
(1989) 04 DEL CK 0009

In the Delhi High Court

Case No : Criminal Writ No. 282 of 1985

Nb/sub Avtar Singh

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 19-04-1989

Acts Referred:

Army Rules, 1954 — Rule 22, 23 , 24

Citation : (1989) CriLJ 1986 : (1990) 2 Crimes 370 : (1989) 38 DLT 19

Hon'ble Judges : S. Duggal, J

Bench : Single Bench

Judgement

1. The petitioner in this writ petition under Art. 226 of the Constitution seeks an order of this Court for issuance of a writ in the nature of certiorari or any other writ, order or direction, quashing the order of Confirming Authority passed as a revision order on 20th July, 1984, the judgment and order of the General Court-martial in pursuance to the directions given in the aforesaid order whereby the petitioner was sentenced to suffer rigorous imprisonment for 18 months and also ordered to be dismissed from service, announced on 7th August, 1984 and the order of the Confirming Authority passed second time on 27th November, 1984.

2. The petitioner pleads that after certain years in service, he was selected and promoted as a Junior Commissioned Officer in the rank of Naib Subedar, and had always earned commendatory remarks in annual assessments. It is alleged that while he was posted in January, 1982 as Platoon Commander of DSC Platoon No. 313 and attached to Engineer Stores Depot, which was under the charge of Major S. K. Verma, respondent No. 6 herein, he incurred the wrath of the said officer because of his having pointed out certain irregularities being committed in the working of the stores by the aforesaid officer and that while the petitioner was under orders of transfer, he suffered a mishap in his family to the effect that his daughter, aged 1 1/2 years received burn injuries, and his wife lost mental balance, and on that account he sought his transfer to a station where there were facility of a hospital equipped with treatment for plastic surgery and on this

ground his posting was changed to AB CD Sureness Jullundur where the requisite facilities existed in the military hospital. He pleads that instead of helping him at the time of his domestic crisis, Major S. K. Verma in order to wreak vengeance did not allow the petitioner to proceed to the place of new posting and eventually got him involved in a case which according to the petitioner was totally false and baseless.

3. The narrative of facts given in the writ petition reveals that a General Court-martial was convened which held sitting from 12th December, 1983 to 16th February, 1984 and during all this period, the petitioner was forced to remain under close arrest but ultimately the General Court-martial recorded a finding of : "not guilty", by order dt. 16th February, 1984. Copies of the charge-sheet, and the order of acquittal are filed with the petition as Annexures "A" and "B". However, the Confirming Authority, who happened to be the General Officer Commanding, imp. led as respondent No. 4, by order dt. 20th July, 1984 purported to pass a revision order, but it was in fact a clear direction to the Court that had earlier found the petitioner : "not guilty". and had ordered his acquittal, and pursuant to the directions made in this order, the General Court-martial was convened again and by judgment and order dt. 7th August, 1984 (Annexure E), the Court reversed its earlier finding on issue No. 1, and held the petitioner guilty, and imposed punishment :

"(a) to suffer rigorous imprisonment for eighteen months, and

(b) to be dismissed from the service."

4. This order was confirmed later by order dt. 27th November, 1984 (Annexure F), with the result that the petitioner had to undergo rigorous imprisonment for 1 1/2 years and also suffer loss of his service, by virtue of dismissal order by the General Court-martial and confirmed by the General Officer Commanding-in-Chief, Southern Command.

5. The petitioner assails these orders on the plea, inter alia, that there was a complete violation of the procedure inasmuch as the mandatory requirements of R. 22 of the Army Rules, 1954, (for short the Rules) had not at all been complied with before convening of the General Court-martial, and further that the Confirming Authority had acted in glaring excess of its statutory powers, and virtually went to the extent of issuing directions, and that a conviction order was passed second time as a result of these directions of the Confirming Authority, and that this order in revision was liable to be quashed, as being in violation of the set principles of law, and being without jurisdiction.

6. There is also a plea that the defending officer, who had been provided to the petitioner to assist him in his defense, namely, Major Bhagat Singh vide his letter dt. 15th December, 1983 (Annexure C), expressed his total unwillingness to continue as defending officer for reasons stated by him, but he was made to continue with the result that an unwilling defending officer was foisted on the petitioner, who had clearly stated that he would not be able to do full justice to

his job as defending officer, and it thus can be presumed that he would not have given his best and earnest assistance to the petitioner in his defense and it was bound to result to his prejudice, and that this action of the authorities in not acceding to the request of Major Bhagat Singh to relieve him of his duties as defending officer shown their bias against the petitioner.

