

## **ALLAHABAD HIGH COURT**

G.B. Singh

Vs.

Union of India

Writ Petn. No. 3932 of 1972

(H.N. Seth, J.)

06.10.1972

### **JUDGMENT**

**H.N. Seth, J.**

1. By this petition under Article 226 of the Constitution, Sqn. Ldr. G. B. Singh seeks a direction that the respondents be asked not to convene a second General Court Martial for his trial on any of the ten charges for which he had already been tried by a general Court Martial on August 1, 1971 and subsequent days :

2. During the period September 1968 to October, 1970 the petitioner was posted as Recruiting Officer at the Air force Station Kanpur. On August 3, 1971 he was served with a charge sheet in which as many as ten charges were leveled against him. These charges related to his duties as Recruiting Officer at the AIR Force Station Kanpur. Subsequently a General Court Martial was convened by the AIR Officer Commanding-in-Chief, Maintenance Command Nagpur for trying the petitioner. This Court Martial found the petitioner guilty on first five counts but acquitted him of the remaining five charges. The petitioner was sentenced to be dismissed from service. In usual course the finding and sentence awarded against the petitioner were referred to the AIR Officer Commanding-in-Chief Maintenance Command for confirmation as required by Section 152 of the AIR Force Act. The AIR Officer Commanding-in-Chief, however, passed an order reserving the same for confirmation by superior authority and forwarded the proceedings to the Chief of the AIR Staff. On 10th Dec. 1971 Chief of the AIR Staff passed an order not confirming the findings of sentence awarded by the court Martial. The findings and sentence which were not confirmed by the Chief of the AIR Staff together with the order of Chief of AIR Staff were promulgated to the petitioner on 17th of January, 1972 as

required by rule 78 of the AIR Force Rules, 1969.

3. After a lapse of about ten months, the petitioner was informed by the Headquarters Maintenance Command that a fresh General Court Martial was being convened to retry him. He then sought clarification as to how and in what circumstances he was going to be tried afresh. By a communication dated June 13, 1972 the petitioner was informed that the findings and sentence of the General Court Martial had not been confirmed as it was found that the proceedings were not in order. Thus, there was no valid order of the Court Martial convicting or acquitting him. Since needs of justice and discipline demanded that he should be retried, the retrial had been ordered under the provisions of AIR Force Act, 1950, in particular in the light of the provisions of Section 152 of the Act. The petitioner contends that once he has been convicted and sentenced by a court martial the respondents have no jurisdiction to convene a second General Court Martial for his retrial. He pleads that Section 120 of the AIR Force Act, bars such a trial and therefore a writ of Mandamus be issued to the respondents directing them not to convene the second General Court Martial.

4. The respondents have raised a preliminary objection to the maintainability of this petition. They contend that the second Court martial is being convened under the orders of the AIR Officer Commanding in Chief Maintenance Command, who is stationed at Nagpur outside the jurisdiction of this Court. This Court Martial has been convened at Nagpur Under Article 226 of the Constitution this Court cannot issue a writ to an authority situated outside its territorial jurisdiction.

5. Article 226 (1-A) of the Constitution of India clearly empowers the High Court to issue a writ against any Government Authority or persons situated or residing outside its territorial jurisdiction provided a part of the cause of action, for the relief claimed arises within its territorial jurisdiction. Main question therefore, that arises for consideration is whether in this case any part of the cause of action for the relief claimed by the petitioner has arisen within the territorial jurisdiction of this Court. It is now well settled that the expression "cause of action" means every fact which if traversed, it would be necessary for the claimant to prove in order to support his right to the judgment of a Court.

Every thing which if not proved would give the defendant a right to immediate judgment must form part of a cause of action. It is a bundle of essential facts which it is necessary for a claimant to prove before he can succeed in getting the relief.

6. In order to succeed in this petition, the petitioner has necessarily to prove that he had been tried convicted and sentenced by a Court Martial at Kanpur. Unless he establishes this fact he cannot succeed in establishing that action of the respondents in convening a fresh Court martial for his trial is barred under the provisions of Section 120 of the AIR Force Act. A part of cause of action for maintaining the present writ petition has therefore arisen at Kanpur. Accordingly, I am of opinion that this Court has ample jurisdiction to entertain the present writ petition.

