
(1962) 05 GAU CK 0006
In the Gauhati High Court

Sita Devi Thapa

APPELLANT

Vs

The Commandant, 6th Battalion Assam Rifles, and Others

RESPONDENT

Date of Decision : 21-05-1962

Acts Referred:

Penal Code, 1860 (IPC) — Section 21

Citation : AIR 1963 Guw 31 : (1963) CriLJ 322

Hon'ble Judges : T.N.R. Tirumalpad, J.C.

Bench : Single Bench

Judgement

T.N.R. Tirumalpad, J.C.

1. This application has been filed by Smti. Sita Devi Thapa, wife of Shri Chakra Bahadur Thapa, who was a Naik in the 6th Battalion Assam Rifles, Agartala to issue a Writ of Habeas Corpus against the respondents namely, the Commandant of the 6th Battalion Assam Rifles, the District Magistrate of Tripura and the Superintendent of Central Jail, Tripura and to order the immediate release of the said Chakra Bahadur Thapa, who is said to have been detained in illegal custody in the Central Jail.

2. Shri Chakra Bahadur Thapa was the NCO on duty in the Assam Rifles Officers Club on T2-it-6t. At about 1 P. M., the acting Commandant of the 6th Battalion Assam Rifles, Major C. N. Madiah, went to the Club and saw some minor girls in the room of Naik Chakra Bahadur Thapa. There is dispute as to what happened then. The petitioner would say that the Major abused her husband and struck him with the Telephone receiver and a scuffle followed in which the Major as well as Chakra Bahadur Thapa were injured. But according to the first respondent the Commandant, Chakra Bahadur Thapa assaulted Major Madiah. and caused him injuries on the Major asking. Chakra Bahadur Thapa why he allowed the girls into the room. There is also an allegation that Chakra Bahadur Thapa threatened the Major with a sword taken from the Club. But this allegation was subsequently found not proved. Any way, Chakra Bahadur Thapa was put under quarter guard.

3. On 17-11-1961 notice was given by one Capt. Roshan Lal on behalf of the Commandant warning Chakra Bahadur Thapa that he was charged under the Assam Rifles Amendment Act, 1958 Section 6 (b) with using criminal force to his superior officer and assaulting him and threatening him with a sword from the Club room, and directing him to give his explanation, by 21-11-1961, as to why judicial proceedings should not be held against him. Chakra Bahadur Thapa appears to have given his explanation on 21-11-61. By that time, the first respondent, who was the Commandant and who was not in station when the incident took place, had returned and on 23-11-61 he began the trial of Chakra Bahadur Thapa. He first framed a charge, stating it to be under the Assam Rifles Amendment Act, 1958 Section 6 (b) for using criminal force to and assaulting Major Madiah and threatening him with the sword from the Club room. Six witnesses were examined at the trial on 23-11-61 and 24-11-61. Then Chakra Bahadur Thapa was questioned and his statement was taken down on 25-11-61.

Then the first respondent Commandant passed the order Annexure G holding that the charge of using criminal force on Major Madiah was proved, but that the charge of threatening him with the sword was not proved and he convicted and sentenced Chakra Bahadur Thapa to 15 months' rigorous imprisonment. By the same order, departmental action also was taken against him and he was ordered to be dismissed from service with effect from 25-11-61. This order is dated 27-11-61. On the same date he was sent to the civil jail on the request made by the Commandant to the District Magistrate by the letter Annexure 4 and he was lodged in the Central Jail, Agartala.

4. On 19-12-61 the petitioner applied to the Commandant to send her a copy of the proceedings as she was in the dark about the reason for the punishment of her husband. No copies were supplied to her and so she sent a petition to the Inspector General of Assam Rifles, on 26-12-61. and after that she was supplied with the copies on 10-1-62. On receipt of the said copies, she came forward with the present petition on 22-1-62.

5. In the petition, the petitioner stated that the judicial proceedings taken against her husband were Court Martial proceedings under the provisions of the Army Act. that the very constitution of the Court for holding the judicial proceedings was unconstitutional and against the provisions of the Army Act and that the Commandant of the 5th Battalion Assam Rifles was only a second class Magistrate and was incompetent to pass a sentence of 15 months' rigorous imprisonment of her husband.

