
(2006) 01 P&H CK 0054
In the Punjab And Haryana At Chandigarh
Case No : Criminal W.P. No. 82 of 2000

Surinder Singh, Ex.Sepoy

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 13-01-2006

Acts Referred:

Citation : (2006) 2 RCR(Criminal) 352 : (2006) 2 SCT 128 : (2006) 4 SLR 386

Hon'ble Judges : Surya Kant, J

Advocate : Shri B.S. Taunque, Advocate. Shri Gurpreet Singh, Advocate.,
Advocates for appearing Parties

Judgement

Surya Kant, J.

1. The petitioner, an exsepoy of 7th Battalion, Sikh Regiment, has invoked the writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India for quashing of the findings of the General Court Martial, Annexure P5, the order of sentence dated 29th January, 1998, Annexure P4, as also the order dated 15th March, 1999, Annexure P7, passed by the Chief of the Army Staff. A writ in the nature of mandamus has also been sought to direct the respondents to reinstate the petitioner in service with all consequential benefits.

2. It may be mentioned here that vide order, dated 29th January, 1998 Annexure P4, the petitioner, after having been held guilty of committing rape while he was on duty in a remote and isolated island area of Assam State, has been sentenced to undergo rigorous imprisonment for 10 years and has also been ordered to be dismissed from service. In terms of the order aforementioned, the petitioner is presently serving the sentence of imprisonment.

3. The petitioner was enrolled in the Indian Army on 29th December, 1992. While serving in the 7th Battalion of the Sikh Regiment, the petitioner was detailed to proceed on a patrol duty under Naib Subedar Amrik Singh of Inland Water Transport Company on 8th May, 1997. The patrolling party consisted of one JCO, two NCOs and 5 others including 3 CRPF personnel as well as the petitioner. The

patrolling party left at about 8.30 AM for Koila Bari in a 10 men boat and on its way it reached a small island in river Brahmaputra which was inhabited by a few tribals. Having suspected that the tribal habitation was being used as militants' hideout, the patrolling party was divided into two groups in order to carry out the search operations. While one group was headed by Naib Subedar Amrik Singh, the petitioner along with his coaccused formed part of the other group. It was alleged that the petitioner and his coaccused entered into the hut of a young lady who was all alone along with her child aged about 45 years and both of them by pushing her on the ground, forcibly committed rape one by one. The aforesaid allegation led to issuance of a chargesheet, dated 12th January, 1998, Annexure P1, to the petitioner containing following charges :

"First Charge Committing a civil offence, that is to say, gang rape, contrary to Section 376(2)(G) Read with Section 34 of the Indian Penal Code.

In that they together, while on active service, at village Machaki Chapari Moila Ali Gaon in District Demaji, on 08 May, 1997, committed gang rape on Smt. Tarulatta Pegu wife of Shri Jatin Pegu, a civilian woman. (Army Act Section 69 read with Section 34 of the Indian Penal Code (Against both the accused)

Second Charge Disobeying a lawful command given by his superior officer.

In that he, while on active service, at the place and date mentioned in the first charge, when ordered by JC347882W Naib Subedar Amrik Singh of 236 Inland Water Transport Company to carry out search of the house in presence of male members of the houses, did not do so. (Army Act Section 41(2) (Against accused No. 1 only)."

4. Since there was no eye witness to the occurrence except the victim Tarulata Pegu, but having found that her testimony was trustworthy and the allegations were also substantiated by the depositions made by other witnesses including those who were members of the patrol party and also having noticed that the medicolegal report submitted by the doctor (PW3) was inconclusive as she could not ascertain whether or not the victim (PW2) was subjected to rape recently, the Summary General Court Martial on consideration of the circumstantial evidence, held the petitioner along with his coaccused guilty and sentenced them for committing rape of PW2 while they were on active service and were engaged in search operations in the execution of their military duty. The petitioner was also held guilty and sentenced for the second charge, as according to the Summary General Court Martial, he was required to search the house only in the presence of the male members of the house.

5. The petitioner's petition under Section 164(2) of the Army Act was turned down by the Chief of the Army Staff vide order dated 15th March, 1999 (Annexure P7).

6. I have heard Shri B.S. Taunque, learned counsel for the petitioner, Shri Gurpreet Singh, learned Standing Counsel for the Union of India on behalf of the

respondents and perused the proceedings of the GCM which the learned counsel representing the respondents has produced.