7. Learned counsel for the Union of India, relied upon the case of *Pratappur Co. v. Cane Commissioner, Bihar*,<sup>1</sup> in which it was held that under Article 226 (1-A) of the Constitution of India a High Court is competent to issue a writ against any Government Authority or persons situated or residing outside its territory or jurisdiction provided it is established that the cause of action for the relief claimed arose wholly or partly within its territorial jurisdiction. In this case validity of certain orders passed by the Cane Commissioner, Bihar at Patna were challenged. By one of the orders, the Cane Commissioner superseded his earlier order passed under Section 6 (1), of Sugar Cane (Control) Order, 1966 in favor of the petitioner Sugar Factory situated in U. P. and reduced the number of villages (all situated in Bidhar) constituting the reserved area of the factory for purchase of sugar cane. This order was communicated to the petitioner factory in U. P. By another order of the same date which was not communicated to the petitioner. Certain villages which were directed to be excluded from petitioner's reserved area were allotted to the reserved area of another factory situated in Bidhar. This Court held that merely because one of the orders was communicated to the petitioner in U. P. it did not mean that any part of cause of action arose in U. P. It is obvious that in that case in order to successfully challenge the order passed by the Cane Commissioner Bihar at Patna it was not essential for the petitioner to establish or prove that the order excluding certain villages from its reserved area was communicated to it. This case, therefore does not support the contention of learned counsel for the respondents.

Accordingly, I overrule the preliminary objection raised on behalf of the respondents.

8. I now proceed to deal with the argument that, in the circumstances it is not open to the respondents to convene a second Court martial and to retry the petitioner. Section 120 of the Act lays down that when any person subject to the AIR Force Act has been acquitted or convicted of an offence by a Court martial or by a criminal Court or has been dealt with under Section 82 or Section 86, he shall not be liable to be tried again for the same offence by a Court martial or dealt with under the said section. In order to appreciate the ambit and meaning of the expression "has been convicted or acquitted of an offence by a Court martial." as used in Section 120 of the Act, it would be relevant to examine certain provisions relating to holding of proceeding by Court Martial and the manner in which they are to be dealt with. Rule 70 of the Rules framed under the AIR Force Act lays down that after the trial of an accused before a Court martial is over the Court is to deliberate on its findings in closed Court and the opinion of each member has to be taken separately on each charge. Rule 71 (1) requires the Court martial to record its finding on every charge and except as mentioned in the Rules, the finding has to be recorded simply as a finding of "guilty" or "not guilty". Rule 72 then requires that if the finding on all the charges is "not guilty" the presiding officer is to date and sign the finding and such signature shall authenticate the whole proceedings. Similarly Rule 73 requires that if the finding on any charge is "guilty" then the Court shall deliberate on the question of sentence to be imposed in the manner provided therein. After completing its deliberation on the question of sentence the Court under Rule 74, is required to pass only one sentence in respect of all the findings of which the accused has been found guilty and award of such sentence is deemed to be in respect of the offence in each charge in respect of which it can be given and not in respect of any offence in a charge in respect of which it cannot be given. According to Rule 76 after the sentence has been pronounced the presiding Officer is to date and sign the sentence and the proceedings, which have to be transmitted for confirmation. It is obvious that in the context a person is said to be convicted by a Court martial where it finds him guilty and acquitted where it finds him not guilty.

9. Now Section 152 of the AIR Force Act provides that no finding or sentence

of a general, district or summary general Court-martial shall be valid except in so far as it may be confirmed as provided by the Act. Section 137 provides that a confirming authority may when confirming the sentence of a Court-martial, mitigate or remit the punishment thereby awarded or commute that punishment for any punishment or punishments lower in the scale laid down in Section 73. According to Section 159 any offence or sentence of a court-martial may be once revised by order of the confirming authority and on such revision the Court, if so directed by the confirming authority may take additional evidence. Sub-section (2) however provides that the Court on revision shall consist of the same officers as were present when the original decision was passed unless any of those officers are unavoidably absent. Rule 77 provides for the procedure to be adopted by the Court where the finding of sentence is sent back to it for revision under Section 159. Section 162 of the Act empowers the Central Government the Chief of the AIR Staff or the Prescribed Authority (which is different from the confirming authority) to annul the proceedings of any Court martial on the ground that they are illegal or unjust. This shows that when the matter is referred to the confirming authority, that authority if it agrees with the finding and sentence awarded by the court-martial may confirm it. If it agrees with the finding but thinks that the sentence should be reduced it may do so under Section 157. In case it does not agree with the finding recorded by the Court-Martial and thinks that the proceedings should be revised or that the accused be retried it may send the case back to the court-martial for revision as provided in Section 159. On being sent back, the case would be dealt with by the Court in the manner provided in Rule 77. However, if the confirming authority does not agree with the finding recorded by the Court, but thinks that no further action in the matter is necessary it may just make an order not confirming the sentence and the proceedings and leave the matter at that. Cases where the proceedings are illegal are required to be annulled under the orders of the Central Government or the Chief of the AIR Staff or the Prescribed Authority under Section 162. Effect of such annulment would be as if no such proceedings have taken place. It is significant to note that the Act and the Rules do not require either the Court martial or the confirming authority to write a judgment in support of the orders passed by them. As already mentioned, Rule 71 requires the Court martial merely to record its finding as "guilty" or 'not guilty'. Similarly, the confirming authority also is required to make an order either confirming or not confirming proceedings or to send them back for