6. The first respondent pointed out in his counter statement that the Commandant of the 6th Battalion Assam Rifles has been invested with the powers of a Magistrate, first class, by the Chief Commissioner of Tripura, that the proceedings against the petitioner's husband were taken for offences under the Assam Rifles Act and the trial was held in accordance with the provisions of the Criminal Procedure Code and that as first class Magistrate, the Commandant had the power to impose a sentence of 15 months rigorous imprisonment. The

learned Government Advocate appearing for the first respondent raised the preliminary objection that if Chakra Bahadur Thapa was aggrieved by the conviction and sentence, held in the course of a normal trial in a criminal case, he should file an appeal to the Sessions Judge and his wife cannot resort to this extraordinary remedy of a Writ for obtaining relief and that on this ground alone the Writ application should be dismissed.

7. Pending final orders in this application, Shri Chakra Bahadur Thapa was released on bail by this Court. He filed an affidavit in reply to the counter statement. In the said reply affidavit he has admitted that the first respondent was invested with the powers of a Magistrate of the first class under the Criminal Procedure Code and that the statement in the Writ Petition about his being a Magistrate of the second class was not correct and that this incorrect statement was made by his wife on reports received. He has further stated that due to his wife's ignorance and due to the fact that when copies of the proceedings against him were supplied to her, she was not informed under what provision of law he was tried and convicted and hence his wife made the mistake in stating that the trial was under the provisions of the Army Act under advice from others. He has further stated that it was only by a communication from the first respondent, dated 31-1-62, in answer to her query that she was informed that her husband was tried and convicted under the Assam Rifles Act and the provisions of the Assam Rifles Manual. He has also admitted in the said reply that he was informed that he was to be tried under the provisions of the Assam Rifles Act.

8. In addition to the above statements, he has referred to various irregularities and illegalities in the trial and in the proceedings held against him. But in this Writ petition we are not concerned with any such illegalities or irregularities and hence I do not propose to detail them. In an application for Writ of Habeas Corpus, what this Court has got to see is whether the detention of the person concerned was illegal or improper. The Constitution of India in Article 21 provides that no person shall be deprived of his personal liberty except according to procedure established by law. Thus if it is shown, as has been done in this case, that Chakra Bahadur Thapa was tried and convicted in a criminal Court and sentenced to imprisonment, it cannot be said that he has been deprived of his liberty otherwise than according to procedure established by law. He has been convicted u/s 6 (b) of the Assam Rifles Act, which provides that a Rifleman who uses or attempts to use criminal force or commits an assault on his superior officer whether on duty or off-duty shall be punished with transportation for life or with imprisonment which may extend to 14 years or with fine which may extend to 500 rupees or with both such imprisonment and fine. Thus this section provides for the punishment of a Rifleman (and a Naik is a Rifleman) who uses criminal force on his superior officer. He was charged under the said section of the Act and a trial was held and he was convicted and sentenced by the first respondent who was invested with the powers of a first class Magistrate.

9. On behalf of the respondents, Annexure D was produced to show that u/s 12

(I) Cr. P. C., the Chief Commissioner has appointed the Commandant of the 6th Battalion Assam Rifles to be a Magistrate of the first class for the purpose of enquiring into or trying any offence committed by a Rifleman and punishable under the Assam Rifles Act or under any other law for the time being in force. On the face of it the first respondent had, therefore, the power to try Chakra Bahadur Thapa and to convict him and sentence him. Thus the detention as a result of the sentence passed against him cannot be said to be illegal or improper.

10. It was however argued for the petitioner that the appointment of the Commandant of the 6th Battalion Assam Rifles under Annexure D was not in accordance with the provisions of the Criminal Procedure Code and hence the Commandant had no jurisdiction to hold such a trial and that therefore the conviction and sentence as a result of any such trial were completely void and hence the detention was illegal. I also felt a doubt on this point and so the case was posted for further arguments on this question. But I was satisfied after such arguments that the jurisdiction of the Commandant cannot be questioned.

11. It was first urged that u/s 12 (1), the appointment of a Magistrate has to be by name and that Lt. Col. Zamir Ahmed, who was the Commandant and who held the trial was not appointed by name. But this argument did not have much force in view of the provision in Section, 39 Cr. P. C. to the effect that in conferring power under the Criminal Procedure Code, the State Government may by order empower persons specially by name or in virtue of their office. Thus a person holding another official post can be conferred the power of a Magistrate in virtue of his office, with the result that the successor in the said office also becomes invested with the said power. Thus a Subordinate Judge or a Munsiff in virtue of their office can be invested with the power of a Magistrate. So also, the Commandant of the 6th Battalion Assam Rifles.

