
(1995) 12 DEL CK 0003

In the Delhi High Court

Case No : Regular Appeal No. 7853 of 1995 and Civil Writ Appeal No. 2231 of 1995

Taj Mohamad Sheikh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Army Act, 1950 — Section 130

Citation : (1996) 1 AD 117 : (1996) 61 DLT 197 : (1996) 36 DRJ 268

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : V.S. Subramaniam, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) This is an application seeking review of the order dated 30.11.95 passed in Cwp No.2231/95 whereby the writ petition Filed by the petitioner was directed to be dismissed on the ground of availability of an efficacious alternate remedy by preferring a petition u/s 164 of the Army Act.

(2) Vide para 19 of the order, we have held that jurisdiction of the High Court to entertain writ petition in an appropriate case without insisting on the Filing and disposal of pre-confirmation/post- confirmation is not taken away such as where there is a patent lack of jurisdiction in constitution of a court martial or any proceeding thereto. It is submitted by learned counsel for the review-applicant that in the case at hand there has been a breach of Section 130 of the Army Act which strikes at the very root of the Constitution of the court martial and hence the present one is a case where the court should have entertained the writ petition for adjudication on merits without driving the petitioner to the necessity of Filing a petition u/s 164 of the Army Act.

2.1Developing the contention so raised, the learned counsel for the petitioner has submitted that u/s 129 of the Act, a court martial cannot proceed unless

attended by a judge-advocate. Under Rule 102 of Army Rules, 1954 an officer who is disqualified for sitting on a court martial shall be disqualified for acting as a judge-advocate at the court martial. Rule 39 providing for ineligibility and disqualification of officers for court martial, disqualifies vide sub-Rule 2 Clause (e) an officer having "a personal interest in the case" for serving on a general or district court martial. The same disqualification applies to a judge-advocate. In the case at hand the judge-advocate was having. "a personal interest in the case". His attendance at the court martial was objected to by the accused. The objection was over ruled by the court-martial. The judge-advocate participated in the decision and hence the proceedings of the court martial are rendered without jurisdiction. In So far as the decision on the objection raised by the accused imputing personal interest in the case on the part of the judge-advocate is concerned, the judge-advocate should have instantaneously withdrawn himself from the proceedings and should not have participated in hearing and decision thereon. This is contemplated by sub-section (2) of Section 130 of the Act, which provides - if the accused objects to any such officer, his objection and also the reply-thereto of the officer objected to shall be heard and recorded and the remaining officers of the court shall in the absence of the challenged officer decide on the objection.

22Reference was also made to Rule 105 (8) which provides :- "(8) In fulfilling his duties the judge-advocate must be careful to maintain an entirely impartial position."

2.3In support of the contention so raised, our attention was invited to document Annexure-XI (at page 49 of the paper book). On 17.9.95 the defense counsel had submitted that on 10.5.95, the defense had raised two vital points of law, but the judge-advocate did not make a direction thereon, which lapse on the part of the judge-advocate had not only caused grave prejudice to the defense, but it was also evident to the defense from the conduct of the Judge-Advocate that he was not free from bias and prejudice. It was further submitted that the judge-advocate instead of withdrawing from the case, gave his advise.

2.4After hearing on the objection, the court closed to consider the submission of the defense and observed that the judge-advocate has been extremely fair and impartial in his conduct and in rendering his advise to the Court from very outset. The submission of the defense was disallowed and the Court martial proceeded ahead.

(3) It is true that in the case of Ranjit Thakur Vs. Union of India (UOI) and Others, their Lordships of the Supreme Court have held that non-compliance with Section 130 of the Army Act is an infirmity going to the root of jurisdiction and vitiates the proceedings. But the facts of the present case are entirely different and do not attract the applicability of Ranjit Thakur's case. For the several reasons to be stated hereinafter, we Find ourselves unable to agree with the contention of learned counsel for the petitioner.

(4) Firstly, Section 130(2) refers to the objection raised by an accused to any officer Constituting the court martial. A court martial is constituted by its members as per Chapter-X of the Act. A judge-advocate u/s 129, though he attends the court martial but he does not become a member thereof. He is not an officer Constituting the court martial. Section 130 does not apply to judge-advocate.

