

(1998) 12 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 187 of 1998

P.T. Peethamber Capt.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 10-12-1998

Acts Referred:

Army (Amendment) Act, 1992 — Section 122
Army Act, 1950 — Section 122, 122(1), 122(2), 153, 164
Army Rules, 1954 — Rule 149, 71
Constitution of India, 1950 — Article 226, 227, 33, 91(1)
Defence Services Regulations — Regulation 468
Evidence Act, 1872 — Section 91, 92

Citation : (1998) 4 GLT 491

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : B. Das, B.B. Deb and D.K. Biswas, for the Appellant; K.N. Bhattacharjee, Sr. C.G.S.C. and S. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—By this writ application under Article 226 of the constitution of india, the writ Petitioner- accused Capt. P.T. Peethamber challenges the Summary General Court Martial proceeding held against him.

2. The General Court Martial under the Army act, 1950 was held to try the Petitioner who was holding the rank of Captain at the relevant time and posted at Agartala as Asstt. Garrison Engineer, for short "AGE". The Petitioner was tried for, as many as, five charges, which reads as follows:

IN A REPORT SIGNED BY HIM KNOWINGLY MAKING A FALSE STATEMENT, in that he,

at field, between 27 July 1994 and 10 August 1994, in the Transit Stores inspection Report in respect of supply order No. 3011/872/65/E-3 dated 07 April 1994, signed by him as Presiding Officer, stated that the stores in respect of the

above said supply order, had been received, checked/inspected on 20 May 1994, well knowing the said statement to be false.

First Charge Army Act Section 57(a) AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE in that he,

at field, during August 1994, improperly forced JC-71272K Subedar Major Rs Mendiratta of Garrison Engineer (project) 872 Engineer Works Section to sign on the Transit Stores Inspection Report in respect of the stores pertaining to supply order number 3011/872/65/E-3 dated 07 April, 1994, showing that the stores in respect of the said supply order were received, checked/inspected on 20 May 1994.

(Second Charge Army Act Section 63) AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE in that he,

at field, during August 1994, improperly forced JC-21945 OW Subedar Thanji S of Garrison Engineer (project) 872 Engineer works Section to sign on the Transit Stores inspection Report in respect of the Stores pertaining to supply order Number 3011/872/65/E-3 dated 07 April 1994, showing that the stores in respect of the said supply order were received, checked/inspected on 20 May, 1994.

Third Charge Army Act Section 63 AN ACT PREJUDICIAL TO GOOD ORDER AND MILITARY DISCIPLINE in that he,

at field, between 27 July 1994 and 10 August 1994, while performing the duties of AGE (E and M) improperly acted the stores in respect of supply order No. 3011/872/65/E-3 dated 07 April 1994, directly from the contractor, in contravention to standard operating procedure of Garrison Engineer (project) 872 Engineer Works Section No. 3000/P/63/E-3 dated 09 May 1994, which enjoins that the stores supplied by firm against a supply order shall be received in the transit stores inspection cell and inspected by the Board detailed by the Garrison Engineer.

Fourth Charge Army Act Section 63 ABSENTING HIMSELE WITHOUT LEAVE in that he,

at field, when sent on temporary duty to Headquarter 137 Works Engineer/ Garrison Engineer (project) 868 (a) Engineer Works Section and Assistant Garrison Engineer (1) Leimakhong vide movement order no. 112/Out/147/EIS dated 09 February 1995, on termination of the said temporary duty, absented himself without leave from 13 February 1995 to 23 February 1995.

Fifth Charge Army Act Section 39(a)

3. On conclusion of the proceeding the Petitioner was found guilty and he was sentenced- (a) to be cashiered, and (b) to suffer rigorous imprisonment for one year. The sentence was pronounced on 10.5.98. and the present writ petition was filed on 15.6.98. During the pendency of this writ petition the sentence was

confirmed as required under the Act but the confirmation was not completed as the Petitioner could not be cashiered in view of the interim order passed by this Court. The Petitioner challenged the legality and fairness of the decision taken by the Court Martial and also alleges malice and motive for his prosecution under the Act. The Petitioner has also tried to challenged the provisions of Section 164 of the Act stating that it is not sufficient to render proper justice. The decision of the Court Martial has also been challenged on the ground that charge No. 1 to 4 were barred by limitation and the charge No. 5 was based on no evidence.

