, Machinegun 9 m.m. Regd. No. ZZ-1945, the property of the Government on the charge of JC 171974-X Sub. Devi Prasad of the same Unit and on trial by the summary Court Martial by Lt. Col. R.C. Malik was awarded the sentence of rigorous imprisonment of three months in civil prison and dismissal from service vide order dated 25.6.1993. The petitioner moved an application dated 4.10.1993 for annulment of proceedings u/s 155 of the Army Act. The application came to be rejected by General Officer Commanding 24th Infantry Bn c/o 56 A.P.O. vide order dated 1.3.1994.

2. The sentence awarded vide order dated 25.6.1993 in summary Court Martial proceedings are sought to be quashed by means of this writ petition under Article 226 of the Constitution of India. A writ in the nature of mandamus directing the respondents to reinstate the petitioner in service with back wages and all consequential benefits is also sought for.

3. It has been contended by the learned Counsel appearing for the petitioner that the Court Martial proceedings are vitiated due to non-compliance with the

mandatory provisions contained in Rules 22, 23 and 24 of the Army Rules. It has been submitted for the petitioner that the hearing of the charge by the Commanding Officer was conducted by Col. P.R. Bakshi but the petitioner was subsequently tried by Lt. Col. R. C. Malik in Court Martial. The settled law, proceeds the submission, is that the person who carried out, the proceedings under Rule 24 of the Army Rules alone could try the accused by summary Court Martial. Trial of the petitioner in summary Court Martial by an officer other than Col. P.R. Bakshi was, submits the learned Counsel, illegal.

4. For the respondents it has been submitted by Sri S.K. Rai that Lt. Col. R.C. Malik having taken over the charge from Col. P.R. Bakshi was competent to try the petitioner and mere fact that hearing of the charge was earlier conducted by Col. P.R. Bakshi the then Commanding Officer will not vitiate that trial. It has been further submitted by Sri Ajeet Kumar Singh that the charge was heard by Col. P.R. Bakshi in presence of the accused petitioner and prosecution witnesses. Maj. Sajju Krishna, Sub. Mohan Singh, Company Havaladar and Maj. Dhiraj Singh were examined in presence of the petitioner and no illegality was committed in summary Court Martial proceedings it is further submitted by the learned Counsel were forwarded to the next superior officer, Deputy Judge, Advocate General for his perusal as required under Rule 133 of the Army Rules and as such no exception can be taken to the proceedings of the impugned summary Court Martial.

5. I have given my anxious consideration to the submissions made at the Bar. Sub-rule (1) of Rule 22 of the Army Rules provides that every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused and the accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defence. Sub- rule (2) provides that Commanding Officer shall dismiss a charge brought before him if, in his opinion the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion he is satisfied that the charge ought, not to be proceeded with. Sub-rule (3) of Rule 22 visualises that at the conclusion of the hearing of a charge, if the Commanding Officer is of the opinion that the charge ought to be proceeded with, he shall without unnecessary delay-

(a) Dispose of the case summarily u/s 80 in accordance with the manner and form in Appendix III; or

(b) refer the case to the proper superior military authority; or

(c) adjourn the case for the purpose of having the evidence reduced to writing; or

(d) if the accused is below the rank of warrant officer, order his trial by a summary Court Martial.

"Provided that the Commanding Officer shall not order trial by a summary Court Martial without a reference 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 unless either :-

(a) the offence is one which he can try by a summary Court Martial without any reference to that officer; or

(b) he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline."

6. In the present case trial of the petitioner by summary Court Martial has been done without reference to the officer empowered to convene a District Court Martial. It may be observed that the Courts Martial are of four kinds : (a) General Courts Martial; (b) District Courts Martial; (c) Summary General Courts Martial; and (d) Summary Courts Martial (Section 108 of the Army Act, 1950). As visualized by Section 116 of the Act the 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. The Commanding Officer Col. P.R. Bakshi and thereafter Lt. Col. R.C. Malik were no doubt competent to hold the summary Court Martial as provided by Section 116 of the Act had the summary Court Martial been validly convened. The proceedings of the impugned summary Court Martial are vitiated for the reason that the summary Court Martial in the present case was not properly convened as visualized by proviso to sub-rule (3) of Rule 22 of the Rules. The Commanding Officer was not competent to order the trial of the petitioner by summary Court Martial without reference to the officer empowered to convene District Court Martial or on active service summary General Court Martial" for the trial of the petitioner "unless the offence is one which he can try by a summary Court Martial without any reference to that officer; or he considers that there is grave reason for immediate action and such reference cannot be made without detriment to discipline". No reference seems to have been made to the officer empowered to convene a District Court Martial namely, Central Government or Chief of the Army Staff or any officer authorised by the Chief of the Army Staff who is competent to convene a General Court Martial and a District Court Martial, as provided by Section 115 of the Army Act, 1950. Summary Court Martial in the instant was not convened by an officer having power to convene a General Court Martial or by warrant to any such officer. Nothing has been brought on record to show that Col. P.R. Bakshi, Commanding Officer was competent to convene a District Court Martial nor is there anything on record to show that before trial of the petitioner by summary Court Martial reference was made by Commanding Officer to an officer empowered to convene a District Court Martial and hence the proviso to sub-rule (3) of Rule 22 has been observed in its total breach.

7. The expression "shall not order" used in proviso to sub-rule (3) of Rule 22 is of mandatory and imperative nature and prohibits the trial by a summary Court Martial without a reference 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 unless either the offence is one which he can try by summary

Court Martial without any reference to that officer or he considers that there is grave reason and such reference cannot be made without detriment to discipline. The offence of theft of which the petitioner was charged is not one which the Commanding Officer could have tried without reference and there was no "grave reason" for immediate action in the sense that reference could not have been made without detriment to the discipline. The incident of the alleged theft took place on 23.12.1992 and the summary of the evidence was recorded by the Commanding Officer Col. P.R. Bakshi and thereafter the trial took place on 25.6.1993 i.e. to say six months after the commission of the alleged offence. During this period of six months reference could easily have been made and nothing has been brought on record to suggest that the referered could not have been made without detriment to the discipline.

8. In view of the above discussion the trial of the petitioner by the summary Court Martial is liable to be quashed. It may be observed that though the High Court does not exercise the power of superintendence over the authorities under the Army Act, 1950 but nevertheless the orders passed by the authorities are open to the judicial review under Article 226 of the Constitution as held by the Hon"ble Supreme Court in Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), . The impugned order of punishment in the circumstances is liable to be quashed that it is vitiated due to gave error in the decision making process itself.

9. Before parting with the case it may be observed that the preliminary objection as to maintainability of the writ petition raised by the learned Counsel for the respondents had been rejected by the Court vide separate order dated 1.3.2001 passed on the order sheet in view of the observations made by the Apex Court in Civil Appeal No. 92 of 2001, Dinesh Chandra Gahtori v. Chief of Army Staff and Anr., decided on January 19, 2001.

10. Accordingly, the petition succeeds and is allowed. The impugned order of sentence of imprisonment and dismissal from service is quashed. The petitioner is held entitled to consequential benefits of reinstatement and salary etc.