Presiding Officer Court of Inquiry & Others

v.

Sunil Issar

(Supreme Court Of India)

HON'BLE MR. JUSTICE H.L. DATTU HON'BLE MR. JUSTICE ANIL R. DAVE

Civil Appeal No. 3144 Of 2012 (Special Leave Petition (Civil) No. 24027 Of 2010) | 15-03-2012

1. Delay condoned.

2. Leave granted.

3. This appeal is directed against the judgment and order passed by the High Court of Bombay in Writ Petition No. 5293/2000 dated 20.04.2009 and the order passed in Review Petition No. 41/2010 dated 17.02.2010. By the impugned judgment and order, the High Court, relying on the observations made by this Court in the case of Union of India and Another Vs. Charanjit S. Gill and Others reported in (2000) 5 SCC 742, has granted relief to the respondent herein.

4. The facts are not in dispute. Therefore, we do not intend to notice the facts in extenso for deciding this appeal. It is an admitted fact that the respondent herein was serving in the Indian Army as Lt. Colonel. For certain acts of omission and commission on his part while working as Lt. Colonel, a charge sheet came to be issued and served on the delinquent officer. In the charge memo, there were six charges which relates to the alleged fraud committed by him while discharging his functions as Lt. Colonel in the stores department. A reply had been filed by the delinquent officer denying the allegations made therein. Not being satisfied with the explanation offered, the authorities under the Army Act, 1950 ('Act' for short) thought it fit to convene the General Court Martial. In the General Court Martial proceedings, an officer who was serving as a Major in the Indian Army, was appointed as a Judge Advocate to assist the General Court Martial proceedings. After a detailed inquiry, General Court Martial awarded sentence

of cashiering and rigorous imprisonment for three years vide its order dated 20.8.1999. Immediately thereafter, the delinquent officer had filed pre-confirmation petition under Section 164 (1) of the Act dated 3.9.1999, before the Confirming authority. The said petition came to be rejected by GOC-in-C, Southern Command vide his Order dated 20.12.1999. However, he had remitted the unexpired portion of the sentence of rigorous imprisonment awarded by the General Court Martial. The same was promulgated on 6.1.2000.

5. In the meantime, the respondent herein filed a writ petition no. 1558 of 1999 before the Bombay High Court on 23.9.1999. The said writ petition was withdrawn on 21.12.1999, since the delinquent officer wanted to exhaust the other remedies provided under the Act itself.

6. Thereafter, the respondent filed a petition under Section 164(2) on 24.12.1999. The said petition was rejected by the Chief of Army Staff vide his order dated 02.06.2000; however, he reduced the sentence of imprisonment to the period already undergone by the respondent.

7. Aggrieved by the said order passed by the General Court Martial, order passed by GOC-in-C, Southern Command and also the order passed by the Chief of the Army Staff; the respondent approached the Bombay High Court by filing a writ petition no. 5293 of 2000 under Article 226 and 227 of the Constitution of India. The primary contention that was raised and canvassed before the High Court was that an officer who was below the rank of delinquent officer, was appointed as a Judge Advocate to assist the General Court Martial and that would vitiate the entire inquiry proceedings. The Bombay High Court, following the observations made in S. Gill's case, has allowed the writ petition on 20.4.2009. At this stage, it is relevant to notice the observations made by this Court in S. Gill's case, which are as under:-

"After examining various provisions of the Act, the Rules and Regulations framed thereunder and perusing the proceedings of the Court Martial conducted against Respondent 1, we are of the opinion that the Judge Advocate though not forming a part of the Court, yet being an integral part of it is required to possess all such qualifications and be free from the disqualifications which relate to the appointment of an officer to the Court Martial. In other words a Judge Advocate

appointed with the Court Martial should not be an officer of a rank lower than that of the officer facing the trial unless the officer of such rank is not (having due regard to the exigencies of public service) available and the opinion regarding non-availability is specifically recorded in the convening order. As in the instant case, the Judge Advocate was lower in rank to the accused officer and no satisfaction/opinion in terms of sub-rule (2) of Rule 40 was recorded, the Division Bench of the High Court was justified in passing the impugned judgment, giving the authorities liberty to initiate fresh court martial proceedings, if any, if they are so advised in accordance with law and also in the light of the judgment delivered by the High Court."

