

(2000) 12 CAL CK 0018
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction W.P. No. 13287 (W) of 1999

Sk. Allauddin

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 06-12-2000

Acts Referred:

Army Act, 1950 — Section 20, 20(3), 38, 39, 50
Constitution of India, 1950 — Article 226

Citation : (2001) 1 CALLT 514 : (2001) 90 FLR 134

Hon'ble Judges : Gorachand De, J

Bench : Single Bench

Advocate : Mr. N.C. Chaudhury and Mr. Faizul Islam, for the Appellant; Mr. Tapas Chatterjee and Mr. Lutfar Rahaman Molla, for the Respondent

Judgement

G.C. De, J.—In this case the petitioner has challenged the Order of Sentence dated 09.03.1998 passed by the Summary Court Martial imposing a rigorous imprisonment for two months and also dismissal from service.

2. The petitioner, a Sepoy (No. 2992741) of D/Company, 15th Rajput Battalion was charge-sheeted on 4.3.98. The charge-sheet is reproduced below ;-

CHARGE SHEET

The accused No. 2992741 X Sep S K Allauddin. 15th Battalion The Rajput Regiment is charged with :-

First Charge WITHOUT SUFFICIENT CAUSE OVERSTAYING LEAVE Army Act GRANTED TO HIM Section 39(b) In that he.

At Calcutta, having been granted leave of absence from 09 Dec 97 to 22 Dec 97 to proceed to his home, failed without sufficient cause, to rejoin unit on 23 Dec 97 on expiry of the said leave, till he rejoined unit on 09 Feb 98 at 12 00 hours at his own accord.

Second Charge DESERTING THE SERVICE Army Act Section 38(1) in that he, At

Calcutta, on 10 Feb 98 absented himself from 15th Battalion The Rajput Regiment, until apprehended by the

Unit personnel at 13 30 hours on 19 Feb 98.

Place : Calcutta

Date : 04 Mar 98

(A.K. Bardalai) Colonel Commanding Officer 15th Battalion The Rajput Regiment.

3. The petitioner pleaded guilty to the charges levelled against him and accordingly he was found guilty after accepting the said plea of guilt. The Summary Court Martial on 9.3.98 Imposed sentences (a) Rigorous Imprisonment for two months and (b) to be dismissed from service. The sentence was communicated by A.K. Bardalai, Colonel. Commanding Officer. 15th Battalion of the Rajput Regiment. Being aggrieved by the said sentence, the petitioner filed an appeal under the Army Act 1950 to the General Officer, Commanding-in-Chief (GOC-In-C) Eastern Command and after due consideration It was rejected by an Order dated 14.8.98. Finding no other alternative the petitioner moved this Court under Article 226 of the Constitution of India praying for setting aside the sentence and for a mandate upon the respondents for his reinstatement.

4. The respondents appeared and filed an Affidavit-in-Opposition denying the material allegations made In the writ petition and it was confirmed that the sentence was rightly passed.

5. In course of hearing a question was raised as to whether the present application is maintainable specially when the petitioner availed of the alternative remedy under the Army Act 1950. The learned counsel for the petitioner placing reliance on a Supreme Court decision reported in A.R. Antulay Vs. R.S. Nayak and Another, argued that as the sentence itself was without jurisdiction, the finding of the Army Authority and the imposed sentence thereon is a nullity upto the appellate stage and hence, this Court is competent to interfere In the matter. The second argument of the learned counsel is that the sentence being passed by a Colonel it cannot be acted upon inasmuch as a Colonel has no authority u/s 20 of the Army Act to issue any order of dismissal.

6. In support of the first submission the learned counsel tried to argue that u/s 38 of the Act a sentence of imprisonment or such less punishment as is in this Act mentioned, could be passed for desertion; and for absence without leave also a sentence of imprisonment or such less punishment could be passed u/s 39 of the Act. So it was argued that as the charge was u/s 28 and section 39, the petitioner could not be sentenced for imprisonment as well as dismissal from service. As regards the second point raised, the learned counsel pointed out the provision of section 20(3) of the Act to Justify his argument that a Colonel being an officer not having power not less than a brigade is not competent to pass the order of dismissal.

