JAMMU AND KASHMIR HIGH COURT

Subedar Surat Singh

Vs.

Chief Engineer Projects

Writ Petn. No. 252 of 1969

(S. Murtaza Fazl Ali, C.J. and Jaswant Singh, J.)

22.05.1970

JUDGMENT

Jaswant Singh, J.

1. The petitioner JC-13018, Subedar Surat Singh and G-75829 Pioneer Joginder Singh and G-87982 Pioneer Tahal Singh, all of 1615 PNR COY (GREF) who were subject to the Army Act, 1950 (Act 46 of 1950 hereinafter called "The Act") were tried by the General Court Martial at Work Shop Base GREF under Section 69 of the Act read with Section 302/109 of the Penal Code for causing the death of G. 87630 Pioneer Suriya Prasad Sharma of 1617 PNR COY on the night intervening 4th and 5th June, 1967, at village Shakti within the jurisdiction of Police Station Leh, District Leh, Jammu and Kashmir State. The Court Martial was convened by the Chief Engineer, Project Beacon Stationed at Srinagar, respondent, herein, who was empowered to do so under Section 109 of the Act. At the conclusion of the trial on 30th May, 1968, the General Court Martial held the petitioner and his aforesaid co-accused "not guilty" and acquitted them of the charges upon which they were arraigned and transmitted the proceedings through proper channel to the respondent for confirmation under Sections 153 and 154 of the Act read with Rule 63 of the Army Rules, 1954, hereinafter referred to as "the Rules". Acting under Section 160 of the Act, the respondent vide his order dated 20th July, 1968, sent back the finding of "not guilty" for revision to the General Court Martial, which originally tried the aforesaid accused. Pursuant to the order of the respondent, the General Court Martial reassembled and deliberated again but seeing no reason to depart from its previous finding, reaffirmed the same. This finding was again sent up under Sections 153 and 154 of the Act read with Rule 68 of the rules to the respondent. Being dissatisfied with the finding the respondent refused to confirm the same and by his order dated 6th February, 1969 directed the re-trial of the petitioner and his other two co-accused by another General Court Martial.

2. Aggrieved by this order, the petitioner has moved this Court under Article 32 (2-A) of the Constitution of India as applied to the State of Jammu and Kashmir and Section 103 of the State Constitution for a writ of Certiorari quashing the order, inter alia on the grounds that there is no provision in the Act or the Rules according to which the confirming authority can refuse to confirm the verdict of "not guilty" after the same has been re-affirmed on revision under Section

160 of the Act and reconvened the General Court Martial for retrial of the offender.

3. In the affidavits filed on behalf of the respondent in reply to the petition, it is contended, that the finding of "not guilty" has no validity unless it is confirmed under Section 153 of the Act read with Rule 63 of the Rules, that if the confirming authority finds that the finding of "not guilty" is perverse it is empowered under Section 160 of the Act to send back the proceedings to the General Court Martial for revision, that this power can be exercised only once, that if on revision the General Court Martial adheres to its former finding and transmits the proceedings for confirmation and the confirming authority comes to the conclusion that the finding given second time by the General Court Martial on revision is still perverse it can refuse to confirm the finding and order retrial because not to try the offender again would mean allowing the charge against him to remain without valid adjudication which would be against the provisions of Section 153 of the Act that in exercise of the powers conferred under Rule 70 of the Army Rules, the respondent refused to confirm the finding of "not guilty" of the General Court Martial in respect of the petitioner and his co-accused pioneers and ordered their retrial in order to meet the requirements of discipline as well as ends of justice, that in the circumstances the proposed fresh trial of the accused by the General Court Martial for the same offences cannot be said to be against the provisions of the Act and the Rules and that it is not open to the petitioner to seek relief by means of a writ petition as a specific remedy under Section 165 of the Act is available to him.

4. The petition first came up for hearing before one of us and finding that it was a case of first impression and involved important questions relating to interpretation of Sections 121, 153, 154 and 160 of the Act and Rule 70 of the Rules, it has been referred to this bench for an authoritative pronouncement.

5. We have heard the learned counsel for the parties at considerable length. They have reiterated the stands taken by their clients in the petition and the reply affidavits respectively.

6. The crucial point for determination in this case is whether the order passed by the respondent is valid or not. The answer to this question turns on the true interpretation of Sections 121, 153, 154 and 160 of the Act and Rule 70 of the Rules, which are reproduced below for facility of reference.