12. But it was stressed for the petitioner that the conferment of powers, referred to in Section 39, would apply to such conferment as authorised u/s 37 Cr. P. C. after the appointment u/s 12 Cr. P. C. and not to the appointment itself u/s 12 (1) Cr. P. C. It was argued that a person has to be first appointed as a Magistrate u/s 12 (1) Cr. P. C. and that, subsequent to such appointment additional powers can be conferred on him u/s 37 Cr. P. C. and that such conferment of additional powers need not be done by name but in virtue of the office held by him. There is nothing in Section 39 Cr. P. C., which would show that the conferring of powers u/s 39 is limited to the conferring of additional powers u/s 37 Cr. P. C. Section 39 mentions conferring of powers under the Criminal Procedure Code and not u/s 37 Cr. P. C. alone. Section 36 Cr. P. C. shows that when a person is appointed as a Magistrate u/s 10, 12 or 13 he shall have powers conferred upon him as specified in the third schedule of the Criminal Procedure Code. Thus the very appointment confers certain powers on him. I may also in this connection refer to the decision State of The State of Madras Vs. T.V. Parvathi Ammal and Others, Mad in which it has been held that the word "appoint" in Section 12, Criminal Procedure Code has reference only to conferment of Magisterial powers and that such an

appointment does not imply that the person so appointed as a Magistrate is appointed to a civil post or that he becomes a member of a civil service different from that which he was holding prior to the appointment and all that it means is that he can exercise the powers", which are specified in schedule III, Criminal Procedure Code.

13. The learned Government Advocate has also drawn my attention to a decision *Sujaniram Daryaosingh v. Lai Shyamshah* AIR 1956 Nag 67, In that case the Provincial Government passed an order in exercise of the powers conferred by Section 12, read with Section 39 Cr. P. C. that all Subordinate Judges shall stand invested with the powers of Magistrate of a first class. This was not an appointment by name but in virtue of the office. Shri Kashiram as Sub-judge and civil Judge thus became invested with the powers of a Magistrate, first class. It was held that in spite of the subsequent appointment of Shri Kashiram as an Additional Sessions Judge, he still continued to be a Magistrate of the first class, as his powers as a Magistrate were not withdrawn by the Stats Government u/s 41 of the Code. It was, however, pointed out for the petitioner that in the said case, the State Government has specifically acted u/s 39 Cr. P. C, also, but that in the present case, Section 39 Cr. P. C. has not been mentioned. Of course, it would have been better if Section 39 Cr. P. C. had also been mentioned in the order of appointment. But we are concerned with the question whether the appointment order Annexure D is illegal and did not confer the powers of a Magistrate on the Commandant. In view of the fact that Section 39 permits conferring of powers in virtue of the office, I am not prepared to hold that Annexure D is invalid.

14. The second contention raised for the petitioner was that Annexure D shows that the Commandant of the Assam Rifles has been appointed Magistrate for a special purpose namely, for the purpose of enquiring into or trying offences committed by a Rifleman under the Assam Rifles Act or under any other law for the time being in force, that this amounted to appointing him with respect of a particular class of cases namely, those involving Rifleman, that it has therefore to be taken that the Commandant was appointed as a special

Magistrate u/s 14 Cr, P. C. even though Section 12 (1) Cr. P. C. is mentioned in the order and that u/s 14 Cr. P. C. the Commandant was not a person qualified for appointment as a special Magistrate. It was therefore stated that Annexure D was beyond the powers of the Chief Commissioner.

It is true that Annexure D shows that the Commandant was appointed specially to enquire into or try a particular class or cases involving Rifleman. It is also seen from Section 12 (1) Cr. P. C. that the State Government cannot appoint Magistrates under the said section restricting their powers to particular class or classes of cases. A Magistrate appointed u/s 12 (1) will have conferred upon him by section 36 Cr. P. C. all the powers mentioned in schedule III in respect of all classes of cases and the State Government has no authority to restrict the powers. The only restriction which can be placed u/s 12(1) is by defining the

local areas within which the persons appointed may exercise all or any of the powers with which they may be respectively invested under the Criminal Procedure Code. It is also seen that u/s 14 Cr. P. C. in appointing persons as special Magistrates, the State Government can restrict their powers in respect to particular cases or to a particular class or classes of cases and their term of office can also be fixed unlike in Section 12 (1) Cr. P. C.

