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(2008) 08 SC CK 0073

In the Supreme Court Of India

Case No : Civil Appeal No. 5306 of 2008 (Arising out of SLP (C) No. 3385 of 2007) and civil Appeal No. 5307 of 2008 (Arising out of SLP (C) No. 5916 of 2007)

Rajiv Arora — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 29-08-2008

Acts Referred:
Air Force Act, 1950 — Section 40, 45, 47, 48, 65
Air Force Rules, 1969 — Rule 43, 43(3), 57

Citation : AIR 2009 SC 1100 : (2009) 5 ALT 14 : (2009) 120 FLR 210 : (2008) 9 JT 499 : (2008) 12 SCALE 90 : (2008) 15 SCC 306 : (2009) 1 SLJ 98 : (2009) 1 SLR 427

Hon'ble Judges : S. B. Sinha, J;Cyriac Joseph, J

Bench : Division Bench

Advocate : K. Ramesh, for Kailash Chand, for the Appellant; Mohan Parasaran, A.S.G., P. Narasimhan and B. Krishna Prasad, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—Leave granted.

2. While appeal arising out of SLP (C) No. 3385 of 2007 is directed against a judgment and order dated 16.11.2006 passed by the Division Bench of the High Court of Delhi whereby and whereunder a writ petition filed by the appellant herein questioning the validity of a Court Martial proceeding has been dismissed, appeal arising out of SLP (C) No. 5916 of 2007 is directed against the order dated 19th December, 2006 passed in the review petition.

3. We may, before adverting to the contentions raised by the parties, notice the admitted fact of the matter.

4. Appellant was commissioned in the Indian Air Force on or about 6.12.1985. He filed an application for posting to MOFT Unit so as to enable him to fly MIG 21 Fighter Aircrafts. The said application was rejected. He applied for premature

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retirement. A good conduct certificate was issued in his favour. However, a disciplinary proceeding was initiated against him, on or about 20.1.2006 in respect whereof a charge-sheet was issued on 1.4.2006, the details whereof are as under:

FIRST CHARGE SECTION 65 AIR FORCE ACT, 1950

AN ACT PREJUDICIAL TO GOOD ORDER AND AIR FORCE DISCIPLINE

In that he

At New Delhi on the night of 28/29 Apr. 05, improperly introduced himself as husband of Mrs. Ambika Singhania to Head Constable Ranbir and Constable Dharmendeer, Police Personnel of Delhi Police, knowing such statement to be false.

SECOND CHARGE SECTION 45 AIR FORCE ACT, 1950

BEHAVING IN A MANNER UNBECOMING THE POSITION AND CHARACTER OF AN OFFICER

In that he,

At New Delhi on the night of 28/29 Apr 05, used offensive language to Sh. Dependra Pathak, Deputy Commissioner of Police, South West District, New Delhi and behaved in a riotous manner.

THIRD CHARGE SECTION 48 AIR FORCE ACT, 1950

INTOXICATION

In that he

AT New Delhi on the night of 28/29 Apr 05, was found in a state of intoxication.

FOURTH CHARGE SECTION 48 AIR FORCE ACT, 1950

INTOXICATION

In that he,

at Gandhinagar (Gujarat) on 06 Jan. 06, was found in a state of intoxication

FIFTH CHARGE SECTION 40(a) AIR FORCE ACT, 1950

ASSAULTING HIS SUPERIOR OFFICER

In that he,

At Gandhinagar (Gujarat), on 06 Jan.06, assaulted Gp.Capt. SS Kothari (16788) F (P) of Headquarter South Western Air Command, Indian Air Force.

SEXTH CHARGE SECTION 45 AIR FORCE ACT, 1950

BEHAVING IN A MANNER UNBECOMING THE POSITION AND CHARACTER OF AN

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OFFICER

In that he,

At Gandhinagar (Gujarat), on 06 Jan.06 at Officers'' Mess Headquarter South Western Air Command, Indian Air Force, used offensive language to 707519 Sergeant Narender Kumar, Catering Assistant of Headquarter South Western Air Command, Indian Air Force and behaved in a riotous manner.

SEVENTH CHARGE SECTION 47 AIR FORCE ACT, 1950 (ALTERNATIVE TO SIXTH CHARGE)

ILL TREATING A PERSON SUBJECT TO THE AIR FORCE ACT BEING HIS SUBORDINATE IN RANK

In that he,

At Gandhinagar (Gujarat), on 06 Jan.06, at the Officers'' Mess Headquarter South Western Air Command, Indian Air Force, ill-treated 707518 Sergeant Narender Kumar Catering Assistant of Headquarter South Western Air Command, Indian Air Force.

5. A convening order was issued for trial by a General Court Martial on 8.5.2006.

6. A contention was raised as regards sustainability of the first three charges, inter alia, on the ground that as the witnesses named therein were not produced for cross-examination, the purpose of continuing the General Court Martial proceedings became frustrated. The same was rejected.

