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Court : Armed forces Tribunal AFT Principal Bench New Delhi

Decided On : Apr-01-2010

Judge : A.K.Mathur, Chairperson & Honourable Lt.Gen. M.L.Naidu, Administrative Member

Appeal No. : T.A.No. 246 of 2009 [Arising out of WP(C)No. 2649 of 1989 of Delhi High Court]

Judgement :

1. Petitioner by this Writ Petition has prayed that by an appropriate writ or direction finding and sentence awarded by General Court Martial vide its order dated 18th November, 1987 and its confirmation by the Confirming Authority may be quashed and petitioner may be reinstated with full back wages and consequential benefits. He also prayed that injuries, which were received by him in the grenade blast, are attributable to military service. He further prayed that Judge Advocate has misconducted in the General Court Martial proceedings, action may be taken against him for misconduct.

2. Brief facts which are necessary for disposal of this petition are that the petitioner was charged for an offence under Section 69 of the Army Act, 1950 committing a civil offence under suspicious circumstances, contrary to Section of the Explosive Substances Act, 1908. Petitioner was tried by General Court Martial at Delhi Cantt from 11th August, 1987 to 18th November, 1987. He was found guilty and dismissed from service.

3. It is alleged by the petitioner that he was commissioned in the Indian Army on 20th December, 1970 in the Madras Regiment as a 2nd Lieutenant. It is alleged that, petitioner, before his commission in the Army, served in the JAT Regiment in the ranks since 4th November, 1963 and he was promoted to Major in the substantive capacity.

4. On 22nd September, 1984 the petitioner was transferred, on deputation, to Headquarters Establishment No. 22 under the IG Headquarters SFF from his parent Unit i.e. 19 Madras Regiment. Headquarters SFF and Establishment No. 22 are civil organisations and not part of Regular Army. On 14th October, 1984 the petitioner was transferred to Project Sunray under the IG, SFF. The petitioner was on probation for a period of three months on his transfer on deputation. While on deputation in Project Sunray petitioner was posted at Sarsawa near Saharanpur, U.P. On 17th October, 1984 some of the personnel belonging to the Project Sunray and stationed in Delhi were detailing to undergo training at Sarsawa.

5. It is also alleged that some misfortune incident happened at Muzaffarnagar Railway Station and in that Major PN Tambe and Captain S Prida wanted petitioners assistance and asked the petitioner to tell the police authorities that the officers were away on training, but, he did not do it. Therefore, a grievance as nursed against him by these officers.

6. It is further alleged that in the first week of November, 1984, the complete contingent moved to Delhi and the contingent was assigned the task of P.M. security. The petitioner also moved to Delhi. It is alleged that on 19th November, 1984, the petitioner, unable to adjust with the growing animosity including threats to his life from these officers, the petitioner made an application for an interview with I.G., SFF. The petitioner was interviewed on or around 24th November, 1984, petitioner requested that he be sent back to the Indian Army and he also informed I.G. regarding threat on account of Muzaffarnagar incident. I.G., SFF assured the petitioner that he will be adjusted either in SFF Academy or on the staff of Headquarters Establishment No. 22. Petitioner insisted to be reverted back to the Indian Army. He was asked to make a written request for reversion to Indian Army. Since the Deputy Director (Coordination) was not in station, the petitioner was

informed that it would take some time on the outcome of petitioners interview with I.G. During the period the petitioner, with permission from one Brigadier MS Panwar, DDMS (C) at SFF, was staying with his parents at Punjabi Bagh during non-working hours. During the working hours the petitioner used to go to Headquarters SFF daily to find out regarding his posting.

7. On 1st December, 1984 the petitioner went to Headquarters SFF. At about 1.30 p.m. he was informed that his posting to 3 Vikas had been ordered, but, he immediately moved an application for reversion to the Indian Army. After taking the application, petitioner spoke to Commander Project Sunray, Lt. Col. KD Pathak, on telephone. Since it was quite late, petitioner requested Lt. Col. Pathak that he would leave the application at his residence, before leaving the detachment. Thereafter, the petitioner, after finishing various jobs, hired a taxi and went to the Officers Mess, where Lt. Col. Pathak stayed. He went to mess and ordered for some refreshments for himself. Petitioner went to handover the application to Major Tambe, who was present there. Major Tambe refused to accept it and he directed me to leave the application at the residence of Lt. Col. KD Pathak. Petitioner went to the residence of Lt. Col. KD Pathak, to leave the application.