The question, therefore arises whether in restricting the powers of the Commandant to a particular class of cases, the State Government must be deemed to have acted u/s 14 Cr. P. C. instead of u/s 12 (1). If the appointment is u/s 14 Cr. P. C. then the Commandant must have the necessary qualification and the order will be invalid because under the said section only a person who holds or has held any judicial post under the Union or State or possesses such other qualifications as may in consultation with the High Court be specified in the said behalf by the State Government by notification in the official gazette, can be appointed as special Magistrate. The Commandant did not hold or has not held any judicial post and no qualifications in consultation with this Court have been specified in the case of other persons and hence he cannot be appointed as special Magistrate.

15. But it is clear from Annexure D itself that he has not been appointed as a special Magistrate and that the State Government has acted u/s 12 (1) Cr. P. C. Under the circumstances, even though the Chief Commissioner has restricted the powers of the Commandant, while appointing him u/s 12 (1), it is not the appointment which will be bad but it is the restriction imposed in making the appointment which will be cut down. Thus all that can be said is that the portion of the order in Annexure D namely for the purpose of enquiring into or trying any offence committed by a Rifleman and punish- able under the Assam Rifles Act or under any other law for the time being in force" has to be held as against law and the Commandant has to be held to have been appointed as a Magistrate of the first class having all the powers of a Magistrate, first class under schedule III of the Criminal Procedure Code. When the Chief Commissioner has acted u/s 12 (1) Cr. P. C. this Court cannot say that he must be deemed to have acted u/s 14.

16. Hence I am unable to hold that the Commandant is not a Magistrate of the first class and that he had no power to try and convict Chakra Bahadur Thapa. Thus the trial conviction and sentence must be held to have been within the jurisdiction of the 1st respondent, and hence the detention must also be held to be proper.

17. What was next argued for the petitioner was that even if the first respondent had the jurisdiction as a first class Magistrate to try the Rifleman the entire proceedings from beginning to end have been held in a most irregular fashion and that the conviction and the sentence after such a trial were wrong and that the detention on the strength of the said sentence must be held to be illegal. I do not propose to go into any detail about the various irregularities pointed out, but I shall only notice them. It was said that the first respondent had not been

invested with the power u/s 190 Cr. P. C. to take cognizance of cases, and hence he cannot have taken cognizance of this case that Chakra Bahadur Thapa was arrested and detained in custody without being produced before any Magistrate, that he was denied assistance of any lawyer, that though the offence required warrant procedure, no such procedure was adopted, that without taking any evidence charge was straightway framed that the records of the case would show that even the depositions were not taken down as provided in the Criminal Procedure Code that the whole proceedings would show that the first respondent was taking the proceedings as a superior officer of the Rifleman and punishing him in that capacity and that the trial and conviction as a result of such a trial cannot be allowed to stand.

18. The short answer to this argument is that these are not matters which can be gone into in this Writ proceeding and will not be gone into in the exercise of this extraordinary jurisdiction. They are matters which should be agitated by the convicted person through the normal channel of appeal or revision under the Criminal Procedure Code. In a writ proceeding we proceed on admitted facts. The irregularities pointed out have not been accepted by the first respondent. All the records in the proceeding are not before me even though some of them have been filed by the respondents. This Court would require the entire records in the case which will show how the proceedings originated, how the Magistrate took cognizance and all other papers relating to the enquiry and trial. So I do not propose to go into these irregularities in the present proceeding. As it has been established that the first respondent had the jurisdiction to try and convict and sentence the Rifleman, the detention as a result of such sentence has to be upheld in this Writ proceeding and this application has to be dismissed. It is accordingly dismissed, but under the circumstances without costs.

19. But sufficient material has been brought out in the course of this proceeding which warrants an examination of the records in this case under the revisional jurisdiction of this Court. The fact that Chakra Bahadur Thapa did not file an appeal to the Sessions Judge has been brought to my notice. But the petitioner was under the impression and appears to have been advised that the punishment was under the Army Act and hence came forward with this Writ instead of filing appeal. Considering all the circumstances and the irregularities pointed out, it is necessary for this Court to examine the records with a view to find out the legality and correctness and propriety of the proceedings taken before the first respondent, as Magistrate. The Registrar will call for the entire records of the proceedings in this case from the first respondent and place them before me. Chakca Bahadur Thapa is on bail. The bail will continue on the same bonds till the disposal of the case after examination of the records.