7. At the outset, there is a serious objection raised on behalf of the respondents in relation to the territorial jurisdiction of this Court. Shri Gurpreet Singh, learned standing counsel for the Union of India, vehemently contended that the alleged offence was committed by the petitioner while he was posted in Assam, the chargesheet (Annexure P1) was also issued in Assam and the petitioner was tried by Summary General Court Martial in the State of Assam, the Convening as well as the Confirming Authorities are both located in the State of Assam, and, thus, "no cause of action" or a part thereof accrued within the territorial jurisdiction of this Court. It is also contended that merely because the petitioner had been kept in custody in the Central Jail at Gurdaspur to undergo the sentence or he sent the postconfirmation petition under Section 164(2) of the Army Act from Gurdaspur Jail to the Chief of Army Staff, who is stationed at New Delhi, and/or mere communication of the rejection order of the said petition to the petitioner in the said Jail, though might have given to him the "right to action" but not the "cause of action" which could clothe this Court with territorial jurisdiction to entertain this petition. On the other hand, Shri Taunque, learned counsel for the petitioner, contended that with the communication of the order to the petitioner, rejecting this petition under Section 164(2) of the Army Act, in Gurdaspur Jail (Punjab), a part of the "cause of action" has accrued to the petitioner within the territorial jurisdiction of this Court.

8. In *Dinesh Chander Gahtori v. Chief of the Army Staff and another*, (2001)9 SCC 525, a writ petition was filed by the appellant in the year 1992 challenging the proceedings of a Summary Court Martial. The writ petition was, however, dismissed by the Allahabad High Court in the year 1999 on the ground that "in view of the fact that the Summary Court Martial proceedings were conducted in the State of Punjab and orders were also passed in Punjab by the Western Comman...., the said High Court had got no territorial jurisdiction to entertain the petition." On an appeal, the aforesaid order of the Allahabad High Court was set aside by the Apex Court observing that :

"4. The writ petition was filed in 1992. The impugned order was passed in 1999. This is a fact that the High Court should have taken into consideration. More importantly, it should have taken into consideration the fact that the Chief of Army Staff may be sued anywhere in the country. Placing reliance only on the cause of action, as the High Court did, was not justified."

9. In *Vijaykumar B. Jiragyal v. Chief of the Army Staff, Secunderabad and others*, 2005(3) RCR(Crl.) 158 : 2005(3) SCT 118 (Karnataka), a learned Single Judge of Karnataka High Court, relying upon the above reproduced judgment of the Apex Court in *Dinesh Chander Gahtori's* case (supra), turned down the objection of lack of territorial jurisdiction in relation to a petition in which General Court Martial proceedings held at Secunderabad (Andhra Pradesh) were challenged before him.

10. In *National Textile Copn. Ltd. v. Haribox Swalram*, (2004)9 SCC 786, their Lordships of the Supreme Court did held that, "the mere fact that the writ petitioner carries on business at Calcutta or that the reply to the correspondence made by it was received at Calcutta, is not an integral part of the cause of action and, therefore, the Calcutta High Court had no jurisdiction to entertain the writ petition". (emphasis applied)

11. In *Kusum Ingots & Alloys Ltd. v. Union of India and another*, 2004(2) RCR(Civil) 420 : 2004(6) SCC 254, the Apex Court has held that even if a small fraction of the "cause of action" accrues within its jurisdiction, the High Court will have jurisdiction in the matter though in an appropriate case it may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. It has also been held that to assume jurisdiction and to entertain writ petition, the High Court would find out as to whether or not the integral facts pleaded in support of the "cause of action" do constitute a cause so as to empower it to decide the dispute and that the entire or a part of such cause arose within its jurisdiction. Their Lordships further observed that :

"27. When an order, however, is passed by a Court or tribunal or a executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable at both the places. In other words, as order of the appellate authority constitutes a part of cause of action, a writ petition would be maintained in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of the original authority merges with that of the appellate authority." (emphasis applied)

12. In *Union of India and others v. Adani Exports Ltd. and another*, AIR 2002 SC 126, the Apex Court observed that the High Court must be satisfied from the entire facts pleaded in support of the "cause of action" that these facts do constitute a cause so as to empower the Court to decide a dispute which is at least in part, arising within its jurisdiction. Each and every fact pleaded by the party does not ipsofacto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case.