8. The petitioner wanted to keep the application at a suitable place where Lt. Col. Pathaks attention could be drawn to it. He saw a dressing table in Lt. Col. Pathaks room and he thought it is a suitable place to keep the application. As soon as the petitioner lifted the books/magazines, to keep the application underneath, so that it does not fly off, there was a blast. The petitioner does not remember anything thereafter till he regained consciousness in the Intensive Care Unit of the Army Hospital, Delhi Cantt.

9. As a result of the blast petitioner received the injuries Laceration of right hand and mutilation of fingers and palm; multiple puncture wounds over the face; puncture TA No. 246 of 2009 9 wounds over right shin; and injury to right eye. It appears that the blast was due to hand grenade, which might have been planted by the terrorists with a view to kill Lt. Col. KD Pathak, who was Commander of the Task Force looking after P.M.s security. It is alleged that nobody bothered to investigate the cause of this blast. However, the petitioner remained in the Army

Hospital till 9th July, 1985. After discharge from the hospital, he reported to the Headquarter SSF Medical Board at the Army Hospital and he was downgraded in medical category. The Medical Board further directed that he may be allotted duties need not be of a sedentary nature but not fit for duties in combat or hilly terrain and extreme cold climate and not to be employed in work requiring good binocular vision. Petitioner remained at Headquarter SFF till 31st August, 1985. On 31st August, 1985 the petitioner was moved from Delhi to Kalsi, Dehradun on a temporary duty, there he stayed with Ordnance Company. Because of his medical condition he was brought to M.H. Chakrata and from there he was kept in Military Hospital, Dehradun. However, according to petitioner, because of the negligence he lost one eye. Petitioner was found to be unsuitable for Project Sunray and ultimately he was sent to Unit 3 Vikas.

10. However, as a sequel to the incident, where a grenade blast took-place at Lt. Col. Pathaks room, it is alleged that after petitioner was sent to hospital, his bedding was also searched and in the tent, which was shared by him and another officer Major KG Nair, during the search a live primed hand grenade (marking: Lot No. 104 and F-77 detonator KF 10-77) was recovered under his pillow. Therefore, petitioner was charged before General Court Martial for offence under Section 5 of the Explosive Substance Act, 1908 by virtue of Section 69 of the Army Act, 1950. A Court of Inquiry was also conducted by the Commandant, Headquarter Establishment No. 22. It is alleged that the whole inquiry was conducted in his absence and in that Court of Inquiry petitioner was found guilty and sent for Court Martial, the charge before the Court Martial reads as under:

CHARGE SHEET

The accused, IC-24965 Major (Substantive) CHILLAR, Satvir Singh, HQ Establishment NO 22 (Project Sunray) attached Central Vehicle Depot Delhi Cantt, an officer holding a permanent commission in the Regular Army, is charged with:-

COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, POSSESSING EXPLOSIVES UNDER SUSPICIOUS CIRCUMSTANCES, CONTRARY TO SECTION 5 OF THE EXPLOSIVES SUBSTANCES ACT, 1908

in that he

at Delhi Cantt, on 01 Dec 84, was in possession of Hand Grenade HE-36 Lot No. 610H KF-77, an explosive substance, under suspicious circumstances.

Station: Delhi Cantt-I0 Sd/-

To be tried by General Court Martial

[HS Bahl]

Place: Delhi Colonel

Colonel A.

Date:06 Aug 87 for General Officer Commanding

Delhi Area

11. The prosecution, examined 19 witnesses and defence examined two witnesses and large number of documents were exhibited. Ultimately the Court Martial authorities found the petitioner guilty and record order of dismissal. The finding and sentence of the Court Martial reads as under:

FINDING

The Court is closed for the consideration of the finding.

The Court find that the accused IC-24965W Major (Substantive) CHILLAR, Satvir Singh, HQ Establishment No. 22 (Project Sunray) attached Central Vehicle Depot, Delhi Cantt, is Guilty. Of the charge with the exception of the words and figures Lot No. 610H KF 77.

SENTENCE

The Court sentence the accused IC-26965 W Major (Substantive) CHILLAR Satvir Singh, HQ Establishment No. 22 (Project Sunray) attached Central Vehicle Depot Delhi Cantt To be dismissed from the service..

ANNOUNCEMENT OF SENTENCE

The Court being reopened, the accused is brought before it. The sentence is announced in open court: the sentence is announced as being subject to confirmation.

Signed at Delhi Cantt, this eighteenth day of November, 1987.

