
(1996) 01 MP CK 0074
In the Madhya Pradesh High Court
Case No : M.P. No. 2611 of 1992

R.P. Shukla and Others

APPELLANT

Vs

Central Officer Commanding-in-Chief, Lucknow and Others

RESPONDENT

Date of Decision : 04-01-1996

Acts Referred:

Army Act, 1950 — Section 120, 191
Army Rules, 1954 — Rule 180, 22(2)
Constitution of India, 1950 — Article 14

Citation : AIR 1996 MP 233 : (1996) ILR (MP) 68

Hon'ble Judges : A.K. Mathur, Acting C.J.; S.C. Pandey, J

Bench : Division Bench

Advocate : K.P. Singh, for the Appellant; I. Nair, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Gen. Officer Comm. in Chief, Lucknow and Others Vs. R.P. Shukla (Dead) by LRs. and Others, AIR 2006 SC 2127 : (2006) 6 SCALE 268 : (2006) 10 SCC 294 : (2007) 1 SCC(L&S) 109 : (2006) 2 SCR 859 Supp : (2007) 1 SLJ 49 : (2006) AIRSCW 2724 : (2006) 4 Supreme 585

S.C. Pandey, J.—This is a petition under Articles 226 and 227 of the Constitution of India whereby the petitioners pray for quashing the proceedings of Summary Court-martial and sentences awarded against them in these proceedings (Annexure P-11). They also claim that consequently they should be reinstated in service with all the benefits that would accrue them, the relief of Habeas Corpus claimed by the petitioners must have become infructuous because they must have undergone the sentences awarded to them. No argument was addressed by counsel for the petitioners on this point.

2. The facts of the case may now be shortly stated. Havaldar R. P. Shukla, Sep. Patiram Balmiki and Sep. Mohanlal were re-enrolled in Defence Security Corps, by virtue of service in the Army for a certain period. It is not in dispute that as per para 170 of Regulations for Army (Revised edition 1987) they fell within the

category "Exemplary" so far as their character assessment was concerned during their tenure with the Army. The petitioners were serving in 473, Defence Security Corps. (D.S.C for short) platoon. On 20th June, 1991 Subedar Jagmohan Singh took command of platoon No. 473 It is alleged in the petition that the petitioner No. 1 did not succumb to certain unauthorised demands of the Platoon Commander, mentioned in paragraph 5 of the petition. It is alleged further that thereupon the Platoon Commander threatened the petitioner No. 1 with serious consequences. It is stated further that the opportunity for taking revenge came on 5th of October, 1991. On that date at about 8 p.m. one overdrunk Sepoy Rajvir Singh demanded more than his authorised quota of meat from Sep. Patiram (petitioner No. 2) who was distributing it. He was given that meat after petitioner No. 1 authorised petitioner No. 2. The petitioner No. 1 was supervising the distribution of meat. In spite of the fact that the demand for more meat was met by the petitioners Nos. 1 and 2, Rajvir Singh began to abuse the petitioner No. 2 under influence of liquor. Thereupon the petitioner No. 1 questioned him about his behaviour but Rajvir Singh became violent and gave a blow to the petitioner No. 1. Thereafter, he ran away. The petitioner No. 1 sustained an injury on his head. It is further alleged that thereafter Subedar Jagmohan Singh came to the spot after half an hour. He, not only supported the action Sep. Rajvir Singh but also began to abuse the petitioner No. 1 filthily. Upon objection, Subedar Jagmohan Singh began to beat the petitioner No. 1. As a result thereof the petitioner No. 1 fell down and sustained injuries on his person.

3. It is alleged by the petitioners that subsequently Major Jodha, who was the Duty Officer came to spot at about 8.45 p.m. He, after making inquiries, sent the petitioner No. 1 to the Unit Medical room. Petitioner No. 1 was then transferred to Military Hospital, Jabalpur where he was treated for about a week. The petitioner No. 1 was not supplied copy of injury report. Major Jodha did not question any of the petitioners but took Subedar Jagmohan Singh and Sep. Rajvir Singh with him. None of these persons had any injury on their person. He made report to respondent No. 3. Thereupon a Court of Enquiry was ordered by respondent No. 3 and Major Jodha was nominated as the Presiding Officer of the Court of Enquiry as per Annexure P-3. It is alleged by the petitioners that this was done in gross violation of para 518 of Regulations of the Army because no person who had personal interest or involvement direct or indirect in subject-matter of investigation could constitute a Court of Enquiry. It is submitted by the petitioners that the terms of reference of the Court of Enquiry were limited to find out in what circumstances Sep. Rajvir Singh and the petitioner No. 1 used criminal force against each other and further that petitioner No. 1 used criminal force against Subedar Jagmohan Singh. It is the case of the petitioners Nos. 2 and 3 that at that stage there was no mention of their involvement in the incident. They were subsequently impleaded. The petitioners hence submitted that Major M. S. Jodha and the respondent, No. 3 grossly violated the principles of natural justice enshrined in the Army Rule No. 180. Major M. S. Jodha gave a perverse finding against the petitioners as per Annexure P-4.

