

VIDYA PRAKASH
v.
UNION OF INDIA & ORS.

FEBRUARY 10, 1988

[A.P. SEN AND B.C. RAY, JJ.]

Army Act, 1950/Army Rules, 1954: Sections 39(a), 71(e), 108 and 116/Rule 39(2)—Jawan—Absent without leave—Charge sheeted—Trial by Summary Court Martial—Held guilty—Dismissed from service—In writ petition assailing constitution of summary court martial by Commanding Officer—Whether Commanding Officer of Corps competent to constitute the summary court martial—Held order of dismissal valid.

The appellant was appointed to the post of Craftsman (Jawan) on November 23, 1973. He was later promoted to the post of Naik in view of his good services and subsequently confirmed in that post. He served at various places in the country, including field areas. He was, however, reverted from the post of Naik to the post of Craftsman (Jawan). While he was in service he incurred the displeasure of the Commanding Officer of his regiment (Major) as he did not comply with his directions. He was consequently harassed and maltreated in various ways. Unable to bear the torture he surrendered to the mercy of the Commanding Officer of the Battalion (Colonel). He, however, directed him to surrender to the Commanding Officer of his regiment and gave him a certificate of surrender. The Commanding Officer took him into custody. He was charge-sheeted for the purpose and sentenced to 42 days imprisonment in military custody. During the period of his remaining in military custody, his family suffered harassment. The appellant on 12th September, 1984 left station with his wife and children without taking any leave. He stated that he became unwell and was under the treatment of a doctor. When he reported back to his unit with the fitness certificate the Commanding Officer of his regiment served him with a charge-sheet on November 2, 1984 and directed that he be tried by a summary court-martial. On November 9, 1984, the order of dismissal of the appellant from service was made by the Commanding Officer in the Summary Court Martial.

The appellant challenged the aforesaid order in a writ petition to the High Court, and sought quashing of the same contending: that the Commanding Officer was not legally competent to preside a summary

- A court martial, that the punishment of dismissal from service was disproportionate to the charge, that he was denied a fair opportunity to defend himself, and was in fact not permitted to question the witnesses.

- B A Division Bench of the High Court however, dismissed the writ petition holding that no objection was taken before the Summary Court Martial that the appellant was not allowed to be represented by his counsel, that no objection was taken as to the competence of the Commanding Officer to act as a Judge in the Summary Court Martial, that the appellant had earlier been convicted four times and entries were made in red ink in his service record, and that as the appellant was absent from duty without leave and pleaded guilty before the court
- C martial proceedings, there was as such no illegality in the order of dismissal made in the court martial proceedings.

Dismissing the Appeal,

- D HELD: 1. Four kinds of courts martial are specified in Section 108 of the Army Act, 1950. These are:(a) General Courts-Martial; (b) District Courts-Martial; (c) Summary General Courts-Martial and (d) Summary Courts-Martial. [959G-H; 960A]

- E 2. Section 116 of the Act says that a summary court martial may be held by the Commanding Officer of any corps or department or detachment of the regular Army, and he shall alone constitute the court, and that the proceedings shall be attended throughout by two other persons who shall be Officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed. It is only in the case if general court martial or district court martial that Rule
- F 39(2) of the Army Rules 1954 is applicable and the Commanding Officer is not competent to convene general or district court martial. [960B, D]

- G 3. In the instant case, the summary court martial was held by the Commanding Officer of the Corps, Major P.S. Mahant and there were two other officers Captain K.J. Singh and another officer to attend the proceedings. In such circumstances, the summary court martial had been convened by the Commanding Officer according to the provisions of the Army Act, 1950. [960C, E-F]

- H 4. Section 39(a) of the Act specifies that to be absent without leave constitutes an offence, while Section 71(e) provides dismissal from service as one of the punishments for such an offence. [960F]

5. The appellant in the instant case, undoubtedly absented himself from duty without taking any leave from the lines as required under the Army Act, was charge-sheeted for the said offence and tried by a summary court martial convened by the Commanding Officer. After giving him due opportunity it was held that the appellant was previously punished also for the offence of absence from duty on four occasions and there was a red ink entry. Considering all this, in the summary court martial proceedings he was convicted and sentenced to the punishment of dismissal from service. The submission on behalf of the appellant that punishment is disproportionate to the charge is wholly unsustainable. As such the said order of dismissal cannot be challenged as disproportionate to the charge or as one tainted with illegality. It is also evident from the judgment of the High Court that the appellant admitted his guilt of absents from duty without any leave. [960G-H; 961A-B, F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2107 of 1987.