7. On this writ petition being filed, it was stated at the outset by Mr. Rameshwar Sharma, learned counsel for the petitioner, that a petition for review as provided by S. 164(2) of the Army Act, 1950 had been filed on 2nd April, 1984, and again on 25th June, 1985, but the same had not been decided, whereupon a notice to show cause was issued to the respondents as to why the petition be not admitted.

8. After appearance was put in on behalf of the respondents who are besides Union of India, the Chief of Army Staff, General Officer Commanding-in-Chief, Southern Command, Pune, the General Officer Commanding, Maharashtra and Gujarat Area, the Commanding Officer and Major S. K. Verma; time was allowed for answer to show cause, and thereafter a direction was given by the Bench which was hearing this petition at that stage that the petition under S. 164(2) of the Army Act be decided within three weeks, vide orders passed on 18th February, 1986.

9. On being informed that the aforesaid petition stands rejected, it was directed by the Division Bench that the petition be suitably amended and after the amended writ petition challenging the rejection of the review petition had been filed, the matter was listed for preliminary hearing. When it was first taken up on 8th October, 1986 for this purpose, petitioner's counsel Mr. Rameshwar Sharma submitted that R. 22 of the Rules had not been complied with inasmuch as no hearing took place and in any case no record had been shown in that behalf whereupon Mr. S. K. Misra, appearing for the respondents, volunteered to produce the original record because an averment had been made in the counter-affidavit that the said rule had been complied with. The Division Bench then hearing the matter, adjourned it to 11th November, 1986.

10. There after some dates intervened for exchange of annexures etc. but when the case was taken up again on 2nd September, 1987, it was observed that the original record had not been made available to counsel for the respondents and on his request for time to produce the same, the matter was adjourned to 22nd September, 1987, on which date again Mr. Misra submitted that he has not been able to get records. Another adjournment was given for 1st December, 1987. Same position prevailed and on request by counsel for the respondents, another adjournment was given to enable him to get the records and eventually by order dt. 15th January, 1988, the writ petition was admitted, after hearing counsel for the parties at length.

11. A broad reference has been made to order sheet just to highlight the facts that Mr. Rameshwar Sharma, counsel for the petitioner, stated in unequivocal terms at the time of preliminary hearing on 8th October, 1986 before the Division

Bench that there has been non-compliance of the provisions of R. 22 of the Rules, and he further spelt out the alleged contravention, as consisting of the fact that no hearing had taken place and no records had been shown to the petitioner in that behalf. A number of adjournments were then given by the Court, on request by learned counsel for the respondents to show the record to the Court but on every date, the counsel had to seek adjournment on the ground that the records had not been made available to him and it was then the writ petition was admitted.

12. The matter now came on board of the daily list effective from 3rd April, 1989 onwards. Mr. Rameshwar Sharma, Advocate who is petitioner's counsel and comes from Chandigarh has been in attendance since the very first day, but no one put in appearance on behalf of the respondents in spite of name of Mr. S. K. Misra, Advocate who had earlier been appearing in the case, being shown in the list. It was eventually taken up for hearing on 4th April, 1989 when it became No. 1 after conclusion of the part-heard matter but still there was no appearance on behalf of the respondents, and the hearing was concluded on 5th April, 1989 after Mr. Rameshwar Sharma, counsel for the petitioner addressed arguments.

13. Mr. Sharma laid stress first on the plea based on the violation of the procedure established by R. 22 of the Rules and submitted that this rule laid down the mandatory requirement of the hearing on the charge in the presence of the accused, and further that he shall be given full opportunity to cross-examine any witness against him and to call any witness and also make his statement in defense. According to Mr. Sharma, there are complete instructions that record be maintained of the hearing of charge, in the manner laid down by R. 22 and that it was in recognition of this requirement of maintenance of records that learned counsel for the respondents had taken time, and then adjournments to produce the record, and that the very fact that there was failure, in spite of number of opportunities given by the Court to produce the records, ought to be held to bear out his allegations that there was no such hearing, and no compliance with the mandatory requirements of the aforesaid rule and that the whole proceedings in regard to petitioner's trial stand vitiated.

14. The learned counsel read out R. 22 which provided as under :

"2. Hearing of charge.-(1) Every charge against a person subject to the Act other than an officer, shall be heard in the presence of the accused. The accused shall have full liberty to cross-examine any witness against him, and to call any witnesses and make any statement in his defense.

....."

He submitted that the procedure laid down in R. 22 has been held to be mandatory, and placed reliance on a Supreme Court judgment reported as Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, . Mr. Sharma argued that on the facts of that case, where the writ petitioners were of the rank of officers, Rr. 22 to 24 were held to be not applicable but the principle

was accepted that where applicable, procedure of R. 22 was mandatory and it was clearly held that this procedure applied to the trial of army personnel who did not hold the rank of officers.