4. It is further alleged by the petitioners that as per para 520(d) of the Regulations, the Court of Enquiry constituted for investigating the injuries sustained by person cannot record its opinion. Despite this prohibition Major M. S. Jodha recorded the opinion of Court as per Annexure P-5, dated 13th October, 1991.

5. It is further alleged that thereafter summary of evidence was recorded as per Rule 22 of the Army Rules, 1954. Major Jodha examined as a witness and his statement Ex. P-18 showed that he was biased witness. On this ground alone the entire Summary Court-martial deserved to be quashed.

6. By 30th October, 1991 the summaries were ready but, the joint charge-sheet dated 7th April, 1992 was served on the petitioners on 9th April, 1992. It is submitted by the petitioners that the Rule 129 of the Army Rules was violated because respondent No. 3 did not permit Captain T. C. Dutt, I.S.T.C., Jabalpur to act as the "Friend of the Accused". The funds demanded by them for their defence were not released. The application dated 13-4-92, Annexure P-8, was rejected by the letter dated 14th April, 1992. The respondent No. 3 forced the petitioner to accept the services of Lt. Col. S. S. Soni, who was putting pressure on the petitioners to plead guilty (Annexure P-9). On 14th April, 1992, the petitioners again made a request by letter (Annexure P-10) to appoint anybody as a "Friend of the Accused", any officer other than that serving in C.O.D. Respondent No. 3 declined to accept it. The joint trial commenced on 20th April, 1992 with Lt. Col. S. S. Sohi as the "Friend of the Accused". He did nothing. Major M. S. Jodha was examined as a witness. The respondent No. 3 awarded one years" R.I. to the petitioner No. 1 and six months" R.I. to petitioners Nos. 2 and 3. All the petitioners were dismissed from service. It is the case of the petitioners that in doing so the respondent No. 3 violated para 448 of the Regulations. The punishment was too harsh.

7. A copy of the order containing the punishment was marked as Annexure P-11 by the petitioners. It is contended by the petitioners that the petitioners were not supplied with the copy of the proceedings of Summary Court-martial which they were authorised to receive. The petitioners were, therefore, compelled to file petition under Articles 226 and 227 of the Constitution of India earlier and the petition was disposed of by this Court as per Annexure A-1 directing the General Officer Commanding-in-Chief, Central Command, Lucknow to dispose of the appeal u/s 162 of the Army Act within one month from the date of receipt of the appeal. It is the grievance of the petitioners that despite the order dated 24-6-92 the appeal was not decided till the date of filing of this petition.

8. The respondents in the case admitted that at the time of the filing of the petition the appeal/ review was not decided and when they filed the return till that date also the appeal/ review was pending. However, it appears that during, the pendency of this petition the appeal/review stood rejected by the respondent No. 1. The respondents have countered the allegation made in the petition by saying that the petitioners were guilty of gross misconduct and Major M. S. Jodha