4. The Union of India have filled a counter affidavit denying the allegation and supporting the decision of the Court Martial. I have heard learned Counsel for both sides at length the learned Counsel for the Petitioner has also filed written statement which is placed on record. Shri B. Das, learned senior Counsel for the petitioner has submitted that the Court Martial proceeding under the Army Act are not fair in the sense that the Petitioner- accused does not get reasonable opportunity to defend himself and there is no provision for proper appeal or revision as the matter has been decided by the departmental officers. Learned Counsel referring to the observatcm of the Apex Court in the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, submits that although way back in the year 1982 the Apex Court lamented over the serious lacuna in the Act, nothing has been done till now. And, as such, the writ Court should step in to ensure for trial in Court Martial, In Prithi Pal Singh (Supra), the Apex Court observed and follows:

Absence of even one appeal with power to review evidence, legal formulation, conclusion and adequacy or otherwise of punishment is a glaring lacuna in a Country where a counterpart civilian convict can prefer appeal after appeal to hierarchy of Courts. Submission that full review of finding and/or sentence in confirmation proceeding u/s 153 is provided for is poor solace. A hierarchy of Courts with appellate powers each having its own power of judicial review has of course been found to be counter-productive but the converse is equally distressing in that there is no even a single judicial review. With the expanding horizons of fair play in action even in administrative decision, the universal declaration of human rights and retributive justice being relegated to the uncivilised days, a time has come when a step is required to be taken for at least one review and it must truly be a judicial review as and by way of appeal to a body composed of non- military personnel or civil personnel. Army is always on alert for repelling external aggression and suppressing internal disorder so that the peace loving citizens enjoy a social orda based on rule of law, the same cannot be denied to the protectors of this order. And it must be realised that an appeal from Ceaser to Ceaser's wife-confirmation proceeding u/s 153 has been condemned as injudicious and merely a lip sympathy to form.

5. The Petitioner has also challenged the vires of Rule 71 of the Army Rules vis-a-vis Section 164(2) of the Army Act. It is stated:

Confirmation is an integral part of the Court Martial proceeding (vide para 46 of

S.N. Mukherjee Vs. Union of India, This confirmation again is not complete before "promulgation is effected" as per Army Rule 71. In the present case if promulgation is effected to make confirmation complete the accused Petitioner is cashiered and he ceases to be "Person subject to the Act" as defined u/s 2(2). A post-confirmation appeal can be filed u/s 164(2) only by a person subject to this Act. Thus the accused cannot be conceived to file an appeal u/s 164(2) after being cashiered and being ousted from the purview of Army Act. It is in view of this the Petitioner has challenged the vires of Rule 71 vis-a-vis Section 164(2) by a rejoinder.

6. The constitutional validity of the various provisions of the Army Act was the subject matter for consideration before the Constitution Bench of the Supreme Court in the case of R. Viswan and Others Vs. Union of India (UOI) and Others, and the Apex Court found the various provisions Constitutionally valid stating that Parliament was within its power under Article 33 to restrict the fundamental right and the clauses (a), (b) and (c) of Article 19(1) to the members of the Armed Forces. In Frithi Pal Singh (supra), the Apex Court was aware of the glaring anomaly in Court Martial proceeding but it refrains itself from quashing the provisions of the Act and seem satisfied by observing:

We, therefore, hope and belief that changes all over the English suited democracies will awaken our parliament to the change value system...this must be remedied in order to ensure that disciplined and dedicated indian Army may not nurse a grievance that the substance of justice and fair play is denied to it.