15. I have carefully gone through the averments made in the writ petition and I find a clear and unequivocal assertion about non-compliance with the provisions of R. 22. There is a bald statement in the counter-affidavit controverting this allegation, but no particulars such as date of hearing, or the manner and nature of the said hearing provided were spelt out.

16. It was obviously for this reason that the learned Judges of the Division Bench, hearing the matter felt it necessary, in face of specific plea about non-compliance of R. 22, even at the stage of admission, being advanced by learned counsel for the petitioner, to require production of the records. Learned counsel for the respondents volunteered to do so but in spite of four adjournments, he had not been provided with any such records, and every time he felt constrained to inform the Court that the same had not been made available to him. Eventually the writ petition was admitted.

17. Now at the time of regular hearing after admission, as no one has put in appearance for the respondents, the records remained still unavailable to the Court for perusal. In view of the clear assertion in the writ petition and in view of the fact that in spite of opportunities being given, the records were not produced, the plea of the petitioner had to be accepted for the short reason that a presumption can be raised that there was no such record in existence, and that had it been so, it would have been produced before the Court without fail.

18. I have, Therefore, no hesitation in holding in the facts and circumstances narrated above, that there has been no compliance with the provisions of R. 22 and the procedure laid there under, which is binding and mandatory in nature. The consequence thus is vitiation of the entire enquiry as held by the Supreme Court in the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, , that the opening words of R. 22 clearly demonstrate the mandatory applicability of the provisions in Rr. 22 and 23 in case of persons subject to the Act other than officers, and that in respect of such persons, namely, belonging to the lower category, it was mandatory that Rr. 22, 23 and 24 have to be followed and there is no escape from it except on the pain of invalidation of the enquiry.

19. I, Therefore, find it to be a case where the writ petition can be allowed on this ground alone and the judgment and order of the General Court-martial passed on proceedings which stand vitiated by virtue of non-compliance with the provisions of mandatory R. 22 are liable to be quashed as also the order of the Confirming Authority passed in exercise of the power under R. 160 of the Rules.

20. It is, however, a fit case where another argument ought also to be taken note of, which is based on the clear plea, taken in the writ petition, assailing the procedure adopted, and order passed by the Confirming Authority, with respect

to the first order of the General Court-martial dt. 16th February, 1984 recording finding of "not guilty" in favor of the petitioner on both the charges.

21. The Scheme of the Army Act, and the Rules framed there under is such that complete judicial authority is vested in the General Court-martial convened under R. 37 and by virtue of S. 71 of the Army Act it can award punishment including that of death as well as imprisonment including that of life, and various other sentences and penalties including dismissal from service. It is also noteworthy that the Act and the Rules do not provide for an appeal or judicial review. The only provisions on the subject are that of confirmation of sentence by an authority in terms of S. 160, and by way of petition to the Chief of Army Staff under S. 164 of the Act.

22. The Confirming Authority is from the hierarchy of administration, and in this case was a Major General posted as General Officer Commanding, Maharashtra and Gujarat area. He is admittedly an executive officer whereas the General Court-martial exercises all the functions of a judicial body. It is in recognition of this position that the only power envisaged under S. 160 is that the Confirming Authority may direct that the order of Court-martial may be revised, and while doing so, may direct taking of additional evidence.

23. Mr. Rameshwar Sharma rightly argued that there are inherent limitations in the jurisdiction of the Confirming Authority and that while perusing the finding of sentence of the Court-martial submitted to it for confirmation, it may record that the matter may be reconsidered by the Court-martial and in doing so it may give a direction that the Court-martial take additional evidence. He submitted that in the present case the Confirming Authority totally exceeded his jurisdiction, inasmuch as it practically recorded a judgment for the General Court-martial, and gave directions how to appreciate evidence and what orders be passed, and discussed in full, the nature of evidence required to be taken in addition to the already examined, besides adding his comments on the merits of the evidence. Learned counsel read out from various portions of the revision order passed on 20th July, 1984 (Annexure D) to substantiate his allegations that the Confirming Authority had gone far beyond his statutory jurisdiction. This he attributed to the bias which Major S. K. Verma entertained, and contended that conclusion cannot be escaped, that the said officer was able to influence his superior officer in this regard, who acted as Confirming Authority.