13. In *Rajendra Kumar Mishra v. Union of India and others*, 2005 Lab. I.C. 2229, a Full Bench of the Allahabad High Court, in relation to the observations made by the Apex Court in *Dinesh Chander Gahtori's* case (supra), held as follows :

"10. In our opinion the observation in the aforesaid decision, "The Chief of Army Staff may be sued in any High Court in the country" cannot be construed to mean that the Supreme Court has laid down any absolute proposition that it is open to the petitioner to file a writ petition in any High Court in India. Such an

absolute proposition as canvassed by the learned counsel for the petitioner may lead to conflicting decisions because different petitions can be filed in different High Courts by coaccused in the same case and conflicting decisions can be given."

14. In *Baldev Singh v. Union of India through Secretary, Ministry of Defence*, (19971) PLR 655, a Division Bench of this Court, after taking notice of the fact that the Summary Court Martial proceedings were held and concluded at Pune and merely because the petitioner came to be posted at Zirakpur (Punjab), this Court had no territorial jurisdiction to entertain the writ petition challenging the Summary Court proceedings.

15. In *Sukhdarshan Singh v. Union of India*, 2003(6) SLR 713, a learned Single Judge of this Court held that, "mere receipt of intimation of rejection of appeal by the Chief of the Army Staff by the petitioner at his native village does not constitute a cause of action but it only gives rise to right of action".

16. So far as the receipt of communication regarding rejection of the Post Confirmation Petition by the petitioner while he was lodged in Gurdaspur Jail (Punjab) is concerned, in my view, mere communication of the order does not give rise to a part of "cause of action" though it might have given the "right to action". Even the expanded meaning given to the concept of "cause of action" by the Apex Court in *Kusum Ingots & Alloys Ltd.*'s case (supra) does not come to the petitioner's rescue as only the High Court within whose territorial jurisdiction the Authority which decided his statutory representation, i.e., the Post Confirmation Petition is located, shall have the jurisdiction to entertain the writ petition. The communication does show that the Post Confirmation Petition moved by the petitioner was decided at Delhi by the Union Govt.

17. Seen from any angle, it is apparent that in so far as the petitioner's challenge to the General Court Martial proceedings held and concluded in Assam and/or the adjudication of his Post Confirmation Petition is concerned, "no cause of action" or part thereof arose within the territorial jurisdiction of this Court, therefore, this Court lacks territorial jurisdiction to entertain the present petition.

18. It cannot, however, be overlooked that the petitioner was sentenced by the Summary General Court Martial in the year 1998. After rejection of his post confirmation petition, he approached this Court in January, 2000. His petition has, thus, remained pending for the last about six years. As noticed by this Court in its order dated 16th September, 2003, the petitioner had already undergone six years and eight months of imprisonment by that time. By now he is near completion of nine years of imprisonment out of the total 10 years rigorous imprisonment awarded to him. In these peculiar and compelling circumstances, I proceed to examine the petitioner's case on merits as well.

19. Learned counsel for the petitioner has vehemently argued that the petitioner has been roped in a totally false and fabricated case. He has highlighted various facts and circumstances in order to cause dent in the prosecution case, as,