7. learned Sr. Central Govt. Standing Counsel has submitted that the provision of Section 164(2) and Section 2(2) may co-exist if a harmonious interpretation is made. Although the language used in the provisions is bit ambiguous, a harmonious interpretation can be made by importing the word "being" after the words "any person". The provisions of Section 164(2) of the Act were considered by another Constitution Bench of the Apex Court in the case of S.N. Mukherjee Vs. Union of India, it was held that Sub-section (2) of Section 164 of the Act provides a post confirmation appeal to the Central Govt., Chief of the Army Staff or any prescribed officer superior in command. In view of the decision of the Apex Court that right is available to an aggrieved officer under Sub-section (2) of Section 164 to prefer an appeal after the finding and sentence has been confirmed by the confirming authority, I am of the opinion that the matter needs no further deliberation.

8. Before entering into the merit of the case, I am tempted to quote the observation of the Apex Court regarding powers of the Court in respect of General Court Martial under the Act. In the case of Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827), the Hon"ble Supreme Court observed:

Though Court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the Court-martial is not subject to the superintendence of the High Court under Article 227 of the constitution. If a

Court-martial 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 of for that matter any Court must stay its hands. Proceedings of a Court-martial 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 provisions of law. It has been rightly said that Court-martial 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 subject to Army Act is tried by Court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a Court where provisions of Evidence Act are applicable. A Court-martial 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 Court-martial 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 provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation then of does not invalidate the Court-martial unless it is shown that accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, Court-martial has jurisdiction over the subject matter and has followed the prescribed procedure and is within its powers to award punishment.

9. The first submission of the learned Counsel for the Petitioner is that so far the charge Nos. 1, 2, 3 and 4 are concerned, they are barred by limitation as provided u/s 122 of the Act, as amended in the year 1992. Section 122 of the Act reads as follows:

Army Act Section 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 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 known 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.

10. On perusal of the charge Nos. 1, 2, 3 and 4 as stated above, it is seen that in the above four charges the date of commission of the alleged offence is in between 27th July, 1994 to 10th August, 1994. There is no dispute at the Bar that the proceeding of the Court Martial commenced on 15th October, 1997, thus the period of three years (limitation) had already expired before the commencement of the trial. The case of the prosecution on the other hand is that the commission of the offence was not known to the competent authority for initiating action in the month of July and August, 1994 and they came to know about it sometime in March/April, 1995 and, as such, in view of the provisions contained u/s 122(1)(b) of the Act, the proceeding was within the time limit. This plea of limitation was raised before the Court Martial and both the parties even led evidence in support of their contentions. The matter was considered in details and it finds mention at page 68 to 77 of the Record of proceedings of the Court Martial (Original Vol. No. 1). The evidence and submissions of the parties were duly considered and the Court was of the opinion that Lt. Col. R.P. Gulati, the then Garrison Engineer who had initiated the Court Martial proceeding came to know about the commission of the offence earliest on 11th March, 1995 and as the proceeding commenced within three years from the above date, the charges are not barred by limitation.

11. In this case, the allegation against the accused Petitioner is that in respect of supply order No. 3011/872/65/E-3 dt. 7th April, 1994, the last date for receiving supply was 20th May, 1994. However the supplier failed to supply the goods during that period although goods were received by the accused Petitioner in between 27th July, 1994 to 10th August, 1994, he falsified the records by giving a back date. Shri S.P. Jain who was examined as Defence witness, D.W.-1 by the writ Petitioner in support of the plea of limitation, has deposed that sometime in the month of August, 1994 he received the bill from the supplier for making payment in respect of the above mentioned supply order. He claims that he had discussed the above bill with R.P. Gulati and thereafter returned the bill raising certain technical objections. This witness, D.W.-1 has nowhere stated that he had discussed with R.P. Gulati regarding fraud committed by the accused in showing the earlier date of receipt of the goods. As a matter of fact, there is no dispute as such that the goods were not received on 20th May, 1994, as shown in relevant register documents and in fact the goods were received sometime in July/August, 1994 only. From the fact that the concerned bill was received back on technical objections, it can not be even inferred that R.P. Gulati had the knowledge or even inkling that this accused had committed fraud by showing previous date in respect of receipt of the goods. The plea of limitation was rejected by the Court by a reasoned order and it is based and supported by the evidence on record. I am therefore in agreement that the charge no. 1 to 4 are not barred by limitation. The Petitioner has not challenged the finding of the Court regarding the first charge which is regarding falsification of official document as defined in Section 57(a) of the Act. The above charge stands established from the evidence of the