8. Even before the High Court, the Union of India had taken the stand that the concluding paragraph of the judgment in S. Gill's case would come to their aid and, therefore, the order passed by the General Court Martial and confirmed by the Chief of the Army Staff cannot be taken exception to on a technical ground, that, a Judge Advocate appointed was junior to the delinquent officer. In aid of that submission, they had relied upon paragraph 27 of the judgment in S. Gill's case. The High Court, after noticing the relevant contentions, orders passed by the General Court Martial and the orders passed by the Chief of the Army Staff and, also after finding that the delinquent officer has specifically taken up the contention that the Judge Advocate was junior to the delinquent officer, concluded, that, the entire General Court Martial proceedings are vitiated, and further has come to the conclusion that paragraph 27 of the S. Gill's case would not come to the aid of the Union of India and accordingly has allowed the writ petition filed by the delinquent officer and has set aside the punishment imposed thereunder and further did not give liberty to Union of India to proceed with the General Court Martial proceedings, since the respondent had retired from service on attaining the age of superannuation.

9. Mr. R. Balasubramanian, learned counsel for the appellants, submitted that, the Bombay High Court was not justified in quashing the punishment imposed by the General Court Martial for the reason, that, the promulgation of the order passed by the Court Martial was done prior to the date of the judgment in S. Gill's case. In aid of his submission, the learned counsel would submit, that, once an order is passed by the General Court Martial and Promulgation is effected as provided under rule 71 of the Rules, it attains finality and, therefore,

the order passed by the General Court Martial cannot be set aside on the ground that a junior Judge Advocate was appointed to assist the General Court Martial proceedings in a case where a senior officer was charge sheeted and his alleged misconduct being enquired into.

10. The learned counsel has taken us through the relevant Sections of the Act and also the Rules framed thereunder, in particular, Section 153, 154, 164(1), 164(2) of the Act and Rule 71 and Rule 168 of the Army Rules, 1954 (`Rules' for short). We will refer to some of these provisions a little later.

11. Per contra, learned counsel appearing for the respondent-delinquent officer justifies the reasoning and the conclusions reached by the learned Judges of the Bombay High Court.

12. Insofar as the appointment of a junior Advocate Judge to assist the General Court Martial in General Court Martial proceeding held against a senior officer cannot be disputed. In view of the observations made by this Court in Gill's case a junior Judge Advocate, lower in rank to the accused officer could not have been appointed, to assist the General Court Martial proceedings. Therefore, the proceedings are vitiated and consequently the order of dismissal passed pursuant to such an inquiry proceeding cannot be sustained. This aspect of the matter, we do not think could be re-agitated and re-argued by the learned counsel appearing for the Union of India. The other submission of Mr. Balasubramanian, learned counsel appearing for the Union of India is, since the Court Martial proceedings had attained finality prior to the judgment of this Court in S. Gill's case, namely, before 24.04.2000, as observed by this Court, the same cannot be reopened on the basis of the judgment in S. Gill's case. To appreciate the stand of Mr. Balasubramanian, it is useful to refer to paragraph 27 of the judgment in S. Gill's case.

"27. In view of this position of law the judgments rendered by the Court Martial which have attained finality cannot be permitted to be reopened on the basis of law laid down in this judgment. The proceedings of any Court Martial, if already challenged on this ground and are pending adjudication in any court in the country would, however, be not governed by the principles of "de facto doctrine". No pending petition shall, however, be permitted to be amended to incorporate the plea regarding the ineligibility and disqualification of a Judge Advocate on the ground of appointment being contrary to the mandate of Rule

40(2). This would also not debar the Central Government or the appropriate authority from passing fresh orders regarding appointment of the fit persons as Judge Advocate in pending Courts Martial, if so required."

13. The Court, after holding that in a General Court Martial proceeding, an officer who is lower in rank than the accused officer cannot be appointed to assist as a Judge Advocate, the Court has given effect to the judgment prospectively by observing, that, if the General Court Martial proceedings have attained finality, the same cannot be reopened. The Court has further observed, if for any reason, those proceedings have been challenged in a Court and that is pending for adjudication, if the ground which found favour in S. Gill's case is not taken, the accused officer/delinquent officer cannot be permitted to raise that ground by way of an amendment of the pleadings.