Sd/-xxxxxxx Sd/-xxxxxxx

(Surinder Singh) (Gupta Sharad Chandra)

Major Brig

Judge Advocate Presiding Officer

12. A reply was filed by the respondent and respondent traverse all the grounds raised by the petitioner and pointed out that in September, 1989 the petitioner was posted to Headquarter Establishment No. 22. On October, 1984, he reported to Special Group on Probation. His probation training commenced on 18th October, 1984. Petitioners performance during probation was not upto the mark. Hence his Officer Commanding informed him on 15th November, 1984 that he will be sent back on posting to one of the units of SFF as he had not been found fit to continue in the Special Group.

13. Consequent to his posting on 19th November, 1984 to 3 Vikas, he was interviewed by his Commanding Officer Col. KD Pathak. Col. Pathak informed him that because of his general behaviour he did not have the right kind of mental thinking to fit into the unit, so he was not being absorbed in the Special Group. Petitioner was satisfied and asked for an interview with Inspector General Special Frontier Force. The interview was granted on 23rd November, 1984 and his request for retention in Delhi was turned down, but, he was allowed to stay in Delhi for a week on compassionate grounds.

14. Petitioner telephoned to Col. Pathak that he doesnt want 3 Vikas posting and he may be absorbed in SSF Academy or he may be reverted back to the regular Army. Petitioner returned to the Special Group Detachment Officers Mess and

went to his tent which he was sharing with Major Nair. After sometime, he came out of tent and told Naik Rajinder Singh to go away from the vicinity of his tent. After a few minutes Naik Rajinder heard an explosion sound coming from the direction of Col. Pathaks room, which was located nearby petitioners tent. Just after the explosion, the petitioner was seen coming out of the verandah of Col. Pathaks room and proceeding towards his tent in an injured state. He then went further and collapsed on the lawn. He was, thereafter, evacuated to the Base Hospital, Delhi Cantt.

15. Thereafter, Col. AS Sundaram of Bomb Disposal Coy., along with his team, was ordered by Brig. Panwar to make safe the Officers Mess Area. During the make safe operation it was revealed that the explosion in Col. Pathaks room was caused by a High Explosive-36 hand grenade. He also recovered a High Explosive-36 hand grenade, which was lying underneath the pillow inside a cardboard bulb cover wrapped in the night suit. The grenade was armed and primed. On 2nd December, 1984 another hand grenade was found lying in the kitchen garden, same was also live.

16. Petitioner was given first aid and petitioner quickly changed his version and stated that he had gone to Col. Pathaks room to put up an application and, there he found something wrapped in a Punjabi newspaper. The moment he lifted it, it exploded. He also instructed Major KG Nair, who was standing next to him to go back to the Officers Mess and collect all his belongings, including beddings. Later on, he told him that he should ring up his father and inform him about the incident and on his arrival hand over all those beddings and personal belongings to his father.

17. A Court of Inquiry was conducted by Lt. Col. AS Yadav and Court of Inquiry found that petitioner entered into the room of Lt Col KD Pathak with the intention of placing a primed and armed HE-36 hand grenade, a booby trap, which exploded while it was being placed, he left a Punjabi advertisement in the room to mislead the authorities and create and arouse anti communal feeling. He was found in illegal possession of stolen property that is one IAFT- 1752, a blank signed and stamped railway warrant bearing No. PA/46 250102. Further, Court of Inquiry

recommended that the injuries received by him were not attributable to military service and loss caused to government property due to the grenade explosion to be written off.

18. It was also pointed out by the respondent that the action was initiated against the petitioner, he was attached by Army Headquarter to 16 Advance Park. Lt. Col. HK Gupta, Commanding Officer of the petitioner carried out the hearing of charge in accordance with the provisions of Army Rule 22 and directed recording of Summary of Evidence. Thereafter, the petitioner was attached by Army Headquarter to Central Vehicle Depot, Delhi Cantt. The commandant Central Vehicle Depot complied with the provisions of Army Rule 24 and referred the case to superior authority i.e. the General Officer Commanding Delhi Area, who after obtaining legal advise from Deputy Advocate General Western Command ordered that the petitioner be tried by a General Court Martial and the petitioner was accordingly charged under Section 69 of the Army Act for committing a civil offence under suspicious circumstances contrary to Section 5 of the Explosives Substance Act, 1908, and, after trial he was found guilty and dismissed from service.