prosecution witnesses and from defence's own witness, Nepal Kanti Paul, the supplier, D.W.-1 It is well established that the Transit Store Inspection Report was falsified by making a back dated entry by the accused.

12. The second and third charge against the Petitioner is in respect of Section 63 of the Act, which alleges that the Petitioner improperly forced Subedar Major R.S. Mendiratta, P.W.-8 and subedar/C1 K.S. Thanji, P.W.-9 to make fraudulent entries in the books of records. P.W.-8 and P.W.-9 have deposed that the accused Petitioner forced them to accept the goods against the above supply order and also gave a back dated entry and they tried in their own way to resist the illegal command but they were forced to do it. In his examination-in-chief the P.W.-8 has stated that he did not complain about the alleged action of the accused Petitioner to his other superior officers. The learned Counsel for the Petitioner, therefore, submits that when there is no complain from P.W.-8 and P.W.-9 the charge must fail, I find no basis for such finding. The two witnesses were cross-examine at length but nothing has come out to show that they were deposing falsely. As the accused so their immediate boss, it was natural on their part not to make any complain to any higher ups. P.W.-9 has categorically stated that when they were asked about their signatures on the record by Garrison Engineer they stated the facts as deposed by them before Court Martial. The act of the accused in forcing his subordinates to put their signatures showing a back date is definitely prejudicial to maintenance of good order and military discipline. The decision in respect of Charge No. 4 has not been challenged by the writ Petitioner.

13. As regards the charge No. 5, learned Counsel submits that the evidence of R.P. Gulati, P.W.-2, is sufficient to exonerate the Petitioner and the learned Counsel relies heavily on parade State Register which has been marked as Ext. JJJ. In the above document the accused has been shown to be on temporary duty from 10.2.95 to 22.2.95 It is submitted that no oral evidence contradicting the documentary evidence in Ext. JJJ can be led in view of the provision of Sections 91 and 92 of the Evidence Act. On perusal of the evidence of P.W.- 2, I find that no such contradictory evidence has been led by this witness. The learned sr. Central Govt. Standing Counsel has submitted that whenever an officer is away from the Headquarter he is marked as on temporary duty and after his return to the unit it is regularised, if it is on official duty or leave or regularisation is made as the case may be. It is submitted that the Petitioner had gone to Vishakhapatnam on his personal visit with prior oral permission and after his return he had filed a leave application for casual leave but P.W.-2 rejected the said application and thereby committed breach of promise. The suggestion was denied by P.W.-2. The evidence on record shows that vide the movement order Ext. CCC the accused left for temporary duty to Dimapur on 9.2.95. and at that time the accused did not apply for leave at the end of his temporary duty. Thereafter the whereabouts of the accused became unknown and he returned on 22nd February, 1995. During this period from 13.2.95 to 22.2.95 the accused was at Vishakhapatnam and this is not disputed. The accused has now come with the story of applying for leave but in his written statement, Ext. HH no plea of

leave was raised. The Court considered the entire evidence on record and found the charge proved.

14. It is well settled that judicial review is not akin to adjudication of the case on merit. In a proceeding under Article 226 of the Constitution the High Court does not act as an appellate authority but exercises within the limits of judicial review to correct the errors of law or procedural errors leading to manifest injustice. In the case of Union of India and another Vs. Ex Constable Amrik Singh, it was held that all the procedure laid down by the Code of Criminal Procedure are not applicable to armed personnel in a Court Martial. Even the principles of natural justice have limited application. After going through the proceedings of the Court Martial I find that no case of non-reading or mis-reading of evidence has been made out and the Judge Advocate has discharged his duty ably and all the relevant facts and the law on the points were summed up and placed before the members of the Court Martial. The accused was allowed to be defended by civil lawyer of his choice.