From the Judgment and Order dated 3.3.1986 of the Delhi High Court in Writ Petition No. 2503 of 1985.

R.K. Garg and D.K. Garg for the Appellant.

M.S. Rao and C.V. Subba Rao for the Respondents.

The Judgment of the Court was delivered by

RAY, J. Special leave granted. Heard arguments of learned counsel for the parties.

This appeal by special leave is against the judgment and order dated 3rd March, 1986 passed by the High Court at Delhi dismissing the writ petition No. 2503 of 1985.

The facts of the case in brief are that the appellant was appointed to the post of Craftsman (Jawan) on November 23, 1973. We was sent to 3 E.M.E. Centre, Bhopal for training. After completion of his two years' training he was posted to 80 EME Battalion C/o 56. A.P.O. on July 25, 1975. The appellant in view of his good service was promoted to the post of Naik and subsequently he was confirmed in that post. During his service as Jawan and as a Naik, the appellant served at various places in the country including the field area at Punj Sector in

- A Jammu & Kashmir. The appellant was reverted from the post of Naik to the post of Jawan (Craftsman) by Lt. Col. G.S. Srivastava and he was, thereafter, directed to report to NEFA. The appellant joined his post in NEFA. However, the appellant was subsequently transferred and posted in Panagarh. One Major N.K. Tiwari who was the Commanding Officer of the said regiment became very much displeased with the appellant as he did not comply with his directions to go to Kanpur to bring his personal goods from Kanpur to Panagarh. The appellant was harassed and maltreated in various ways. The appellant being unable to bear the torture caused to him approached Col. R.K. Mehta, Commanding Officer, EME Depot Battalion, Sikandrabad and surrendered to the mercy of the said Colonel. The Colonel advised the appellant to go back to Panagarh and report to his Unit. The appellant was sent with the certificate of surrender. On his return, the appellant was not permitted to join his duty; but he was taken into the custody immediately and thereafter he was directed by Major Tiwari to be treated without leave for three days and should be court-martialled for the same. The appellant was charge-sheeted for the purpose and he was convicted to 42 days imprisonment in military custody. During the period of his remaining in military custody, he was given only a small sum of Rs.60 and as such his family had to suffer much harassment. The appellant, however, on 12th September, 1984 left Panagarh with his wife and children for Kanpur without taking any leave. It is stated that he became unwell and he was under the treatment of a doctor.
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- After coming round he reported to Panagarh and reported in his Unit with the fitness certificate. The appellant was called by the Officer Commanding and he was served with a charge-sheet on November 2, 1984 wherein it was ordered by Major P.S. Mahant that the appellant be tried by a Summary Court Martial. It has been alleged that Major Mahant appointed his close associate Captain K.J. Singh to record summary of evidence. The appellant was not given proper opportunity to defend himself. In the proceedings the appellant was not allowed to raise any objections. On 9th November, 1984, the order of dismissal from service of the appellant was made by Major P.S. Mahant, Commanding Officer, in the summary court martial.
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- The appellant challenged this order by a writ petition being Civil Writ Petition No. 2503 of 1985 on the ground that the Commanding Officer was not legally competent to preside a summary court martial. It was also stated in the petition that the punishment of dismissal from service was disproportionate to the charge; he was denied a fair
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opportunity to defend himself and was in fact not permitted to ask questions to the witnesses. The appellant so prayed for issuance of an appropriate writ for quashing the impugned order of dismissal from service and also for a direction to the respondents to pay the entire arrears of salary and allowances which are legally due to him.

The writ petition was heard by a Division Bench of the High Court at Delhi and it was dismissed on March 3, 1986 holding *inter alia* that no objection was taken before the Summary Court Martial that the appellant was not allowed to be represented by his counsel. It was also held that in the writ petition no objection was taken as to the competence of Major P.S. Mahant to act as a Judge in the Summary Court Martial nor objection was made to the effect that Captain K.J. Singh ordered him to keep his mouth shut. It was also observed that besides Major P.S. Mahant who was presiding Summary Court Martial there were two other members. The appellant, it was held, had earlier been convicted four times and entries were made in the red ink. The appellant was absent from duty without any leave and he pleaded guilty before the court martial proceedings and as such there was no illegality in the order of dismissal made in the court martial proceedings.