revision under Section 159. Under Rule 78, after the confirming authority decides either to confirm or not to confirm the proceedings, the charge, finding, sentence and any recommendation of mercy together with the confirmation or non-confirmation of the proceedings have to be promulgated in such manner as the confirming authority may direct and if no such direction is given, according to custom of the service. However, in a case where the confirming authority sends the case back to the Court for revision for finding of sentence under Section 159, no promulgation is to be made.

10. Learned counsel for the Union of India argued that in view of the specific provision of Section 152, that no finding or sentence of a general, district or summary general court-martial shall be valid except as far as it may be confirmed as provided by the Act, a finding or a sentence passed by a general court-martial which have not been confirmed remain invalid and cannot be taken notice of for any purpose, whatsoever, including that for purposes of Section 120 of the Act. Accordingly, in such cases the concerned authority is not debarred from convening a second court-martial for retrying the accused officer.

11. I am unable to accept this submission. The expression "on (no?) finding of sentence of a general, district or summary general court-martial shall be valid unless confirmed as provided by the Act" used in Section 120 (152?) of the Act can either mean.

- (1) That a finding or sentence passed by the court-martial comes into existence only when it is confirmed by the confirming authority, or
- (2) That the finding or sentence passed by the court-martial exists but it cannot be put into effect unless it has been confirmed under the provisions of the Act.

In my opinion, the expression has been used in the second of the two senses. As explained above, provisions of the Act do not require the confirming authority to record or to substitute its own findings in place of the findings recorded by the court-martial. All that they require is that the confirming authority will either confirm a finding or not confirm it or to send the same back for revision to the court-martial itself. Rule 78, which requires promulgation after the matter

has been dealt with by the confirming authority makes it clear that the finding and sentence passed by the court-martial do not merge in the order passed by the confirming authority. Even when the authority does not confirm the proceedings, its order does not have the effect of setting aside the finding and sentence awarded by the court-martial. If the intention of the Legislature was that a finding or sentence recorded by court-martial is set aside as a result of non-confirmation of proceedings, there was absolutely no point in requiring them to be promulgated along with the order of nodes not confirm the proceedings, its order does not have the effect of setting aside the finding and sentence awarded by the court-martial. If the intention of the Legislature was that a finding or sentence recorded by court-martial is set aside as a result of non-confirmation of precedence awarded by the court-martial. If the intention of the Legislature was that a finding or sentence recorded by court-martial is set aside as a result of non-confirmation of proceedings, there was absolutely no point in requiring them to be promulgated along with the order of non-confirmation. It is true that when the findings are not confirmed it would not be possible to take any further action on their basis and the sentence passed by the court-martial cannot be carried out as provided in Section 120 of the Act, but this does not mean that if the findings are not confirmed they are wiped out of existence or cease to exist. It follows that even if a finding of conviction recorded by a court-martial is not confirmed and that no action can be taken on that basis, it does not affect the fact that the accused has been tried and convicted by a court martial. In such a case, Section 120 of the Act will fully apply and bar a retrial of the accused by another court-martial.

12. In the counter affidavit filed on behalf of the respondents it was asserted that an order not confirming the proceedings results in annulment of proceedings under Section 162 of the Act, and therefore a fresh trial by a court-martial is not barred. The power to annul proceedings under Section 162 of the Act has been conferred on the Central Government, Chief of Staff or prescribed authority. The authority required to confirm the proceedings of a court-martial is not the same as the prescribed authority under Section 162. Chief of the Staff, in this case, neither passed an order annulling the proceedings nor does he purport to exercise his power under Section 162 of the Act. Sri T. N. Sapru learned counsel for the respondents rightly conceded before me that this stand taken in the counter affidavit is not correct and did not seek to justify the action on this

basis

13. Lea counsel for the respondents rightly conceded before me that this stand taken in the counter affidavit is not correct and did not seek to justify the action on this basis.

