

(2004) 03 AHC CK 0239
In the Allahabad High Court
Case No : Writ Petition No. 2115 (S/S) of 2000

Ram Chandra Tiwari	Vs	APPELLANT
Union of India (UOI) and Others		RESPONDENT

Date of Decision : 16-03-2004

Acts Referred:

Army Act, 1950 — Section 116(1), 130, 144, 144(1), 164(2)
Army Rules, 1954 — Rule 123, 129, 13(3), 23, 23(3)

Citation : (2004) 5 AWC 4714

Hon'ble Judges : Pradeep Kant, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; K.D. Nag and Yogesh Kesharwani, for the Respondent

Final Decision : Dismissed

Judgement

Pradeep Kant, J.—Heard the Petitioner in person and Sri. Yogesh Kesharwani for the Respondent.

2. The Petitioner was enrolled in the Army Medical Corps on 11.9.1984 on the post of clerk, as Non-Commissioned Officer (in short N.C.O.) and remained in service for 11 years and 141 days. While posted at Gangtok Military hospital since September, 1993, he was served with a notice of discharge in February, 1995. The notice of discharge was challenged by the Petitioner in the Sikkim High Court by means of Writ Petition No. 2 of 1995, in which initially a restraint order was passed directing the army authorities not to give effect to the letter of discharge dated 14th February, 1995.

3. The writ petition was, however, disposed of vide order dated 19.8.1995 saying that the Petitioner without availing the departmental remedy has approached the Court straightaway, and therefore, liberty was given to the Petitioner to file a statutory complaint with the appropriate authority. The Petitioner appears to have filed a statutory complaint but it is not much of significance as the Respondent after the interim order having been passed in favour of the

Petitioner, reinstated the Petitioner in service and informed him in writing that no further order shall be issued. It was also disclosed to the Petitioner that the Petitioner could send statutory complaint to the authority concerned when any discharge certificate is served upon him. Since the notice of discharge was not acted upon and the movement order was cancelled, which was never issued again, he continued to remain in service.

4. It appears that thereafter the Petitioner was served with an order of transfer on 20.11.1995, which again was challenged by means of Writ Petition No. 50 of 1995 in the Sikkim High Court. In the said writ petition the Petitioner also claimed compensation on various counts because of his harassment during the period between passing of the order of discharge dated 14th February and the date when he was reinstated in service at Gangtok.

5. The Respondent in the aforesaid writ petition took the defence about unworthiness of the Petitioner of being an Army Officer and that of his service record being bad all throughout and that lastly in pursuance of disciplinary proceedings, the Petitioner had been inflicted punishment of dismissal from service, and, therefore, the aforesaid writ petition filed against the transfer order did not have any merit. The Sikkim High Court finding that the Petitioner has been dismissed from service refused to grant any relief to the Petitioner, the writ petition having been filed against the order for transfer. The claim for compensation was also denied finding no merit in the same.

6. However, the High Court while refusing to make pronouncement upon the dismissal order observed that the Petitioner can take shelter as provided under the Statute and thus, dismissed the writ petition vide order dated 29.2.1996. The order of punishment namely ; reduction in rank and dismissal from service was passed on 2nd February, 1996.

7. The present writ petition has been filed challenging the order of punishment dated 2nd February, 1996 and also for certain other reliefs but the Petitioner confined his remedies only for the relief of setting aside the punishment order, quashing of proceedings of summary court martial and also setting aside the order passed on statutory complaint.

8. Raising challenge against the impugned order the Petitioner, mainly urged almost the same grounds which he had taken in the statutory petition filed u/s 164(2) of the Army Act. It has been submitted by the Petitioner that once the Petitioner stood discharged from service by means of the notice of discharge from service dated 14.2.1995, he could neither have been proceeded with, with summary court martial nor any punishment could have been inflicted upon him including the punishment of reduction in rank and dismissal from service.

9. It has been urged that once the Petitioner stood discharged from service there remained no relationship of employer and employee, and therefore, even if, the Petitioner continued in service on the strength of the interim order passed by the Sikkim High Court, that would not vest the Respondent, with the power to initiate

or proceed with the summary court martial and to pass the punishment order. The argument is fallacious. The judgment passed by the Sikkim High Court in the Writ Petition No. 50 of 1995 dated 29.2.1996, has been placed before the Court. Unassailable facts are that the Petitioner while being attached to one Military Hospital at Gangtok, was served with a letter of discharge dated 14.2.1995 which letter was challenged by means of Writ Petition Bearing No. 2 of 1995 wherein initially the High Court passed an interim order restraining the Army Authorities from giving effect to the letter of discharge dated 14.2.1995 and as a consequence of the aforesaid interim order, the Petitioner was not only reinstated in service but was also intimated that the certificate of discharge would not be issued giving further right to the Petitioner to file statutory complaint as and when the discharge certificate is served upon him. No movement order was also issued.