SECTION 121

When any person subject to this Act has been acquitted or convicted of an offence by a Court Martial or by a Criminal Court, or has been dealt with under any of the Sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a Court martial or dealt with under the said sections.

SECTION 153

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.

SECTION 154

The findings and sentences of general Court martial may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government.

SECTION 160

(1) Any finding or sentence of a Court martial which requires confirmation 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.
(2) 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.
(3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the Court shall proceed with the revision, provided that, if a general Court Martial, it still consists of five officers, or, if a summary general or district Court martial, of three officers.

RULE 70

Upon receiving the proceedings of a general or district Court martial, the confirming authority may confirm or refuse confirmation or reserve confirmation for superior authority, and the confirmation, non-confirmation or reservation shall be entered in and form part of the proceedings. It will be seen that Section 121 inter alia prohibits the second trial of a person subject to the Act who has been acquitted or convicted of an offence by a Court martial or by a criminal Court. Section 153 provides that no finding or sentence of a general, district or summary general court martial would be valid unless confirmed as laid down in the Act. Section 154 enumerates the authorities who are competent to confirm the finding and sentence of a general court martial. Section 160 authorizes the confirming authority to order revision of a finding or sentence by the court martial without taking or after taking additional evidence. But the finding or sentence of the Court martial requiring confirmation can be revised once only by the order of confirming authority. If on revision the Court does not find any reason to depart from its previous finding it has to reaffirm the same. If, however, the Court does not adhere to its former finding it has to revoke the finding and sentence and record the new finding and if such new finding involves a sentence, it has to pass a fresh sentence. In either case it has according to Rule 68(4) of the Rules to transmit the proceeding for confirmation to the confirming authority. The powers of the confirming authority are not absolute and untrammelled but are defined and circumscribed by Rule 70 of the Rules. According to that rule it can upon receiving the finding of the general Court martial adopt any one of the following courses :-

(i) confirm, or,
(ii) refuse confirmation, or,
(iii) reserve confirmation for superior authority.

The powers of the confirming authority being limited, as stated above, it cannot go beyond that and direct retrial of the accused specially in the absence of a provision for retrial like the one contained in Sections 423 (1) (A) and 376 (b) of the Code of Criminal Procedure. It is true that in

India unlike in England where the acquittal by the Court martial is conclusive and requires no confirmation, every finding of a general Court martial whether of acquittal or of guilty cannot be regarded as valid unless it is confirmed by the competent authority but the legislature could not have reasonably intended that an officer convening a general Court martial can go on dissolving such Courts and reconstituting them ad infinitum until he obtains a verdict or a finding of his own liking. That would not only be against public policy and the ancient maxim "nemo debet bis vexari pro una et eadem causa" (no person should be twice disturbed for the same cause) but would also reduce the provisions of the Act to a mockery and given an appearance of mala fides. In the present case if the findings arrived at by the general Court martial on revision appeared to the respondent to be perverse he should have referred the case to his superior authority for confirmation and should not have taken upon itself the odium of withholding confirmation and ordering a retrial.

7. Section 117 of the Act cannot also be pressed into service by the respondent as it appears to relate to contingencies arising before the return of the finding by the Court martial and not to cases of the present nature.

8. As the impugned order does not appear to be warranted by any provisions of the Act or the Rules, we have no hesitation in declaring it to be invalid.

9. Before concluding we must also advert to the objection raised in one of the counter-affidavits filed before this Court that since it was open to the petitioner to apply to the Central Government to annul the proceedings, and he has not availed of the remedy the petition is not maintainable. It is now well settled that if the impugned order is manifestly contrary to law or principles of natural justice, it can be interfered with by the High Court under its writ jurisdiction even though an alternative remedy is available and has not been exhausted.

10. In *Calcutta Discount Co. Ltd. v. Income Tax Officer*[1], it was held that the existence of an alternative remedy is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. It was further observed in this ruling that when constitution confers on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief is refused without adequate reasons.

11. Again in *Collector of Monghyr v. Keshav Prashad Goenka*[2], it was held that the High Court has certainly a discretion to grant relief under Article 226 even if there are

[1] AIR 1961 SC 372

[2] AIR 1962 SC 1694

other alternative statutory remedies.

12. In the present case, we find no reason which would justify our refusal to grant the relief.

13. In the result we allow the petition and quash the impugned order by a writ of certiorari and direct the respondent to order the release of the petitioner.

14. There will, however, be no order as to costs.

S. Murtaza Fazl Ali, C.J.

15. I agree.

Petition allowed.