7. He filed an application for substitution of the Judge Advocate. It was also disallowed.

8. On the aforementioned premise, the writ petition was filed.

9. Indisputably, the witnesses named in respect of first three charges were not examined. Was it violative of Rule 43 of the Air Force Rules is the question.

It reads as under:

43. Convening of General and District Courts-martial: (1) An officer before'' convening a general or district courts-martial shall first satisfy himself that the charges to be tried by the court-martial are for offences within the meaning of the Act, and framed in accordance with Law, and that the evidence justifies a trial on those charges, he may amend the charges if he deems fit, and if not so satisfied order release of the accused, or refer the case to superior authority.

(2) He shall also satisfy himself that the case is a proper one to be tried by the description of court-martial he proposes to convene.

(3) The officer convening the court-martial shall appoint or detail the officers to form the court and may also appoint or detail such waiting officers as he thinks expedient. He may also where he considers the services of an interpreter to be

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necessary, appoint or detail an interpreter to the court.

(4) After the convening officer has appointed or detailed the officers to form a court-martial under Sub-rule (3), convening order of the court-martial and endorsement on the charge sheet for trial of the accused by the court-martial may either be signed by the convening officer or by a staff officer on his behalf. The charge sheet on which the accused to be tried, the summary of the evidence and convening order for assembly of court-martial shall then be sent to the senior officer of court-martial and the Judge Advocate, if appointed.

Rule 57 of the Rules enables the accused to object to the charge, inter alia, on the ground that it does not disclose an offence under the Act or is not in accordance with these Rules.

10. It is not in dispute that such an objection was taken by the petitioner, stating:

It would be ironical and amazing to state that the cause of action relating to first three charges pertain to when I was posted at AIR HQ at New Delhi and for, the last one year no cognizable action was taken against me. Now in the absence of any Court of Inquiry or formal marshaling of evidence in the Summary of Evidence, I am being prejudiced by facing these charges which have cropped up for the first time in the Court Martial itself which is in violation of all the aforementioned AF Rules and the principles of Natural Justice. Inter alia, the Fourth to Seventh Charges have been made out after analyzing the evidence in the Summary of Evidence but in the First three charges not a single prosecution witness had deposed in the Summary of Evidence which is open to verification. I was also given a Good Conduct Certificate by my CO.

3. therefore, I pray in all humility that the Convening orders of the General Court Martial is not only based on summary of evidence but it also lacks jurisdiction as the only competent authority to convene the GCM is an officer of the rank of Air Marshal in the appointment of AOC-in-C and this power and the warrant cannot be delegated to any Staff Officer as has been done in this instant case for which there are enough case laws on the subject which the respected Judge Advocate is well aware of.

11. Respondents never denied or disputed the said contentions. It is, however, urged that no prejudice has been caused to the petitioner due to non-examination of the said witnesses during the summary of evidence. Such a plea has been raised on the premise that a report had been furnished, inter alia, in respect of charge No. 2 by Shri Dipendra Pathak and the same has been produced in the summary of evidence by Sq. Ldr. T.S. Reddy who was the custodian thereof.

12. Whether prejudice has been caused by non-examination of witnesses named in the charge-sheet is essentially a question of fact. An inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The charges framed as against the appellant were specific. The misconducts were

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said to have been committed are in relation to the persons named therein. In the proceedings, seven witnesses were examined, namely, Air Commander M. Bhandari, Sgt. Narender Kumar, Flight Lieutenant S. Dasgupta, Gp. Captain S.S. Kothari, Gp. Captain P.W. Amberkar. Gp. Captain S.C. Kabra and Sqn. Leader T.S. Reddy.

13. No explanation has been offered as to why the concerned witnesses could not be examined. Shri Reddy, PW-7 was the custodian of the report. He was not the maker thereof. Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. No reason has been assigned as to why the named witnesses who only could prove the change had not been examined. Indisputably, they were the prime witnesses.

14. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review. Before a court martial proceeding is convened, legal requirements therefore must be satisfied. Satisfaction of the officer concerned must be premised on a finding that evidence justified a trial on those charges. Such a satisfaction cannot be arrived at without any evidence. If an order is passed without any evidence, the same must be held to be perverse.

15. The High Court was also not correct in opining that the appellant did not raise any objection in the said proceedings.

16. We, therefore, are of the opinion that the impugned judgment in regard to the charge Nos. 1, 2 and 3 cannot be sustained. They are set aside accordingly. It has not been disputed that witnesses for proving charge Nos. 4 to 7 have been examined. The General Court Martial Proceedings shall continue in respect of charge Nos. 4 to 7 and not in respect of charges No. 1 to 3. Appeals are allowed to the above extent with costs. Counsel''s fee assessed at Rs. 50,000/-.

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