10. In their own wisdom the Respondent did not choose to issue discharge certificate nor the movement order, and therefore, the Petitioner was reinstated into service where he continued till he was dismissed. The discharge order dated 14.2.1995 was restrained from being acted upon by the High Court of Sikkim as a consequence of which the Petitioner remained in continuous service of the Army.

11. The argument, therefore, that the Petitioner could not have been reduced in rank or dismissed from service by means of impugned order dated 2.2.1996, in view of the order of discharge being passed against the Petitioner, is based on misconception and is wholly misconceived, particularly in view of the fact, that the authorities instead of discharging the Petitioner reinstated the Petitioner and allowed him to continue in service. It was during this period after reinstatement the Petitioner again committed certain misconduct, for which summary court martial was held, and the Petitioner was awarded the impugned punishments.

12. The Petitioner asserts that in holding the summary court-martial proceedings and in awarding the punishment, the provisions of Section 130 of the Army Act and the Rules 129, 23 and 24 of the Army Rules, 1954, have been violated.

13. In respect of non-observance of the provisions of Section 130 of the Army Act, the Petitioner submits that he was not afforded any opportunity as provided under the said provision and thus, was deprived of making a petition against any member in the summary court martial. For adding strength to the aforesaid argument, he placed reliance on the judgment of the Apex Court in the case of Ranjit Thakur Vs. Union of India (UOI) and Others, , but that judgment was reviewed by the Supreme Court in Review Petition No. 43 of 1998 decided on 10th August, 1988. The judgment passed in review petition is in Union of India Vs. Ranjit Thakur, . The Supreme Court in the review petition made it clear that Section 130 of the Army Act applies to General Court Martial and not to summary court martial, wherein Section 116(1) of the Army Act is applicable. In view of the aforesaid pronouncement of the Apex Court, the challenge on the ground that the provision of Section 130 of the Army Act was not followed in the

Summary Court Martial stands rejected.

14. So far as the alleged violation of provision of Rule 129 of the Army Rules, 1954 is concerned nothing has been brought on record nor it could be established that the Petitioner ever asked for a legal advisor or any other person of his liking to prepare the defence in respect of the charges levelled against him.

15. Rule 129 of the Army Rules reads as under:

Rule 129. Friend of accused.-In any summary court martial, an accused person may have a person to assist him during the trial, whether a legal advisor or any other person. A person so assisting him may advise him on all points and suggest the questions to be put to witnesses, but shall not examine or cross-examine witnesses or address the Court.

The discretion for having a legal advisor or any other person, for assisting him in the proceedings, ought to have been exercised by the Petitioner by making such a request but no such request was ever made.

16. For seeing as to whether there has been any violation of Rules 23 and 24 of the Army Rules, 1954, it would be appropriate to have a glance on the aforesaid provisions, which are being reproduced below:

Rule 23. Procedure for taking down the summary of evidence.-(1) Where the case is adjourned for the purpose of having the evidence reduced to writing, at the adjourned hearing evidence of the witnesses who have been present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence and hearing of the accused before the commanding officer, or such officer as he directs.

(2) The accused may put in cross-examination such questions as he thinks fit to any witness, and the questions together with the answers thereto shall be added to the evidence recorded.

(3) The evidence of each witness after it has been recorded as provided in the rule when taken down, shall be read over to him, and shall be signed by him, or if he cannot write his name shall be attested by his mark and witnessed as a token of the correctness of the evidence recorded. After all the evidence against the accused has been recorded, the accused will be asked, "Do you wish to make any statement? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Any statement thereupon made by the accused shall be taken down and read with him, but he will not be cross-examined upon it. The accused may then call his witnesses, if he so desires, any witnesses as to character.

(4) The evidence of the witnesses and the statement (if any) of the accused shall be recorded in the English language. If the witness of accused as the case may be, does not understand the English language, the evidence or statement, as

recorded, shall be interpreted to him in a language which he understands.