according to him : (i) the petitioner was wearing combat dress which was comprising of web anklets, two pouches attached to the belt in front below the chest containing 4 magazines of rifle 7.62 mm each containing 20 rounds and two hand grenades. He was also carrying a small bag of web material attached with the belt, worn on left side which contained his personal items of clothing weighing about 56 kilograms. On the right side a water bottle was attached to the belt at hip level and at the back a big bag weighing about 25 kgs. containing spare uniform, clothing items, blankets etc. was attached with the belt. In addition the petitioner was armed with a 7.62 mm rifle loaded with two rounds and, thus the dress worn by the petitioner itself was a serious hindrance and obstruction in indulging in a sexual act, especially of rape; (ii) with the type of dress and carrying materials, referred to above, if the petitioner still indulged in commission of rape, it would have caused bodily injuries to the prosecutrix but none was found during the course of her medicolegal examination; (iii) the floor of the hut where the alleged occurrence took place was of bamboo, a rough surface which ought to have caused some physical injuries on the back parts of the prosecutrix but no such injury had been noticed during the course of medicolegal examination; (iv) as per the requirements of search operations, the CRPF personnel were to search the house and the army personnel were to guard the same, however, in the case in hand even if the reverse is assumed to have happened, yet the CRPF personnel would have immediately entered the house upon hearing the hue and cry allegedly made by the prosecutrix; (v) the testimony of the prosecutrix is not worth of credit. As per her deposition before the Summary General Court Martial, she had shown her petticoat smeared with semen and her own blood to the CRPF Havildar, local women, etc. however, neither such a material piece of evidence has been produced before the Summary General Court Martial nor the said Court has appreciated the fact that if the blood was present, then the prosecutrix must have suffered some injury either on her private part or other parts of her body but in the medicolegal report no such injury was detected; (vi) as per the deposition of the medical officer who was got declared as an "expert witness" under Section 45 of the Evidence Act, no injury on private parts of the prosecutrix was detected, no marks of violence on other parts of her body were found, vaginal swab was taken and examined but it could not be ascertained whether she was subjected to rape or not; (vii) the Summary General Court Martial has not considered another material piece of evidence, namely, the FIR registered by the police of Police Post Jonai, investigation carried out by the SHO and his report submitted after visiting the village alongwith the Executive Magistrate on 10th May, 1997, according to which the prosecutrix was not raped; (viii) even as per the prosecution witnesses, the petitioner spent 45 minutes inside the house of the prosecutrix and within such a short span, it could not have been possible for him and his coaccused to commit rape and come outside; (ix) Rule 23(1)(2) of the Army Rules, 1954 has not been complied with; (x) Rule 184(1) of the Army Rules in terms whereof a copy of the proceedings of Court of inquiry was required to be provided to the petitioner prior to the recording of evidence by Summary General Court Martial, was also

not complied with, and, thus, the proceedings conducted by the Summary General Court Martial are vitiated for non compliance of mandatory provisions of the rules.

20. So far as the last two contentions, namely, noncompliance of Rule 23 and/or 184 of the Army Rules is concerned, it is not disputed on behalf of the petitioner that the copy of chargesheet and summary of evidence in terms of Army Rules 33(7) and 34(1)(2) were provided to him well in advance to prepare his case. He was also given an opportunity to cross-examine the witnesses. No material foundation is laid to show as to how Rule 23 of the Army Rules has been violated and/or any prejudice has been caused to the petitioner.

21. Rule 184 of the Army Rules, reads as follows :

"184. Right of certain persons to copies of statements and documents : (1) any person subject to the Act who is tried by a Courtmartial shall be entitled to copies of such statements and documents contained in the proceedings of a Court of Inquiry, as are relevant to his prosecution or defence at his trial.

(2) Any person subject to the Act whose character or military reputation is affected by the evidence before a Court of Inquiry shall be entitled to copies of such statements and documents as have a bearing on his character or military reputation as aforesaid, unless the Chief of the Army staff for reasons recorded by him in writing, orders otherwise."

22. Apparently, the rule does not contemplate that supply of a copy of the Report of Inquiry to an accused is mandatory, especially when the proceedings of the Court of Inquiry are in the nature of preliminary inquiry. However, if an accused requires the proceedings of a Court of inquiry, including any report made by the said Court, Rule 184 enables him to seek copies on payment of the prescribed fee. It is not the case of the petitioner that he applied for the copies of the proceedings of the Court of Inquiry and was denied the same.

23. On the other hand, the respondents have come up with a specific stand that the petitioner was represented by a defence counsel who was well conversant with the legal provisions and "should have requested" for the copies of proceedings of Court of Enquiry at the "time of Court martial". It, thus, appears that the respondents never denied the petitioner copies of the proceedings of the Court of Inquiry in terms of Rule 184 of the Army Rules.

24. Coming to the other contentions, it may be seen that the same are primarily founded upon reappreciation and reappraisal of the evidence recorded by the Summary General Court Martial. The petitioner's endeavour is that this Court, while exercising its writ jurisdiction, should reappraise the entire evidence and extend the benefit of doubt to him after holding that the evidence on record is wholly insufficient to hold the petitioner guilty of charges levelled against him.