It is against this judgment and order, the impugned appeal on special leave has been preferred before this Court.

An affidavit in counter sworn by one Capt. D.K. Ghosh on behalf of the respondents has been filed. In paragraph 4 of the said affidavit, it has been submitted that Rule 39(2) of the Army Rules deals with the disqualification of officers for General and District Courts Martial. The said rule says that an officer is disqualified for serving on a general or district court martial if he is the Commanding Officer of the accused. The appellant has assailed the court martial proceedings on the ground that the Commanding Officer served on the Court Martial and as such the court martial proceedings are in breach of Rule 39(2) of the Army Rules, 1954. It has been further stated that the appellant was tried by a Summary Court Martial and not by a General or District Court Martial and Army Rule 39(2) does not apply to Summary Court Martial constituted under Section 116 of the Army Act, 1950. It has been further stated that a Summary Court Martial may be held by a Commanding Officer of any Corps, Department or Detachment of the regular army, as stipulated by Section 116(c) of the Army Act. It has been submitted that the appellant has been tried by a Summary Court Martial and he was sentenced to dismissal from

- A service on November 9, 1984. It has also been stated that the proceedings have been attended throughout by two other persons in accordance with the provisions of Section 116(1) of the said Act. It has been averred that in a case of Summary Court Martial as per Section 116 of the said Act, the Commanding Officer shall alone constitute the Court. The proceedings of the Court shall be attended by two officers/
- B JCOs or one of either. It has been further stated that the appellant incurred the following red ink entries while serving with various units prior to the summary court martial:

(i) 14 days R.I. in military custody under AA (Army Act) Sec. 39(a) on September 3, 1975 by 80 EME Bn.

- C (ii) 3 days R.I. in military custody under A.A. Sec. 39(a) on 22nd June, 1979 by 1 EME Centre.

(iii) Reduced to the rank under AA Sec. 63 on 24 January, 1983 by 174 Fd. Regt.

- D (iv) 28 days R.I. and 14 days detention in mil. custody under AA Sec. 39(a) on 10th July, 1984 by 986 AD. Regt WKSP.

- The appellant was issued a show cause notice for discharge being unsuitable inefficient soldier on 30th August, 1984 to which he replied
- E on 2nd September, 1984. The appellant again became absent without leave on 13th September, 1984. The appellant did not inform the Unit authority again of taking his family to Kanpur. While leaving for Kanpur he locked his quarter securely to keep possession of the family accommodation. The proceedings of the summary court martial were in accordance with the provisions of the Army Act and the order of
- F dismissal from service of the appellant is a valid order.

- A rejoinder was filed by the appellant wherein he reiterated that the order of dismissal passed by the Commanding Officer, Major P.S. Mahant was illegal and contrary to the provisions of natural justice. The charge-sheet was given to the appellant by the aforesaid Major
- G alleging that the appellant remained absent from 13th September, 1984 to 30.10.1984 without leave from the Unit's line and the said officer himself made an order that the appellant shall be tried by a summary court martial on that day. The said officer constituted the court of summary court martial and himself presided over the same. The order of dismissal was passed in violation of the rules of natural
- H justice. It has also been submitted that the conviction of the appellant

was in utter breach of Articles 14 and 21 of the Constitution of India and as such the said order was liable to be set aside.

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The first submission on behalf of the appellant is that the constitution of the Summary Court Martial by the Commanding Officer Major P.S. Mahant is in contravention of Rule 39(2) of the Army Rules, 1954. the relevant provisions of Rules 39 are in the following terms:

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“Rule 39

(2) An officer is disqualified for serving on a general or district court martial if he:

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(a) is an officer who convened the court; or

(b) is the prosecutor or a witness for the prosecution; or

(c) investigated the charges before trial, or took down the summary of evidence, or was a member of a court of inquiry respecting the matters on which the charges against the accused are founded, or was the squadron, battery, company, or other commander, who made preliminary inquiry into the case, or was a member of a previous court-martial which tried the accused in respect of the same offence; or

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(d) is the commanding officer of the accused, or of the corps to which the accused belongs; or

(e) has a personal interest in the case.”