(5) If a person cannot be compelled to attend as a witness, or if owing to the exigencies of service or any other grounds (including the expense and loss of time involved), the attendance of any witness cannot in the opinion of the officer taking the summary (to be certified by him in writing), be readily procured, a written statement of his evidence purporting to be signed by him may be read to the accused and included in the summary of evidence.

(6) Any witness who is not subject to military law may be summoned to attend by order under the hand of the commanding officer of the accused. The summons shall be in the form provided in Appendix-III.

Rule 24. Remand of accused.-(1) The evidence and statement (if any) taken down in writing in pursuance of Rule 23 (hereinafter referred to as the "summary of evidence"), shall be considered by the commanding officer, who thereupon shall either:

(a) remand the accused for trial by a court martial ; or

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

(c) if he thinks it desirable, re-hear the case and either dismiss the charge or dispose of it summarily.

(2) If the accused is remanded for trial by a court martial, the commanding officer shall without unnecessary delay either assemble a summary court martial (after referring to the officer empowered to convene a district court martial when such reference is necessary) or apply to the proper military authority to convene a court martial, as the case may require.

17. The Petitioner has been afforded full opportunity for cross-examining each prosecution witness and also to produce the defence evidence. The statements of prosecution witnesses have been brought on record, which show that the Petitioner was given full opportunity to cross-examine them. In all seven prosecution witnesses were examined. After the aforesaid opportunity being given to the Petitioner he was required to express his desire that if he wants to give any defence as required in Rule 23 (3) of the Army Rules, the Petitioner declined to make any statement or to produce any evidence in defence. The Petitioner was informed as follows:

Do you wish to make any statement? You are not obliged to say anything unless you wish to do so, but whatever you say shall be taken in writing and may be given in evidence.

18. The Petitioner refused to give any statement and also declined to produce any defence witness. The summary of evidence was thus, concluded, therefore, it cannot be said that the Petitioner was not afforded reasonable opportunity and that the provisions of Rules 23 and 24 of the Army Rules, were not observed at the time of summary of evidence. The Petitioner was also given full opportunity

for putting his defence in the trial in summary court martial.

19. The Petitioner was reinstated in service and he continued in service but while continuing in service, he was served with a charge-sheet dated 28.1.1996 with respect to four charges mentioned therein, which charges had nothing to do with the material on the basis of which he was issued with the letter of discharge. Thus, the Petitioner was inflicted with the major punishment of dismissal from service on summary court martial being held with respect to specific and different charges as against the material, which prompted the Army Authorities to issue a letter of discharge.

20. The copy of the charge-sheet is on record which shows that in all four charges were levelled against the Petitioner. The first and second charge was with respect to disobeying the lawful command given to him by his superior officer.

21. In the first charge, the Petitioner was charged for disobeying the lawful command of the superior officer on 5th December, 1995, when he was ordered by Major K.S.N. Thankappan Administrative Officer of 178 Military Hospital C/o. 99 A.P.O. to proceed on temporary duty to 417 Field Ambulance C/o 99 A.P.O. as instructed vide H.Q. 33 Corps (Med) Singnal No. A-8028 dated 2nd December, 1995, but he refused to follow the said order. Likewise in the second charge the Petitioner on 15th November, 1995 by an order dated 14th November, 1995, was asked to take move the charge of Medical Board Section from No. 13979515 N.K./ C. Lk. V.N. Barkhade but the Petitioner did not follow the said command. The third charge related to the absence without leave for a total period of 17 days when he was apprehended by the Military Police and the last charge, namely ; fourth charge is related to neglecting to obey the general order as on 25th November, 1995 he had submitted an application addressed directly to Chief of the Army Staff in contravention to Regulation for the Army, 1987 (Revised Edition).

22. In a matter of summary court martial, the Court has to see as to whether the principles of natural justice to the extent they are applicable, on the face of the statutory provisions, have been followed and if not the prejudice caused to the Army Personnel in the trial. The procedural irregularities, if any, committed during the trial in the Summary Court Martial has to be weighed with a view to see if it affects and prejudices the decisions so taken. If the Court finds that the provision of the Army Act and the Rules have been duly observed and the principles of natural justice have also been adhered to, there will be little scope for interference by the Court in such proceedings.