15. learned Counsel for the Petitioner has fairly submitted that at the inception of the trial there was no malice or bias against the accused Petitioner, but during the trial the Petitioner faced malice and bias of the Court. The allegations are contained in paragraph 31 of the writ petition but there is no supporting material.

16. It is further submitted that as the petitions was treated harshly in awarding the sentence, and it can be inferred that the proceedings of the Court martial were biased and prejudicial against him. In page 15 of the written argument, it is stated:

In Ranjit Thakur Vs. Union of India (UOI) and Others, the Hon"ble Supreme Court clearly indicated in para 23 that unduly harsh punishment "amounts in itself to conclusive evidence of bias." Thus without considering any evidence this Hon"ble Court can come to the conclusion from the shockingly disproportionate punishment that the Court was biased against the accused. Such a proceeding in fact with bias is liable to be quashed by this Hon"ble Court.

17. The relevant portion of para 25 of Ranjit Thakur Vs. Union of India (UOI) and Others, reads as follows:

Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.

18. Severity of sentence cannot be a ground to overthrow the finding of guilt, which is based on evidence. There is no infirmity or illegality in the decision making process in the instant case.

19. It is further submitted that clause 468 of Regulations of the Army has not been complied with. Regulation 468 reads as follows:

468. Sentences of Court-Martial.- (a) When passing sentence, a Court-martial will have regard not only to the nature and degree of the offence and the previous character of the accused, as proved in evidence, but also to the nature and amount of any such consequences as, by virtue of any statute, rule, order or regulation, are involved in their finding, or entailed by their sentence, in addition to the punishment awarded by the Court. Where attention has been called in local orders to the unusual prevalence of the offence of which the accused has been found guilty, the Court, will also pay regard to the fact that such warning has been issued.

(b) all convictions, whether by Courts-martial or by civil Courts, for offence committed by an officer, JCO, WO, or OR during his military service, including any time passed in a State of desertion, will be given in evidence against him. The Court will consider if any circumstances have been disclosed by the evidence in extenuation or aggravation of the offence. Sentences must vary according to the requirements of discipline, but in ordinary circumstances, and for the first offence, a sentence should be light. Care must be taken to discriminate between offences due to youth, temper, sudden temptation, grave and sudden provocation or unaccustomed surroundings, and those due to premeditated misconduct.

20. I have perused the statement of the accused Capt. P.T. Peethamber in respect of imposition of sentence which is exhibited in EX QQQ. In view of the documentary evidence on record, there is no dispute at the bar that the previous conduct of the Petitioner was exemplary. The learned Counsel for the Respondents has submitted that this aspect was considered by the confirming authority and sentence of imprisonment for one year was commuted to imprisonment for the period already undergone.

21. Apparently accused took delivery of goods after expiry of validity period of supply order. Evidence shows that validity period of supply order can be extended on the prayer of supplier. There is no allegation that receipt was shown without receiving the goods as such. It is submitted by the learned Counsel for the Petitioner that there was no loss to the Government and the alleged act of the Petitioner at best may be termed as irregular. It is further submitted that the absence of the accused may be regularised by granting of leave.

22. There is some force in the above submission and there are grounds to believe that the sentence awarded to the Petitioner is on severe side. However, considering the fact that the matter relates to maintenance of discipline in the armed forces and this Court is exercising writ jurisdiction only, following the

dictum of the Apex Court in the case of General Court Martial and Others Vs. Col. Aniltej Singh Dhaliwal, I remit the matter back to the confirming authority to reconsider the sentence in the light of the submissions and observations made above. The confirming authority shall also reconsider the previous conduct of the Petitioner as required under Regulation 468.

23. In the result the writ petition stands dismissed without any order as to costs.