

# SUPREME COURT OF INDIA

Samrendra Beura

Vs.

U.O.I.

(Dr.B.S.Chauhan and Dipak Misra JJ.)

20.05.2013

## JUDGMENT

### **DIPAK MISRA, J.**

1. In this writ petition, preferred under Article 32 of the Constitution of India, the petitioner, an employee of Indian Air Force, who has been found guilty of the offence under Section 39(a) of The Air Force Act, 1950 (for brevity “the Act”) and has been awarded sentence to suffer rigorous imprisonment for three months along with other punishments by order dated 15.3.2013 which has been affirmed by the Competent Authority under Section 161(1) of the said enactment, has prayed for issue of a writ of habeas corpus directing the respondents to release him as he is in illegal detention because he had already spent one and half months in custody before the conviction was recorded by the court-martial.

2. The factual score, as depicted, is that the petitioner was appointed as a Mechanical Transport Driver in the Indian Air Force on 16.12.2002. As he absented himself without leave from 9.10.2012 to 1.2.2013, a court-martial proceeding was initiated against him and, eventually, by order dated 15.3.2013, he was found guilty and was imposed the sentence of rigorous imprisonment for three months apart from dismissal from service and reduction of rank. It is put forth in the petition that the petitioner had surrendered before the Competent Authority whereafter he was charged for the offence under Section 39(a) of the Act. It is contended that the sentence imposed under Section 39(a) should take into consideration the period commencing 1.2.2003 as he had surrendered to custody before the Competent Authority.

3. As the respondents have been represented and the issue involved exclusively relates to pure realm of law, we have heard Mr. Merusagar Samantary, learned

counsel for the petitioner, and Mr. Rakesh Khanna, learned Additional Solicitor General, and Mr. Balasubramanian, learned counsel for the respondents.

4. It is the admitted fact that the petitioner surrendered to custody on 1.2.2013. There is a dispute with regard to the date of the order passed by the Competent Authority, namely, district court-martial. The learned counsel for the petitioner would contend that it was passed on 15.3.2013 whereas Mr. Khanna would submit that it was passed on 18.3.2013. The said disputed fact is neither material one nor would it have any impact on the adjudication of the writ petition inasmuch as the fulcrum of the matter is whether the period of custody prior to the date of passing and signing of the order by the district court-martial is to be set off in respect of the sentence imposed.

5. Section 39 which provides for absence without leave stipulates that any one who commits any offence falling under clauses 39(a) to (g) shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as the Act mentions. Chapter IX deals with arrest and proceedings before trial. Section 102, which occurs in this Chapter, deals with custody of offenders and reads as follows: -

“102. Custody of offenders. –

(1) Any person subject to this Act who is charged with an offence may be taken into air force custody.

2) Any such person may be ordered into air force custody by any superior officer.

3) Any officer may order into air force custody any officer, though he may be of a higher rank, engaged in a quarrel, affray or disorder.”

6. Section 103 deals with duty of commanding officer in regard to detention and Section 104 provides for interval between committal and court-martial. It reads as follows:-

“104. Interval between committal and court-martial. – In every case where any such person as is mentioned in section 102 and as is not on active service remains in such custody for a longer period than eight days, without a court-martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner

prescribed; and a similar report shall be forwarded every eight days until a court-martial assembled or such person is released from custody.”

7. Section 107 deals with inquiry into absence without leave. Sub-section (1) of the said Section provides that when any person has been absent from duty without due authority for a period of 30 days, a court of inquiry shall, as soon as practicable, be assembled and such court shall, on oath or affirmation administered in the prescribed manner, inquire regarding the absence of the person. The rest of the provision need not be adverted to.

8. Section 109 deals with different kinds of court-martial and clause (b) of the said Section relates to district court-martial. Section 119 deals with the powers of district court-martial. Chapter XI commencing from Sections 127 to 151 deals with the procedure of court-martial. Section 152, which occurs in Chapter XII, deals with confirmation and revision and provides 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 by the Act. Section 154 deals with the power to confirm finding and sentence of district-court martial.

9. In the case at hand, after the sentence was imposed, the Air Officer Commanding-in-Chief confirmed the order on 20.4.2013. The learned counsel for the petitioner would propound that the sentence of imprisonment of three months should commence from 1.2.2013, the date on which he surrendered and was taken into custody. In this context, Mr. Khanna has drawn our attention to Section 164 of the Act. It reads as follows: -

“164. Commencement of sentence of transportation or imprisonment. – Whenever any person is sentenced by a court-martial under this Act to transportation, imprisonment or detention the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the presiding officer.”