23. The next question would be to see as to whether the findings of guilt arrived are supported by some evidence or material or not. The Court has to see that sufficiency of material/evidence in itself would not be a ground for the Court to hold that the charges could not be proved unless there is ample evidence to the contrary falsifying or nullifying such evidence and which evidence on the face of

it, could not have been relied upon, for any legal and valid reason. Perverse finding or a finding with no evidence in support, can also be looked into by the Court. The punishment order and the nature thereof, cannot be interfered with by the Court, even if, in his opinion, a milder punishment could also have been awarded. The quantum of punishment cannot be looked into unless it pricks the conscience of the Court but such discretion has to be exercised in the rarest of rare cases, in so far as the punishment under the Army Act, is concerned.

24. In the case of Union of India and Ors. v. Major A. Husain 1998 MLJ 18 (SC), the Supreme Court held that while finding out that whether there has been any violation of principles of natural justice the High Court, would not sit in appeal. The Supreme Court further held that if there has been no flagrant violation and if no irregularity has been committed coupled with the fact that the accused has been provided with reasonable opportunity to defend, the order on sentence cannot be set aside by the High Court.

25. In the instant case, the specific charges were levelled against the Petitioner. He was afforded opportunity to adduce the evidence and to cross-examine the witness. On the evidence on record and on the appraisal of the evidence and material on record, the charges have been found to be proved, which finding cannot be said to be perverse or based on no material. The relevant provisions of the Act and the Rules having been followed and the Petitioner having afforded reasonable opportunity in putting his defence, it cannot be said that either the proceedings at any stage suffered from any illegality so as to make them invalid or the decision making process suffered from the vice of unreasonable or that punishment awarded could not have been inflicted upon him.

26. It has also been stressed by the Petitioner that the order of sentence (punishment) has been passed by taking into consideration the evidence of previous conviction and general character without affording him any opportunity and therefore, the order is prejudicial and biased.

27. In appreciating the aforesaid arguments, the provisions of Section 144 of the Army Act, and Rule 123 which read as under, have to be noticed.

144. Evidence of previous convictions and general character.-(1) When any person subject to this Act has been convicted by a court martial of any offence, such court martial may inquire into, and receive and record evidence of any previous convictions of such person, either by a court-martial or by a criminal court, or any previous award of punishment under any of the Sections 80, 83, 84 and 85 and may further inquire into and record the general character of such person and such other matters as may be prescribed.

(2) Evidence received under this section may be either oral, or in the shape of entries in, or certified extracts from, court martial books or other official records ; and it shall not be necessary to give notice before trial to the person tried that evidence as to his previous conviction or character will be received.

(3) At a summary court martial the officer holding the trial may, if he thinks fit, record any previous convictions against the offender, his general character, and such other matters as may be prescribed, as of his own knowledge, instead of requiring them to be proved under the foregoing provisions of this section.

28. Section 144 of the Army Act is regarding the evidence of previous convictions and general character which can be received in evidence by a court martial.

Rule 123. Procedure on conviction.-(1) If the finding on any charge is "Guilty", the Court may record of its own knowledge, or take evidence of and record, the general character, age, service, rank, and any recognised acts of gallantry or distinguished conduct of the accused, and previous conviction of the accused either by a court martial, or a criminal court, any previous punishments awarded to him by an officer exercising authority u/s 80 ; the length of time he has been in arrest or in confinement on any previous sentence, and any military decoration, or military, reward, of which he may be in possession or to which he is entitled.

(2) If the Court does not record the matters mentioned in this rule of its own knowledge, evidence on these matters may be taken in the manner provided in Rule 64 for similar evidence at general and district court martial.

29. Sub-section (1) of Section 144 confers power upon the court martial to inquire into and record any evidence of any previous conviction of the person convicted either by the court-martial or by a criminal court or any previous award of punishment under any of the Sections 80, 83, 84 and 85 with respect to the person convicted and may further inquire into and record the general character of such person and such other matters as may be prescribed.

30. Sub-section (2) provides that the evidence received under this section may be either oral or in the shape of entries in, or certified extracts from, court-martial books or other official records.

31. For receiving all this evidence it shall not be necessary to give notice to the person that the evidence of previous conviction of character will be received.

32. Sub-section (3) deals with the summary court-martial. The officer holding the trial in his discretion if he thinks fit may record any previous conviction against the offender, his general character and such other matters as may be prescribed, as of his own knowledge instead of requiring them to be proved under the foregoing provisions of this section.