24. It is pertinent to note that the charges against the petitioner consisted of having used threatening language against Major S. K. Verma, and having trespassed into his house armed with a rifle with an intention to kill him. The incident is thus entirely personal to Major S. K. Verma, to whom motives of ill-will and resentment against the petitioner because of his boldness in pointing out certain irregularities on the part of the aforesaid officer are attributed. The order in revision has to be appreciated in the light of this alleged background, which seems to be substantiated by the manner in which the revisional authority proceeded to dispose of the reference to him for confirmation. It is imperative to

extract some portions from the order in revision to highlight the utter lack of awareness on the part of the Confirming Authority about the scope of his power and jurisdiction. For instance, he observed :

"(b) The fact that the accused attributed motive of financial irregularity coupled with other administrative matters for implicating him in the offences alleged against him does not take away the criminal liability of the offences against him. Moreover, these matters being extraneous in nature to, the criminal charges against the accused should have been ignored in the light of weight of evidence on record in respect of the charges against the accused.

(c) The fact that the accused took the rifle and live ammunition from the Kot on false pretext of showing the same to Major Verma (PW 1) further aggravates the offence, there the accused used his position as a PI Cdr and could take the rifle and the rounds which is amply proved by the depositions of NK Kamal Singh (PW 4) NK Raja Ram (PW 5) and Sep Avtar Singh (PW 6). The accused was also seen going out of the main gate with the rifle by Sep C. Durairaj (PW 7). The Court may not reject their depositions without any material infirmity, discrepancy and contradiction in them. They should be appreciated judiciously."

.....

"(k) The oral evidence as brought out by various witnesses seems to point again and again towards the criminal intention of the accused which is the basis of both the charges. The Court must consider that the accused was found with the rifle before, at the time and after the incident as brought out by various PWs then it is immaterial to how and under what circumstances he had obtained the said rifle and the ammunition and whether or not he was authorised to draw the same from the Kot."

"(1) This fact seems to have been overlooked by the Court. Sept Hans Raj (DW 4) had in fact brought nothing on record to show that the accused did not commit the alleged offences. This aspect needs to be reconsidered."

.....

"(4) This Court should thereafter reconsider their findings on the charge in the light of observations made above, the circumstantial evidence appearing on record and the cumulative effect of the whole evidence on record. If the Court after carefully considering all the aforesaid matters and the whole proceedings decide to revoke their finding/s and find the accused "guilty" on either or both the charges, the same should be recorded accordingly and announced in open Court as being subject to confirmation. If on the other hand, the Court adhere to their findings on all the charges, they should record and announce the same in the open Court as being subject to confirmation."

25. A bare reading of the above noted portions from the order recorded by the

Confirming Authority leads to the unescapable inference that he went completely out of the bounds of his jurisdiction which was confined only to giving of directions for additional evidence by the General Court-martial, if found necessary, whereas he took upon himself to discuss in detail the nature of the evidence against the petitioner that had already come on record, implicating nature thereof, and stating in unequivocal terms that the charge of house trespass with intention to kill stood established on the basis of the evidence examined.

26. The second General Court-martial had been convened pursuant to the directions given in this revisional order and it is then that a reversal of the finding on the first charge has been recorded vide order dt. 7th August, 1984 (Annexure E).

27. This order was subject to confirmation and has been confirmed without any further hesitation vide order dt. 7th November, 1984 (Annexure F).

28. The order recorded on 7th August, 1984 by the General Court-martial pursuant to the revision order dt. 20th July, 1984 cannot be sustained because inference cannot be escaped that this is based not on any independent judgment, but influenced by the undisguised opinion expressed by the Confirming Authority on merits of the case, in its aforesaid order. That order, as already noticed, contained such unwarranted observations, which were tantamount to recording of finding, which was in no way the function of the Confirming Authority and there has been thus unabashed excess and misuse of jurisdiction by this Authority. Consequently, this order in revision dt. 20th July, 1984 is liable to be quashed.

29. As a result the finding and the sentence recorded by the General Court Martial on 7th August, 1984 pursuant to the aforesaid order in revision cannot stand and is thus liable to be quashed and so is the subsequent order of Confirming Authority dt. 27th November, 1984.

30. As a result, the writ petition is allowed and all the three orders dt. 20th July, 1984 (Annexure D); 7th August, 1984 (Annexure E) and 27th November, 1984 (Annexure F) are hereby quashed, with directions to the respondents to give such consequential relief to the petitioner, as may flow, as a result of the setting aside of the finding of guilty and sentence awarded by order dt. 7th August, 1984 and confirmed by order of Confirming Authority dt. 27th November, 1984. The petitioner shall also be entitled to his costs. Counsel's fees assessed at Rs. 500/-.

31. Petition allowed.