was the Officer on Duty at the time of the incident and, therefore, he was entitled to look into the misdemeanour of the petitioners on the date of incident. He had no personal interest, direct or indirect, in the matter and, therefore, he was entitled to be the Presiding Officer of the Court of Enquiry. It was denied by the respondents that the petitioners were falsely implicated and it was asserted that the petitioners were given full opportunity of hearing before the Court of Enquiry and at the time of summary evidence under Army Rule No. 22. It was admitted that the petitioner No. 1 had suffered an injury. It was asserted that the petitioner No. 1 was not entitled to any report regarding the injury suffered by him. It was asserted that before trial, Hawaldar R. P. Shukla was in custody for $51 + 3 = 54$ days, Patiram Balmiki was in custody for $56 + 3 = 59$ days and Mohanlal was in custody for $40 + 3 = 43$ days. It was asserted that due to inadvertence the custody period of these persons was wrongly recorded. It was also asserted that as per Army Rule 22, Appendix-A to Army Order 20/84, Major M. S. Jodha who had conducted the preliminary inquiry and was also Presiding Officer to inquiry was entitled to appear as the witness and therefore, there was nothing illegal in the fact that he appeared as a witness at the time of summary of evidence. It was asserted that summary of inquiry was not done in mechanical way but with due regard to Act and the Rules. It was asserted that the case of the petitioners was not unduly belated as asserted by them but, delay if any, was caused because of the procedural bindings before conducting a trial. As far as Army Rule No. 129 was concerned, it was asserted that the petitioner had no right to choose "Friend of the Accused". In fact, they were given choice among three persons and they could have chosen any one of them. Their letter dated 13th April, 1982 was sent with a view to stall the trial. It was asserted that only Major Chahal was working under the respondent No. 3. The other two persons suggested by the respondent No. 3 were not working under the respondent No. 3. It was also asserted that the petitioners could have engaged any civil counsel for which they have ample time and money. It was also denied that the appointed "Friend of the Accused" Lt. Col. S. S. Sohi advised the petitioners to plead guilty. It was also asserted that the punishment given to the petitioners was proper and they were guilty of various offences under the Army Act. During the course of the argument it was pointed out that the reviewing authority has already rejected the appeal filed by the petitioners.

9. In this petition the following points were urged by the counsel for the petitioners :--

It was asserted that the respondent No. 3, Major General M. S. Jodha had violated Army Rule No. 180. It was further urged that Major Jodha being the officer on duty and who had personally gone to the spot to acquaint himself about the incident that occurred on 5th October, 1991 within 45 minutes of the incident, was personally interested or involved in the subject-matter of investigation. He was himself prejudiced against the petitioner No. 1 and, therefore, conspired to involve the petitioner in the offence for which he was not guilty. He was nominated as President of Court of Enquiry in violation of para 518

of the Army Services Regulations. He could not be Presiding Officer of the Court of Enquiry. Since this regulation was violated the entire proceeding thereafter were bad in law. Thirdly, it was urged that the respondent No. 3 too had not given a proper opportunity to the petitioners by not giving them a proper "Friend of the Accused" as per Army Rule No. 129. The demand of petitioners that they should be given a particular person to represent them during summary trial was arbitrarily rejected with a view to find them guilty during the course of Summary Court-martial. It was also asserted that even the demand of Rs. 5,000/-for expenses during the course of summary trial was not given. During the argument it was asserted that Major Lt, Col. Sohi was a person who was working under the respondent No. 3 and he could not have acted as a "Friend of the Accused" because from the very beginning he suggested to the petitioners that they should plead guilty before the Court Summary Court-martial. It was further urged that the petitioners were kept illegally for court arrest, petitioner No. 1 for 65 days and petitioner No. 2 for 62 days and this was so done in violation of paras 3(2)(B)(J), 3(94)(C) and 3(95) of Army Regulation and Rule No. 27 of the "Army Rule". Another contention was raised to the effect that joint trial of the petitioners was in violation of Rule 35 of the Army Rules. It was also contended that the punishment awarded, to the petitioners was too harsh in the facts and circumstances of the case.

10. The learned Counsel for the respondents countered the argument of the petitioners and denied thereby any violation of Rule 129 or 180 in this case. She also urged that M. S. Jodha was doing the duty and during the course of the duty he came to know the facts of the case and it cannot be said that he was directly or indirectly personally interested or involved in getting the conviction of the petitioners. There was nothing on record to suggest that Major M. S. Jodha acted in such a manner as to cause any prejudice which can be seen from his conduct. He acted as an upright army officer and held Court of Enquiry in accordance with law. He was bound to be a witness in the summary proceedings because he was the Presiding Officer of the Court of Enquiry and the Officer on Duty. It was also urged that there was no violation of Rule 129 as urged by the counsel for the petitioners. Rule 129 enabled an accused person to seek advice from the "Friend of the Accused" during his trial. It did not entitle the accused to demand for an officer of his choice. There is nothing on record to show that the "Friends of the Accused" given to the petitioners were serving under respondent No. 3 except Lt. Col. M. S. Chahal. It was also urged that the punishment awarded to the petitioners was good and it was confirmed in the review proceedings. It was also pointed out that the accused persons were not guilty of the offences committed by them for the first time. They have been previously convicted and have also been punished specially the petitioners Nos. 1 and 2. It was finally urged that the members of the Army Services are bound to maintain higher discipline and, therefore, if there is a violation of discipline their misdemeanour is liable to be viewed strictly. In view of this the punishment awarded by the Army authorities should not, therefore, be interfered with by this Court.