33. Likewise Rule 123 deals with the procedure of conviction which lays down the procedure after finding on any charge, if the offender is held "guilty" of any charge which says that if the finding on any charge is "guilty" the Court may record of its own knowledge, or take evidence of and record the general character, age, service, rank and any recognized acts of gallantry or distinguished conduct of the accused, and previous convictions of the accused either by a court martial, or a criminal court, any previous punishments awarded

to him by an officer exercising authority u/s 80, the length of time he has been in arrest or in confinement on any previous sentence, and any military decoration, or military reward, of which he may be in possession or to which he is entitled.

34. Sub-rule (2) says that if the Court does not record the matters mentioned in this rule of its own knowledge, evidence on these matters may be taken in the manner provided in Rule 64 for similar evidence at general and district court martial.

35. The aforesaid provisions enable the court martial to have the evidence of previous conviction and general character and for that purpose it would not be necessary to give notice before trial to the charged person saying that such evidence would be received. The provision, thus allows the evidence with respect to previous nature of conviction and general character of the person tried and further the nature of such evidence could be either oral or in the shape of entries in, or certified extracts from court martial books or other official records.

36. The Petitioner during his service tenure could not maintain himself as an Army Personnel and failed to maintain himself as disciplined personnel. The service record of the Petitioner reveals that the Petitioner had earned 7 red ink entries as follows:

Sl. No. Date Unit Section of Army Act Punishment

(a) 9.3.91 M.H. Secunderabad 63 Severe Reprimand and 14 days pay fine

(b) 25.1.93 -do- 48 (c) Severe Reprimand

(c) 30.1.93 -do- 41 (2), 42 (e) and 52 (c) 14 days pay fine

(d) 9.9.93 178 M.H. 41 (i) Severe Reprimand

(e) 26.11.93 178 M.H. 63 Deprivation of paid acting rank and severe reprimand

(f) 19.3.94 178 M.H. 63 Severe Reprimand

(g) 5.3.95 178 M.H. 39 (a) Severe Reprimand

37. The Petitioner challenged each of the punishment awarded in proceeding of court martial by filing statutory complaints u/s 26 of the Army Act but the same were rejected. Looking to the work and conduct of the Petitioner and the fact that he was earning red ink entries continuously, his case was considered by the Commanding Officer for seeking sanction of the competent authority to discharge him under Rule 13 (3) of the Army Rules.

38. The Petitioner was also issued a show cause notice for the said purpose. The discharge order was issued on 14th February, 1995. The movement order was cancelled and thereafter no order of discharge was issued. The said discharge order was challenged before the Sikkim High Court as indicated earlier in the judgment and on passing of the stay order, the Petitioner was reinstated in

service cancelling his movement order.

39. In view of the aforesaid facts it cannot be said that while awarding punishment, the aforesaid material could not have been taken into consideration.

40. In the case of U.P. State Co-operative Land Development Bank Ltd. v. Chandra Bhan Dubey and Ors. etc. (1991) 1 UPLBEC 296, the Apex Court observed that the rules of natural justice vary with a varying Constitution of contrary Bodies and the Rules prescribed by the Act under which they function and the question whether or not any rules of natural justice have been contravened should be decided not under any pre-convict notions, but in the light of the statutory Rules and provisions.

41. In the case of Union of India and Ors. v. Ex. Constable Amrik Singh (1991) SCC 654, the Apex Court held that special enactments such as Army Act, B.S.F. Act do not attract all the principles of natural justice.

42. The Petitioner also made an attempt to impress upon the Court to show that there was certain discrepancy about the period of absence in charge No. 3 and the statement given by one of the witnesses. I do not find any such discrepancy at all which may be taken as prejudicial to the interest of the Petitioner and for giving him a right to challenge the entire proceedings for being declared invalid or vitiated. The fact as mentioned is that the Petitioner absconded from duty without leave and he was apprehended by Military police, which period of absence has been specifically shown in the charge-sheet.

43. The Petitioner lastly submitted that the orders, on the statutory petition moved by the Petitioner, u/s 164(2) has been passed without giving any reason which is denied by the counsel for the Respondent. The photostat copies of the entire draft petition, directions of the General Officer Commanding in Chief Eastern Command on the petitions dated 9th April, 1996 and 10th May, 1996, submitted by the Petitioner and other relevant material which was considered, with the recommendations of Major General, A.D.G. D and V along with the order passed by competent authority, have been not only been produced before the Court but have also been supplied to the Petitioner which clearly indicate that the Petitioner was dismissed after full consideration and appraisal of the entire material.

44. No other point has been pressed. The petition lacks merit and is hereby dismissed. Costs easy.