13. Learned counsel for the State relied upon a decision of Munir, J. of the Lahore High Court in a habeas corpus petition filed by one Sardar Singh decided on November 27, 1945. He produced a copy of the aforementioned decision for my perusal. In that case one Kartar Singh had been tried for an offence by a court-martial which found him guilty and sentenced him to undergo three years imprisonment. The confirming authority, however, refused to confirm the sentence on the ground that the court-martial which tried him had not been properly constituted. Therefore, Kartar Singh was tried again by a different court-martial and on being found guilty was sentenced to five years rigorous imprisonment. The confirming authority, this time while confirming the finding reduced the sentence to three years imprisonment. Kartar Singh filed a habeas corpus petition before the Lahore High Court. It was contended on his behalf that the proceedings of the second court-martial were invalid as the trial by the second court-martial was barred by the provisions of Section 66 of the Indian Army Act which provided that where any person, subject to the Army Act has been acquitted or convicted of an offence by a court-martial or by a criminal Court he cannot be tried again for the same offence by another court-martial. Mr. Justice Munir observed that the findings recorded by the confirming authority that earlier court-martial was not constituted according to law was binding on him. In that finding it was clear that an order refusing to confirm did not amount to an acquittal and that Section 66 did not bar second trial of Kartar Singh by another court-martial. It is significant to note that in that case it was held that the earlier court-martial which had tried the accused was not validly convened. In the circumstances the finding recorded by the earlier court-martial could not be considered to be a finding of acquittal by a validly convened court-martial. In my opinion, before a bar under Section 66 of the Army Act or Section 120 of the AIR Force Act can be raised, it must be shown that there is a finding by a court-martial which has been validly convened. In the case before me it is not contended that the earlier court-martial which tried the petitioner had not been validly convened. Facts of the case cited by the

learned counsel for the respondents are therefore distinguishable from the facts of this case. The reasoning mentioned in the case cited by the learned counsel cannot apply to a case where the earlier court-martial had been validly convened, but ultimately its findings were not confirmed.

14. Learned counsel also relied upon a note to Section 66 of the Indian Army Act as contained in the Manual of Indian Military Law, 1937 published by the Government of India Ministry of Defense. That note reads thus :-

"A finding of a general, summary general (if confirmed as required) or district court-martial, if not confirmed is of no validity; in such case, therefore the accused has not been acquitted or convicted and may legally be tried again: see Sections 94, 98 but re-trials should rarely be resorted to and only when the needs of discipline and justice demand that an offender shall not escape punishment on account of a legal technicality. Retrial should not be ordered until the Deputy or Assistant Judge Advocate-General of the Command has been consulted and the sanction of superior authority obtained."

For reasons already mentioned, I am of opinion that the view expressed in this note does not represent the correct legal position. In a case where needs of discipline and justice demand that the accused should not escape punishment on account of legal technicality and that he should be retried, the object can be achieved either by an appropriate authority taking action for annulment of proceedings under Section 162 of the Act or if the charges leveled against the officer also amount to an offence under the general law by trying him with the sanction of the Central Government before a regular Court as provided in Section 126 of the Act.

15. On behalf of the petitioner reliance was placed on a decision of the Punjab and Haryana High Court in the case of *Major Manohar Lal v. Union of India*,<sup>2</sup> In that case one Major Manohar Lal was tried by a General Court-martial which gave a verdict of 'not guilty' in his favour. The confirming authority did not confirm the proceedings and directed that a fresh trial be held on the ground that the proceedings of the first General Court-martial were null and void under rule. Accordingly, a second General Court-martial was convened. This time it found

the petitioner guilty and awarded a sentence of three years loss of seniority for increments promotion and pension. The petitioner challenged the decision given by the Second Court-martial before the Punjab and Haryana High Court. The High Court held that, in the circumstances it could not be said that the first court-martial which acquitted the petitioner had not been validly convened. Its findings were not null and void. Trial of the petitioner by a second court-martial therefore was invalid. Although, the point discussed in that case is different from the point canvassed before me, still the ultimate conclusion arrived at does help the petitioner to this extent that it was held there that although the findings of the earlier court-martial had not been confirmed still the trial of the petitioner by the second court-martial was held to be barred.

16. In view of the aforesaid discussion, I am of opinion that the proposed trial of the petitioner by the second court-martial sought to be convened by the AIR Officer Commanding in Chief Maintenance Command Indian AIR Force, Nagpur in respect of the offences alleged to have been committed by him at Kanpur and in respect of which he had already been tried by another court-martial will be without jurisdiction.

17. After filing this petition, the petitioner made an application praying that the respondents be restrained from convening the second General Court-Martial for his retrial. This prayer was opposed by the respondents. After hearing the counsel for the parties, this Court permitted the second court-martial to be convened, but directed that further proceedings before it after reading over the charge to the petitioner be stayed. Accordingly, I direct that the proceedings pending against the petitioner before the court-martial which has been convened at Nagpur for trying him in respect of the offences alleged to have been committed by him at Kanpur be quashed. petitioner is entitled to his costs.

Petition allowed.

Case Referred.

1. AIR 1969 All 105
2. 1971 (1) Serv L. Rule 717 (Punj)