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Rule 39(2) provides that an officer who is the Commanding Officer of the accused or of the corps to which the accused belongs or who is an officer who convened the court or who is the prosecutor or a witness for the prosecution and who has a personal interest in the case, is not eligible for serving on a *general or district Court Martial*. There are four kinds of court martials specified in Section 108 of the Army Act, 1959. These are:

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(a) General Courts-Martial;

(b) District Courts-Martial

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- A (c) Summary General Courts-Martial;
- (d) Summary Courts-Martial

Section 116 of the said Act says that a summary court martial may be held by the commanding officer of any corps or department or detachment of the regular Army, and he shall alone constitute the court. It further provides that the proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not as such, be sworn or affirmed. In the instant case a summary court martial was held by the Commanding Officer, Major P.S. Mahant in accordance with the provisions of Section 116 of the Army Act. The Commanding Officer of the Corps, Department of Detachment of the Regular Army to which the appellant belongs, is quite competent in accordance with the provisions of Section 116 of the said Act and as such the constitution of the summary court martial by the Commanding Officer of the Corps cannot be questioned as illegal or incompetent. It is neither a general court martial nor a district court martial where the appellant's case was tried and decided. In case of general court martial or district court martial Rule 39(2) of the Army Rules, 1954 is applicable and the Commanding Officer is not competent to convene general or district court martial. The summary court martial was held by the Commanding Officer of the corps, Major P.S. Mahant and there are two other officers including Capt. K.J. Singh and another officer to attend the proceedings. In such circumstances, the summary court martial having been convened by the Commanding Officer of the corps according to the provisions of the Army Act, 1950, the first submission made on behalf of the appellant fails.

Chapter 6 of the Army Act specifies the offences and also the punishments for such offences. Section 39(a) specifies that to be absent without leave constitutes an offence and Section 71(e) of the said Act provides dismissal from service as one of the punishments for such an offence. The appellant undoubtedly absented himself from duty without taking any leave from the lines as required under the Army Act. The appellant was charge-sheeted for the said offence and he was tried by a summary court martial convened by the Commanding Officer and after giving him due opportunity it was held that the appellant was previously punished also for the offence of absence from duty on four occasions and there was a red ink entry. Considering all this in the summary court martial proceedings he was convicted and sentenced to the punishment of dismissal from service. The submission

that the punishment is disproportionate to charge is wholly unsustainable. The summary court martial constituted by Major P.S. Mahant after considering the evidences has found the appellant guilty of the alleged charge and awarded the said punishment in accordance with the provisions of the Army Act. As such the said order of dismissal cannot be challenged as disproportionate to the charge or as one tainted with illegality.

It has been urged on behalf of the appellant that he raised an objection to Major P.S. Mahant to preside over the summary court martial. It has also been urged that at the time of taking evidence of the witnesses, the appellant was asked to keep his mouth shut and as such the appellant could not cross-examine the witnesses examined on behalf of the prosecution, thereby the principles of natural justice have been violated. It appears that the appellant has not filed any objection before the summary court martial objecting to the presiding of the court martial proceedings by Major P.S. Mahant nor any such objection had been taken in the writ petition moved before the High Court. It is for the first time in the appeal which the appellant filed before the Chief of the Army Staff (Competent Authority), Army Headquarters, New Delhi that he raised an objection to the presiding of Major P.S. Mahant as Judge of the court martial proceedings. It has been rightly held by the High Court that this is an after-thought and as such this submission cannot be permitted to be made by the appellant after the court martial proceedings were completed and the order of dismissal from service was made. As regards the other objection that he was directed by Capt. K.J. Singh to keep his mouth shut, it is also without any substance in as much as it appears from the summary of the evidences recorded that the appellant in fact cross-examined the prosecution witnesses. It is also evident from the judgment of the Delhi High Court that the appellant admitted his guilt of absenting from duty without taking any leave.

Considering all these facts and circumstances, the judgment and order passed by the High Court of Delhi appears to us as unassailable. We, therefore, dismiss the appeal and affirm the judgment and order of the High Court. There will be no order as to costs.

N.V.K.

Appeal dismissed.