10. On a plain reading of the said provision, it is clear as day that the period of imprisonment is to be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer. The Presiding Officer has signed, as submitted by Mr. Khanna, on 18.3.2013 and, therefore, the petitioner has to suffer three months imprisonment from that date. In this context, we may usefully refer to a two-Judge Bench decision in *Ajmer Singh and others v. Union of India and others*[1]. The issue before this Court was regarding the applicability of Section 428 of the Code of Criminal Procedure to a person sentenced to undergo

imprisonment by general court-martial under the Army Act, 1950 (for short “the 1950 Act”). The two learned Judges observed that the position in the Army Act would equally govern the person sentenced to undergo rigorous imprisonment by the court-martial under the Navy Act, 1957 (for short “the 1957 Act”) and the Air Force Act. The two-Judge Bench referred to the divergence of views between different High Courts pertaining to the applicability of Section 428 of the Code and, thereafter, the interpreted Section 167 of the 1950 Act and came to hold as follows:-

“9. Section 167 of the Act specifically lays down that whenever a person is sentenced by a court martial under the Act to imprisonment, the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer or, in the case of a summary court martial, by the Court. In the face of this categorical provision laying down that the sentence of imprisonment shall be deemed to have commenced only on the day when the court martial proceeding was signed by the Presiding Officer or by the Court as the case may be, it is in our opinion futile to contend that the Army Act is silent with respect to the topic as to the date with effect from which the period of imprisonment covered by the sentence is to be reckoned. We state this only for the reason that an ingenious argument was advanced before us by counsel for the appellants that Section 5 of the Code of Criminal Procedure only lays down that nothing in the Code shall affect any special or local law and hence in the absence of any specific provision in the special or local law covering the particular subject-matter, the provisions of the Code would get attracted. Even if this argument is to be assumed to be correct (which assumption we shall presently show is wholly unwarranted), inasmuch as Section 167 of the Act specifically deals with the topic of the date of commencement of the sentence of imprisonment, there is absolutely no scope for invoking the aid of Section 428 of the Code of Criminal Procedure in respect of prisoners convicted by court martial under the Act.”

11. In *Bhuwaneshwar Singh v. Union of India and others*[2], the Court referred to the pronouncement in *Ajmer Singh* (supra) and opined that as far as set off of the period of pre-trial detention against the period of sentence is concerned, Section 428 of the Code is not attracted to the cases of persons convicted by the court-martial to undergo imprisonments.

12. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the pre-trial detention cannot be set off against the sentence of imprisonment

passed by the court-martial for the offence under Section 39(a) which has been affirmed under Section 161(1) of the Act and the period of sentence shall commence from the date when the original proceeding was signed by the Presiding Officer. Thus, there is no illegal detention warranting issue of writ of habeas corpus.

13. We have been apprised that the petitioner has submitted a representation under Section 180(1) read with Section 184 of the Act. Without expressing any opinion on the merits of the said representation, we direct the Competent Authority to decide the same within a period of seven days from today.

14. Before parting with this case, it is necessary to note that in the 1950 Act, the Parliament has incorporated Section 169-A to avoid hardship to the persons convicted by the court-martial. The said provision is as follows: -

“169-A. Period of custody undergone by the officer or person to be set off against the imprisonment.— When a person or officer subject to this Act is sentenced by a court-martial to a term of imprisonment, not being an imprisonment in default of payment of fine, the period spent by him in civil or military custody during investigation, inquiry or trial of the same case and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person or officer to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him.”

15. Similarly, Section 151 of the 1957 Act which deals with commencement of sentence has been amended by Act 23 of 2005 with effect from 23.6.2005. For the present purpose, it is requisite to reproduce Section 151(1) and (3): -

“151. Commencement of sentence. –

(1) Subject to the provisions of sub- sections (2) and (3) every term of imprisonment or detention awarded in pursuance of this Act shall be reckoned as commencing on the day on which the sentence was awarded.

2) .....

3) Whenever any offender is sentenced by a court-martial to a term of imprisonment, in pursuance of this Act, not being imprisonment in default of payment of fine, the period spent by him in civil or naval custody during investigation, inquiry or trial of the same case, and before the date of order

of such sentence, shall be set off against the terms of imprisonment imposed upon him, and the liability of such offender to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him.”

16. Though such amendments have been made by the Parliament under the 1950 Act and the 1957 Act, yet no such amendment has been incorporated in the Air Force Act, 1950. The aforesaid provisions, as we perceive, have been incorporated in both the statutes to avoid hardship to persons convicted by the court-martial. Similar hardship is suffered by the persons who are sentenced to imprisonment under various provisions of the Act. Keeping in view the aforesaid amendment in the other two enactments and regard being had to the purpose of the amendment and the totality of the circumstances, we think it apt to recommend the Union of India to seriously consider to bring an amendment in the Act so that the hardships faced by the persons convicted by the court-martial are avoided.

17. The writ petition is accordingly disposed of.

[1] (1987) 3 SCC 340

[2] (1993) 4 SCC 327