25. In *Union of India v. Major A. Hussain*, 1988(1) RCR(CrL.) 300, while expanding the scope of judicial review under Article 226 of the Constitution of

India in relation to the proceedings conducted by the Courtmartial, the Apex Court held that though such proceedings are subject to judicial review by the High Court, however, the Courtmartial is not subject to the superintendence of the High Court under Article 227 of the Constitution. Their Lordships held that if a Courtmartial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court must stay its hands. Defining the yard sticks for interference under Article 226 of the Constitution, it has been further held that the proceedings of a Courtmartial are not to be compared with the proceedings in a Criminal Court under the Code of Criminal Procedure.

26. In *Union of India v. Himmat Singh Chahar*, 1992(2 RCR(Crl.) 784, the Apex Court held that notwithstanding the finality attached to the orders of the Courtmartial proceedings, the High Court is entitled to exercise its power of judicial review under Article 226 but that would be "for a limited purpose of finding out whether there has been infraction of any mandatory provision of the Act prescribing the procedure which has caused gross miscarriage of justice or finding out whether there has been violation of the principles of natural justice which vitiates the entire proceedings.....". Their Lordships observed that "the said power of judicial review cannot be the power of an appellate authority permitting the High Court to reappraise the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the competent authority in Courtmartial proceedings."

27. In *Union of India and others v. R.K. Sharma*, (2001)9 SCC 592, the Supreme Court while considering the scope of interference under Article 226/227 and/or Article 31 of the Constitution in relation to the quantum of punishment, held that the scope of judicial review does not permit to interfere with the punishment merely because it is disproportionately harsh except in *ex facie* cases of perversity or irrationality.

28. In the backdrop of the these guiding principles, it would be apposite to refer that the Summary General Martial, on charge No. 1, i.e. committal of gang rape upon a tribal lady by the petitioner and his coaccused, concluded as follows :

"(a) Although there are no eye witnesses to the incident of gang rape except the victim woman, the Court found no reasons to disbelieve the testimony of PW2 who is a tribal lady residing in an isolated Chapori (Island). PW2 had clearly brought out the aspect of gang rape committed on her by accused No. 1 and accused Number 2.

(b) Testimony of PW2 stands amply corroborated by other prosecution witnesses as follows :

(i) At the time of the incident PW1, 7 and 8 heard a child crying whereas PW5 heard scream of PW2 after she had seen the accused persons entering into the house of PW2.

(ii) After the incident PWs 1, 7 and 8 saw accused persons coming out the house of PW2, PW7 saw PW2 going hurriedly behind her house and when he went near her he found her terrified.

(iii) As regards time spent by accused persons in the house of PW2, the Court believe the time span deposed by PWs 7 and 8 which ranges between 5 to 10 minutes.

(iv) Conduct of PW2 immediately after the incident is noteworthy because at the first available opportunity she complained to PW7 and then to PW5. When PW7 saw PW2 she was wearing only her petticoat and blouse and was not wearing her mekhala and her blouse was open exposing her breasts.

(c) Medical examination report submitted by PW3 is inconclusive because PW3 had opined that she could not ascertain whether or not PW2 was subjected to rape recently. It is a fact that after the incident PW2 washed the clothes worn by her at the time of incident and took bath. PW3 had brought out that in the case of a married woman who is mother of a child, tenderness of vagina is ruled out after 24 hours of the occurrence. Absence of injury on the person of PW2 is indicative of the fact that she did not offer much resistance due to the fear of gun, it does not, however, rule out the factum of gang rape.

(d) The Court do not find any plausible motive on the part of the victim woman or other prosecution witnesses to falsely implicate the accused persons, at the cost of reputation of PW2 and burden of social stigma attached to the victim of the offence of gang rape.

(e) Accused number 1 along with accused number 2 committed the offence of gang rape on PW2 while they were on active service and were engaged in search operations in the execution of their military duty. In view of the foregoing the Court found accused Number 1 guilty of the first charge.

29. On a bare and plain reading of the findings reproduced above, the same can neither be termed as perverse nor absurd. In such like case where the occurrence has been possibly witnessed by none, the reliance placed upon circumstantial evidence by the General Court Martial is fully justified more so when no motive, whatsoever, is attributable to the victim woman. Thus, I do not find any scope to tinker with the above reproduced finding of fact.

Consequently, on merits also, no case for interference is made out.

Dismissed.