14. Having said that, we will notice the provisions on which Mr. Balasubramanian, learned counsel has relied upon :

"S.153- Finding and sentence not valid, unless confirmed. No finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by this Act.

S.154- Power to confirm finding and sentence of general court-martial. The findings and sentences of general courts-martial may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government.

S.164- Remedy against order, finding or sentence of court-martial.

(1) Any person subject to this Act who considers himself aggrieved by any order passed by any court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such court-martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit.

The Army Rules, 1954

71. Promulgation.--The charge, finding, and sentence, and any recommendation to mercy shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct; and if no direction is given, according to the custom of the service. Until promulgation has been effected, confirmation is not complete and the finding and sentence shall not be held to have been confirmed until they have been promulgated.

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S.168- Sentence of Cashiering or Dismissal.--

(1) A sentence of cashiering or dismissal awarded by a court-martial shall take effect from the date on which the sentence is promulgated to the person under sentence, or except in the case of an officer, from such subsequent date as may be specified by the commanding officer at the time of such promulgation.

(2) When dismissal is combined with imprisonment which is to be carried out in a military prison or in military custody, the dismissal shall not take effect until the date on which the prisoner is released from a military prison or from military-custody.

(3) When cashiering or dismissal is combined with imprisonment for life or with imprisonment which is to be carried out in a civil prison, the cashiering or

dismissal shall not take effect until the date on which the prisoner is received into a civil prison."

15. Sections 153 and 154 of the Act are placed under the Chapter XII of the Act. This Chapter speaks of Confirmation and Revision. Section 153 of the Act specifically says that no finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided in the Act. Section 154 gives power to the Central Government or by any officer empowered in that behalf by warrant of the Central Government of confirmation of the findings and sentence of the General Court Martial. Section 164 of the Act is in two parts - Section 164(1), provides an opportunity or right of remedy to the aggrieved person against an order passed by Court Martial to present a petition to the officer or authority empowered to confirm any finding or sentence of such Court Martial. The Confirming Authority, on receipt of such representation or petition, may take such steps as are necessary to satisfy himself as to the correctness or legality or propriety of such order or as to the regularity of such proceeding to which the order relates. Section 164(2) of the Act provides a remedy for redressal of grievance of any person aggrieved by the finding or sentence of any Court Martial which has been confirmed to present a petition before the Central Government, Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence. On receipt of such representation or petition, the Central Government, Chief of the Army Staff or the prescribed officer may pass such order as it thinks fit.

16. Rule 71 speaks of promulgation of the charge, finding and sentence. The said Rule makes it abundantly clear that only when such a promulgation is effected, confirmation of the sentence is complete and further it makes it clear that the findings and the sentence shall not be held to have been confirmed unless they have been promulgated. Rule 168 speaks of sentence of cashiering or dismissal. It provides that such sentence when awarded by a court-martial shall take effect from the date on which the sentence is promulgated to the person under sentence.

17. Shri. Balasubramanian, learned counsel, relying on Rule 71 and Rule 168, submits since in the instant case, promulgation was done prior to the judgment

of this Court in S. Gill's case, the findings and the sentence awarded to the respondent/delinquent officer has attained finality and, therefore, the same cannot be reopened and the ground that a junior officer lower in rank to that of the senior officer could not have assisted the Court Martial, cannot be agitated once over again. We cannot agree with the submission of the learned counsel. Section 164(1) and (2) of the Act, provides for right of appeal/representation against the order of the General Court Martial to the Central Government/Chief of the Army Staff or any other person authorised by the Central Government. While exercising this power, the Central Government or Chief of the Army Staff or the delegatee of the Central Government, after satisfying himself as to the correctness, legality or propriety of the order questioned, may pass such order thereon as it thinks fit. It means that Central Government or Chief of the Army Staff or the delegatee of the Central Government has power to annul, modify, amend, cancel the orders passed by the General Court Martial, if, for any reason, they are satisfied that the order passed is either improper or illegal. Therefore, it cannot be contended that the order of promulgation passed by the General Court Martial under Rule 71 had attained finality. It is no doubt true that once the promulgation is effected as provided under the Act and the rules, the same can be executed, but subject to any interdiction as provided under Section 164(2) of the Act read with provisions provided under Chapter XIV of the Act. The word `promulgation' has been defined in the Oxford Advanced Dictionary, which means to make public or make widely known by act of final proclamation. Further, the Black's Law Dictionary (9th ed. 2009), defines word `promulgate' as thus: 1. To declare or announce publicly; to proclaim. 2. To put (a law or decree) into force or effect. 3. (Of an administrative agency) to carry out the formal process of rule making by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal.