7. The learned counsel for the respondents, however, placing reliance on the provisions of section 71 of the Act argued that the "dismissal in service" as given in section 71 is a lesser punishment in comparison to imprisonment and hence, it can be inflicted u/s 38 and also u/s 39 of the Act. He further argued that a Court Martial may award in addition to, or without any one other punishment, the punishment specified in clause (d) or clause (e) of section 71 under the provisions of section 73 of the Act. Accordingly the learned counsel contended that the sentence of imprisonment and the lesser punishment, being dismissal from the service, was within the competence of the Court Martial u/s 73. Admittedly, the sentence was passed by the Summary Court Martial which is one of the kinds of Court Martial Indicated u/s 108 of the Act.

8. The learned counsel, in this connection, placed reliance on a Division Bench judgment of the Allahabad High Court reported in *Ranjit Singh Chaurasia Vs. The Union of India (UOI) and Others*, In support of the contention that a Summary Court Martial had the Jurisdiction u/s 73 to inflict both the punishments. For meeting the second argument, the learned counsel argued that the order of imprisonment and dismissal was passed by the Officer Commanding and it was duly promulgated in accordance with Army Rule 131. It was also clarified that the proceedings of the Summary Court Martial were duly countersigned by the General Officer Commanding. Headquarter. Bengal Area. So the conclusion was that the order of dismissal having been passed by the Court Martial the validity of the sentence cannot be challenged under the provisions of section 20. It was further argued that in this case the order of dismissal was passed by an equivalent Commander within the meaning of section 20(3) of the Act.

9. Admittedly, the petitioner was charged under sections 38 and 39 of the Act and after accepting his plea of guilt, he was sentenced to suffer Rigorous Imprisonment for two months and also was dismissed from service. The finding of guilt was not questioned or reopened before this Court but the entire argument indicate herein above centres round the question of awarding dual sentence. But after a careful scrutiny of the provision of section 71 read with section 73 of the Act, it is sufficiently clear that the Court Martial has ample power of combination of punishment. It is rightly argued that the dismissal from service is a lesser punishment than imprisonment with the framework of section 71 of the Army Act. If the petitioner was punished by any other authority other than the Court Martial, the question of double Jeopardy o(SIC) punishment beyond the scope of section 38 of section 39 could have been u."sed. But In this case the punishment was inflicted by the Court Martial and as such, the punishment inflicted In this case was within its competence u/s 73 of Act. In the Division Bench Judgment of the Allahabad High Court (supra) after examining the different provisions of the Army Act. it was interpreted that the Court Martial has the power to combine more than one punishment u/s 73. In that case, the charge was u/s 40(c) of the Act, that is for using insubordinate language to Superior Officer and a sentence of imprisonment for three months as well as dismissal from service was passed, and it was upheld to be a valid sentence. So

in tune with the views expressed by Their Lordships in the above cited decision and keeping in view the provisions of sections 71 and 73 of the Act, it is held that the Summary Court Martial was competent to pass both the sentences and hence, the sentence passed against the petitioner is not without jurisdiction and is not a nullity. That being the position the present writ petition is not maintainable and the principle laid down in Antulay's case (supra) is not applicable in this case.

10. As regards power of dismissal it is to be noted that u/s 73 read with section 71 of the Act the Court Martial has the power to pass an order of dismissal. The officers mentioned in section 20 of the Act are competent to pass such order of dismissal or removal from service. When an order of dismissal is passed by a Court Martial! it is required to be communicated to the concerned person and for this reason, any prescribed officer named in the Rules framed under the Act is competent to issue such order of dismissal. It cannot be said that the Colonel when performing the functions of a Commanding Officer is not a prescribed officer or that he has no authority to sign an order of dismissal. So the ground taken on this score is not tenable in law and I find no reason to interfere with the sentence inflicted by the Court Martial and communicated by the Colonel being the Commander of the 15th Battalion of the Rajput Regiment. Both the grounds taken by the petitioner are not tenable in law.

11. Accordingly sitting in writ jurisdiction, I do not find any reason to interfere with the sentences, inflicted upon the petitioner. The writ petition is accordingly rejected. Parties do bear their own cost of this hearing.

12. Xerox certified copy, if applied for, may be supplied with promptitude on payment of requisite costs.

13. Petition rejected