11. In this case, the petitioners had urged in paragraph 12 of the petition that Major M. S. Jodha while conducting the Court of Enquiry had violated Rule 180. Rule 180 of the Army Rule reads as under:--

"180, Procedure when character of a person subject to the Act is involved.-- Save in the case of a prisoner of war who is still absent, whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The Presiding Officer of the Court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of and fully understands his right, under this rule."

12. Annexure P-3 is a document which has been produced by the petitioner. We find in this document that the filing has been said in the column. The contention of the Court is directed to Army Rule 180 which directs the presence throughout as under:--

^ ^ vnkyr dk /;ku lsuk fu;e 180 dh vksj vkdf" kZr fd;k tkrk gS tks funsZ" k nsrk gS fd og vQlj ;k lSfud ftdh lSfud izfr" Bk dks gkfu iggap ldrh gks] ml le; rd tkap vnkyr esa mifLFkr jgs tc rd vnkyr cSBsA

"The attention of the Court is directed to Army Rule 180 which directs the presence throughout a Court of Enquiry of any officer, or soldier, whose character of military reputation may be affected."

13. It is clear from that column that presence of the accused is necessary during the Court of Enquiry. We found nothing on record to show whether the accused persons were present during the course of inquiry because nothing has been recorded in the document Annexure P-3. We pointly asked learned Counsel for the respondent whether the accused persons were present during the Court of Enquiry. The learned Counsel for the respondents was unable to reply the question but she told that she will inform the Court specifically if there was any evidence on record to show that the petitioners were present during the Court of Enquiry. After close of the case the counsel for the respondents specifically informed this Court that there was nothing on record to show that the petitioners were present when the Court of Enquiry was held.

14. The position that emerges is this there is nothing on record to show that when the Court of Enquiry was held by Major Jodha, the accused persons were present. The Supreme Court in the decision in the case of Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, , has held that whenever a Court of Enquiry is held it is obligatory to follow the procedure prescribed for the Court of Enquiry. It was held that (para 41):--

"Rule 180 sets up a stage in the procedure prescribed for the Court of Enquiry. It cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up a Court of Enquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a Court of Enquiry is set up and in the course of inquiry by the Court of Enquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of Court of Enquiry. Court of Enquiry by its very nature is likely to examine certain issues generally concerning a situation or persons. Where collective fine is desired to be imposed, a Court of Enquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an inquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the spacious plea that no specific inquiry was directed against the person whose character or military reputation is involved. To ensure that such person whose character or military reputation is likely to be affected by the proceedings of the Court of Enquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation."

If it is not done then the show cause notice on which Summary Court-martial is held would be vitiated and all the subsequent proceeding based on the show cause notice would, there fore, be void ab initio. It is well established that when a certain procedure is mandatory in nature, then it should be done in that manner and no other manner. In view of the decision of the Supreme Court non-participation of the petitioners at the stage of Court of Enquiry would be violative of a mandatory rule and, therefore, the entire proceedings would be liable to be quashed on this short ground alone.

15. Rule 22 of the Army Rules reads as under:--

"22. 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 defence.

(2) The Commanding Officer shall dismiss a charge brought before him, if, in his opinion, the evidence does not show that an officer 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.

(3)"

It would be clear from Rule 22(2) that Commanding Officer has discretion not to proceed with the charge, if he is satisfied that charge ought not to be proceeded with, in case of a person who is not an officer under the Act. The question, therefore, is that by not following the mandatory procedure prescribed by Rule 180 the report of the Court of Enquiry was vitiated. Therefore, recording of