4.1 Secondly, we do not think that a judge- advocate is bound to withdraw from the proceedings the minute an accused raises an objection to his attendance without a Finding by the court martial whether the objection to the attendance of the judge-advocate was sustainable or not. We do not Find any warrant for the proposition that the minute an objection is raised to the eligibility of a judge-advocate at mid-stream the proceedings, he must instantaneously withdraw from the proceedings and should observe abstention when the court martial takes a decision on his eligibility. Section 130(2) of the Army Act on which is based the contention refers only to an officer who is a member of a court martial. It does not refer to judge-advocate. Merely by parity of reasoning the applicability of the provision cannot be extended to a judge-advocate. Such an interpretation if accepted would create a dead-lock. The decision on the objection of the accused is also a step in proceeding of court martial. The judge- advocate will be removed only when the court martial has pronounced on his alleged ineligibility and that pronouncement would be outcome of such proceedings as were held in the absence of the judge-advocate which by itself would vitiate the decision as having been taken in the absence of the judge-advocate.

4.2 Thirdly, Rule.39(2)(e) speaks of an officer having "a personal interest in the case". It was not the objection of the accused that the judge-advocate was having any "personal interest in the case". All that was suggested was a bias on the part of the judge- advocate and that too because of the alleged failure on the part of the judge-advocate to give advise on two points considered by the defense to be vital. Alleging bias does not necessarily mean attributing personal interest of some one. This is apart from the fact that merely because the advise given by a judge- advocate does not suit the accused or is not in line with expectation of the accused it does not mean that it was an outcome of bias.

4.3 At the worst, what has been contended before us may amount to alleging an illegality or impropriety in court martial proceedings but we are positively of the opinion that the plea raised by the petitioner does not amount to alleging infirmity of jurisdiction in the Constitution or proceedings of the court martial.

(5) Learned counsel for the petitioner has placed heavy and implicit reliance on a Division Bench decision of Himachal Pradesh High Court in Sansar Chand Vs. Union of India & Ors. 1980(3) Slr 124. Therein vide para 35, it has been held :-

"THE General Court Martial was not properly constituted since Major Ajwani was disqualified to be a Judge-Advocate in the trial of the petitioner. The proceedings and the consequential conviction and. sentence of the petitioner have, Therefore,

to be quashed and set aside on this ground alone."

5.1 We have gone through the decision in Sansar Chand's case (supra). Major Ajwani was appointed the Judge-Advocate. He participated in court martial proceedings till August. On 5th May, he had written a letter, the contents whereof clearly revealed that he was hands in glove with two witnesses and was interested in the conviction of the accused-petitioner. Because he was "interested in the case", he was disqualified from being appointed as a judge-advocate. Having recorded this finding, the Division Bench has proceeded to hold (vide para 35) that the G.C.M. had ceased to be properly constituted since Major Ajwani was disqualified to be a judge-advocate, as according to Section 129 of the Army Act no Gcm would be complete unless it is attended by a judge-advocate. Vide para 28, the Division Bench has emphasised the significance of the presence of the judge-advocate in the court martial proceedings and how he would be in a position to affect decision of the court martial if only he be not impartial resulting in vitiating the judgment.

5.2 We have given our careful consideration to all the relevant provisions of the Army Act and the Army Rules, especially the provisions of Chapter X and Xi of the Act. It is true that the General Court Martial proceedings cannot be conducted unless attended by a Judge-Advocate. But we do not find any provision either in the Act or in the Rules which makes a judge-advocate a constituent of the court martial. It is one thing to say that a General Court Martial is not constituted without a judge-advocate and it is another thing to say that the proceedings cannot be conducted by a duly constituted court martial without a judge-advocate being an attendance. Former goes to the root of jurisdiction; the latter raises a question of legality/illegality merely. We find ourselves not persuaded to subscribe to the view which goes to the extent of holding that constitution of the court martial itself is vitiated unless attended by a qualified and eligible judge-advocate.

(6) Reference was also made to Rule 83 which speaks of trial being suspended by reason of dissolution of court martial as specified in Section 117 and to Rule 6 which speaks of competent authority taking a just and proper decision in regard to any matter not specifically provided for in the Rules. We do not think any of the two rules has any relevance to the case at hand.

(7) We are firmly of the opinion that no illegality, much less a jurisdictional error was committed if the judge-advocate participated in process of an objection alleging bias on his part being dealt with by the Gcm and Finding the allegation devoid of any merit. To the same effect is the view taken by a Division Bench of Rajasthan High Court 1981(1) R Lr 916, cited at pt.4 below Section 130 of the Army Act, 1950 at pages 346-347 of the Air Manual 5th Edition Vol.2)

(8) For the foregoing reasons, we Find the review-application wholly devoid of any merit and liable to be dismissed. It is dismissed accordingly.