18. An order becomes final, if for any reason that order cannot be interfered with by an authority under the Act. If, for any reason, that order can be modified or annulled or cancelled, the said order cannot be said to have attained finality. In the facts of the present case, after the promulgation of order of General Court Martial and its confirmation under Section 164(1) of the Act on 6.1.2000, the Chief of the Army Staff in exercise of its power under Section 164 (2) has modified the order passed by the General Court Martial and has reduced the sentence vide his order dated 2.6.2000. Therefore, in our opinion, the promulgation dated 6.1.2000 cannot be said to have attained finality in view of express statutory remedy available to the respondent, even after the said promulgation.

19. Furthermore, the order can be said to have attained finality, only when it is final and conclusive, with respect to the controversy involved between the parties. In other words, the order is final, in case when all the proceedings against or with respect to that order has attained finality and concluded.

20. The word final in relation to order has been defined in the P. Ramanatha Aiyar, Advanced Law lexicon, 3rd Edition, as: "The word `final' means `without appeal'. It does not mean without `recourse to certiorari'; and "The expression "final" prima facie connotes that an order passed on appeal under the Act is conclusive and no further appeal lies against it."

21. This Court in South Asia Industries (P) Ltd. v. S.B. Sarup Singh, (1965) 2 SCR 756, has elaborately considered the meaning of expression `final', appearing in Section 43 of the Delhi Rent Control Act, 1958, in relation to an order passed under the said Act. This Court has observed thus:

"11. The expression "final" prima facie connotes that an order passed on appeal under the Act is conclusive and no further appeal lies against it."

22. In our view, the expression `Finality' used in the judgment in S. Gill's case (supra) could only mean that the order impugned under the Act has attained finality. That only means that that order cannot be called in question before any other forum under the Act. The Act admittedly provides for hierarchy of superior officers like Central Government, Chief of the Army Staff or any delegatee of the Central Government in deciding the dispute/s arising under the Act for a person aggrieved by an order passed by any Court Martial proceedings. Alternatively, it can be said the order or its promulgation by any Court Martial Proceedings cannot attain finality, until its challenge is alive under the other provisions of the Act. Therefore, we cannot agree with the contention of Mr. R. Balasubramanian, that once the finding and sentence is promulgated, as provided under Rule 71 of the Rules, the order passed by the Court Martial becomes final under the Act.

23. Keeping in view the first principles enunciated in decisions cited above, let us notice the fact situation. In the instant case, the promulgation was done on 06.01.2000 under the Act. The judgment of this Court in S. Gill's case is dated 24.04.2000. After order is passed by the Chief of the Army Staff, that is, on 2.6.2000, which is clearly made after the judgment in S. Gill's case, the respondent had filed a writ petition before the Bombay High Court and in that he had taken a specific ground which came for consideration in S. Gill's case before this Court. In view of that, in our opinion, the observations made by this Court in S. Gill's case, in particular paragraph 27, would not assist the Union of India.

24. In view of the above, we do not find any legal infirmity in the judgment and order passed by the Bombay High Court while disposing of the writ petition no. 5293 of 2000 dated 20.04.2009. Accordingly, the appeal stands dismissed in the facts and circumstances of the case.

Parties are directed to bear their own costs.

25. Since we have dismissed the appeal filed by the Union of India, they will now implement the orders passed by the Bombay High Court within two months from the date of receipt of the copy of this order.

26. Ordered accordingly.