summary evidence and framing of charge would also be bad in law. The very foundation of framing the charge would then disappear. Therefore, under Rule 22(2) in case of an officer other than the officer could not be legally satisfied that the charge could be proceeded with. It was, therefore, his duty to verify whether the Presiding Officer of the Court of Enquiry had followed the procedure prescribed by Rule 180 of the Army Rules before convening Summary Court-martial. This position in law appears to have been settled by the Supreme Court decision noted above. In that case the Supreme Court has found that it is not mandatory to Court in each and every case of the Court of Enquiry but once the Court of Enquiry has been held the procedure prescribed therein is of mandatory character. The learned Counsel for the petitioners has drawn our attention to a decision of Jammu & Kashmir High Court in the case of Vinayak Daulatrao Nalawade v. Core Commander, Lt. Gen. G.O.C.H.O. 15 Corps., an unreported judgment in Writ Petn. No. 490 of 1985, decided on 5th May, 1986 in which the High Court of Jammu and Kashmir has also taken the view that non-compliance of Rule 180 would be fatal. Their Lordships of Jammu and Kashmir High Court pointed out that in accordance with Article 33 of the Constitution of India the Army Personnel have been provided with a special procedure under the Army Act and the Rules. The vires of these Act and Rules are not challengeable because of Article 33 of the Constitution of India. However, further derogation in the rights of an Army Personnel would be violative of Articles 21 and 14 of the Constitution. Be as it may, we do not though go so far but we rest our decision on the narrow ground that respondents were bound to act within the four corners of statute that empowers them to frame charges against the petitioners to be tried by somebody in Court-martial. We find in this case that the mandatory procedure under Rule 180 appears to have not been followed by the respondents and, therefore, the very foundation on which charges were framed against the petitioners is shaken. The Commanding Officer ought to have held that he was not satisfied that the charge ought to be proceeded with.

16. In the case of N. Manoharan v. State of Tamil Nadu AIR 1981 Mad 147, Division Bench of Madras High Court held relying upon Section 8(b) of the Commission of Enquiry Act, 1952 which provides that if at any stage of enquiry the Commission considers it necessary to inquire into conduct of any person that the reputation of any person is likely to be prejudicially affected it shall give that person a reasonable opportunity of being heard in the inquiry and produce evidence in his defence. The following observations are relevant for the purpose (at p. 150, para 6 of AIR):--

"... Therefore, that portion of the report which deals with the conduct and reputation of the appellant without giving the appellant an opportunity of being heard in the inquiry should be taken to be vitiated for violation of Section 8B of the Act. It is true that the report of the Commission of Enquiry has no legal force proprio vigore. But, however, it is seen in this case that the findings rendered by the Commission of Enquiry in paras 4(56) and 7(26) have been taken as the sole basis for initiating the disciplinary proceedings against the appellant. In these

circumstances the appellant is entitled to put forward his grievance that the Commission of Enquiry has given findings regarding his conduct without giving him an opportunity to put forward his defence and behind his back and, therefore, that portion of the report which deals with his conduct and affects his reputation cannot be relied on by the State Government..... we have to, therefore, hold that no action could be taken purely on the basis of those findings. In this case, the findings have been taken as the sole basis for initiating disciplinary proceedings as against the appellant and the second respondent in the writ petition has been appointed as the Enquiry Officer for conducting the disciplinary proceedings."

In the book of D. Smith i.e. "Judicial Review of Administrative Action at page 203 the matter has been discussed and it has been observed :--

"The degree of proximity between the investigation in question and an act of decision directly adverse to the interests of the person claiming entitlement to be heard may be important. Thus, one who is empowered or required to conduct a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under an obligation to comply with the rules of natural justice. But he may be placed under such an obligation if his investigation is an integral and necessary part of a process which may terminate in action adverse to the interests of person claiming to be heard before him; for instance natural justice must be observed by Magistrates conducting a preliminary investigation in respect of a charge of an indictable offence."

17. Here, we find that the Court of Enquiry was required by mandatory rule to observe the principles of natural justice and, therefore, even during the course of investigation a Court of Enquiry cannot flout the rules of natural justice and if it does so it cannot be argued that the accused person had opportunity of hearing during the course of Summary Court-martial. The parallel here is to say as mentioned by D. Smith in the book referred above regarding the inquiry conducted by Magistrates as a preliminary investigation in respect of a charge. Here the Court of Enquiry is not only investigating a criminal charge akin to that the Magistrates do in a preliminary inquiry, as this is not a service matter but an investigation into criminal offence punishable with jail sentence. Therefore, the mandatory character of Rule 180 cannot be ignored while holding a Court-martial.

18. In the view that we have taken, the entire proceedings of Summary Court-martial including charge-sheet dated 9-4-92, Ex. P-7 are liable to be quashed. Therefore, the sentences awarded to the petitioners vide Ex. P-11, are set aside as a consequence thereof they will be entitled to be reinstated in their services. It is not necessary, therefore, to deal with other points raised by the petitioners.

19. The petition succeeds and is allowed. There shall be no order as to costs.