Union of India

Vs

Harish Chandra Goswami

Criminal Appeal No. 102 of 1994

(G.B. Pattanaik, M. Srinivasan, N. Santosh Hegde JJ)

28.04.1999

JUDGMENT

N. Santosh Hegde, J.

1. The respondent herein was commissioned in the Indian Army in 1963 and in due course, was promoted on selection basis as Lieutenant Colonel and worked as Colonel till 7th October, 1989. He was a Commanding Officer in 316 Station Workshop (Maintenance) from 18th December, 1982 to 23rd February, 1986. Certain complaints were sent to the Chief of Army Staff alleging irregularities on the part of the respondent in the local purchase of material for repair. A charge sheet was framed against the respondent setting out as many as eight charges. The details thereof are wholly unnecessary for the purpose of this appeal.

2. The General Court Martial was convened and after trial, the respondent was found guilty on 2nd, 3rd, 5th and 7th charges and not guilty on 1st, 4th, 6th and 8th charges. He was awarded the sentence "to be cashiered" and to suffer RI for two years. The said sentence was confirmed by the concerned authority on 26.9.89.

3. The respondent filed Writ Petition before the Delhi High Court challenging the entire Court Martial proceedings as well as the order of punishment. By its judgment dated 28.5.92, the Delhi High Court upheld one of the contentions of the respondent while rejecting the other contentions. The only contention which was upheld was that the constitution of the Court Martial was not done by the Commanding Officer and thus Rule 37(3) of the Army Rules was violated. Consequently, it was held that the Court Martial has no jurisdiction to proceed with the trial and the entire proceedings was, therefore, vitiated. In the result, the High Court quashed the proceedings as well as the order of punishment.

4. Aggrieved by the said order of the High Court, the Union of India and the concerned officials of the Army have preferred this Appeal by Special Leave. Learned counsel for the appellants has contended that the view taken by the High Court, that there was no written order by the Commanding Officer nominating the personnel of the Court Martial and that there was no valid constitution of the Court Martial as per the rules was erroneous. According to him, the order for the Assembly of a General Court Martial, a copy of which had been furnished to the respondent before the trial, was the relevant order convening the Court Martial. The said order was signed by the Colonel Offg. Brig. A for General Officer Commanding 1 Corps. The same was the order appointing personnel of the Court Martial and it was made only by the Commanding Officer namely Lt. Gen. R.N. Mahajan. According to the Learned Counsel, the said order was in the appropriate form prescribed under the Rules namely form IAFD-916 and it could be signed by the convening

Officer personally or for him by the Staff Officer authorised by the custom of service to sign his orders. Learned Counsel contended that in this case, the order was signed by the Colonel who was authorised by the Lt. General to sign his orders. Thus, according to the learned counsel, the requirement of Rule 37 of the Army Rules has been fully satisfied in the present case. It is also his contention that the respondent did not raise this plea in the Writ Petition and for the first time, the argument was advanced by the counsel in the High Court in the course of arguments and when the appellants sought to file an affidavit to prove the existence of the order by the Commanding Officer, the High Court did not permit them to do so on an erroneous understanding of the provisions in the rules.

5. However, learned counsel for the appellants admitted that the original records were not produced before the High Court, even though the Court had called for the same. It is also admitted by learned counsel that there is no order in the file containing the signature or initial of the Lt. General, who was the Commanding Officer at the relevant time or any other record to show that the members of the Court Martial were appointed by the Lt. General. On the other hand, learned counsel for the respondent has contended that the said contention was raised in the Writ Petition itself in ground (L) and the appellants failed to meet the same in their reply.

6. In our opinion it is not necessary for us in this case to consider in detail, the arguments advanced on both sides. We must also place on record that, besides supporting the conclusion arrived at by the High Court on the question of the validity of the constitution of the Court Martial, learned counsel for the respondent has also challenged the findings which have been rendered by the High Court against the respondent on other questions. In the view, we are taking in this matter it is not necessary for us to consider all the submissions made by the counsel on both sides.

7. Rule 37, Army Rules in so far as it is relevant reads as follows :-

> (1) "An officer before convening a general or district court-martial shall first satisfy himself that the charges to be tried by the court are for offences within the meaning of the Act, and that the evidence justifies a trial on those charges, and if not so satisfied, shall order the release of the accused, or refer the case to superior authority.
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> (2) He shall also satisfy himself that the case is a proper one to be tried by the kind of court-martial which he proposes to convene.
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> (3) The officer convening a court-martial shall appoint or detail the officers to form the court and, may also appoint or detail such waiting officers as he thinks expedient. He may also, where he considers the services of an interpreter to be necessary, appoint or detail an interpreter to the court".

Admittedly there is no record whatever in the file to show that the personnel of the Court Martial were appointed by or nominated by the Lt. General. The order for the assembly of a General Court Martial did not contain either the signature or the initial of the Lt. General. It was signed only by the Colonel and none else. In the circumstances the said order cannot be considered to be an order evidencing the appointment of personnel of the Court Martial by the Lt. General. There is no dispute before us that under Rule 37, the Commanding Officer has to apply his mind to satisfy himself that the charges to be tried by the Court are for offences within the meaning of the Act and that evidence justifies the trial of those charges. It is also admitted that the Commanding Officer has also to satisfy himself that the case is a proper one to be tried by the kind of Court Martial which he

proposes to convene. However, learned counsel for the appellants contends that sub-Rule 3 of Rule 37 is only procedural in nature and there is no need for the application of mind by the Commanding Officer in the matter of appointment of the personnel of Court Martial. That contention loses its relevance in the present case in view of the categorical stand taken by the appellant, that there was an order by the Commanding Officer appointing or detailing the officers to form the Court Martial. According to the learned counsel as stated earlier, the form for Assembly of Court Martial is the only relevant form and when it is signed by an officer on behalf of the Lt. General, that is sufficient proof of the appointment of the personnel of the Court Martial by the Lt. General. We are unable to accept this contention in view of the fact that the said form does not contain either the signature or the initial of the Lt. General. Even assuming that the Lt. General passed an oral order, there is no record of any kind whatever to prove it. The form for Assembly of Court Martial was not contemporaneous to such oral order, if any. In the absence of any record whatever to show that the appointment of the personnel of the Court Martial was by the Lt. General, we are not persuaded to accept the contention of the appellants that the requirements of Rule 37 were fully satisfied. It is unnecessary for us to consider whether sub-Rule 3 of Rule 37 requires an order in writing or not in view of the specific stand taken by the learned counsel for the appellants in this case that there was an order in writing and the said order was nothing else but the form for Assembly of the Court Martial.

8. In the facts and circumstances of the case, we have no hesitation to hold that the view taken by the High Court is unassailable. We agree with the same. There is no merit whatever in the appeal and it is hereby dismissed. There will be, however, no order to costs.

Appeal dismissed.