19. Learned counsel for the petitioner has strenuously urged before us that since the Establishment No. 22 is not a part of the Army Establishment, Army Act and Rules is not applicable as per Section 4 of the Army Act, 1950. Lt. Col HK Gupta was not the commanding officer as given in Section 3 (v) of the Army Act, 1950. Therefore, the Court of Inquiry which had been conducted by the Commanding Officer Lt. Col. Gupta, and Summary of Evidence are illegal and on that basis the charges could not have been framed, as such, learned counsel submitted that the convening of the Court Martial, on the basis of such illegal inquiries, cannot be sustained.

Next he submitted that the whole investigation was illegal as no physical search was taken in the tent where the bed of the accused was there, no proper sealing was done, no independent witnesses were produced and the area is open and accessible to all. There is a serious mistake regarding identification of the tent number. No dogs were used, there is no evidence to show that so called recovery

of the grenade from the bedding of the petitioner contain explosive. The items recovered were not kept in sealed condition in possession of the competent authority. Identity of the main grenade is also not established because the number of the grenade, which was recovered, and number of the grenade, which was produced in the court, did not tally. The charge itself stands vitiated. No expert witness was produced, but not identified. In order to support all the contentions learned counsel for the petitioner has submitted large number of decisions of Apex Court, bearing on the subject.

20. As against this, learned counsel for the respondent submitted that Lt. Col. Gupta was the Commanding Officer of the petitioner and Court of Inquiry was properly conducted, petitioner was given full opportunity to cross-examine the witnesses.

21. We have heard learned counsel for the parties and perused the record. So far as the first question is concerned, the conduct of the Court of Inquiry in an unauthorised manner, because the Establishment No. 22 was not a part of the Army Establishment, therefore, it stands vitiated, suffice it to say that nothing turns on this aspect, because petitioner was an Army Officer and ultimately what affects him is the Court Martial proceedings, which were initiated against him. Whatever irregularities were there in conduct of court of inquiry or summary evidence they are in nature of preliminary inquiries. Even if we take it that Establishment No. 22 is civil organisation, all those inquiries were preliminary inquiries which, otherwise, could have been conducted by civil organisation to find out the truth of the matter.

22. So far as Court Martial proceedings are concerned, which have been initiated against the petitioner, when he was attached to the Delhi area and it was conducted by a competent authority. It may also be relevant to mention here that as per Regulation 409 of Defence Regulations ultimately final order has to be passed by the Army only. Even if we take that the Establishment No. 22 was under the Cabinet Secretariat and also a civil organisation, as per Regulation 409 civil organisation cannot dismiss or remove any person who is subject to Army Act and Rules. Therefore, any person working with civil organisation has to be sent back to the Army because the army officer is subject to army discipline only and

competent authority alone can pass the orders.

23. In the present case, whatever preliminary enquiry, which has been done by way of Court of Inquiry or by Summary of Evidence, they were all in a preliminary investigation by the civil administration in order to find out the truth of the allegation and ultimately when it was found that there is prima facie case against the petitioner he was regularly attached with the Delhi unit of Army for conduct of the trial and the Court Martial was ordered by the competent authority under the Army Act. The grievance of the petitioner with regard to the preliminary enquiry, the preliminary enquiry is in a nature of fact finding enquiry only and, even if they had not resorted to Rules 22, 23, 24 and 180 of the Army Rules, 1954, still it was open for them to hold a preliminary enquiry like in civil administration to find out the allegation against the petitioner and, if they find prima facie case against him for illegal possession of explosive substance, for which the competent authority was the Army to pass the order. Therefore, all the proceedings which have been conducted by Commanding Officer Gupta was in nature of preliminary enquiry and ultimately when it was found that there is prima facie case, then, petitioner was attached to the regular Army Unit at Delhi Cantt. and a competent authority has ordered a Court Martial against the petitioner. Therefore, this objection of the petitioner does not in any manner vitiate the whole Court Martial proceedings. It may at best be the irregularity as the authorities were not sure that whether Army Act and Rules should be made applicable for preliminary enquiry or they should call for a preliminary enquiry like in other civil administration. They were under the impression that since the petitioner is an army officer, the whole establishment is being manned by army personnel, therefore, they have proceeded to make an investigation like Court of Inquiry. The net result of this exercise was in the nature of preliminary enquiry to find out the truth in the matter and ultimately they came to the conclusion that this is a case in which some explosive substance has found in the bedding of the petitioner, as such he is required to be enquired by a competent authority, therefore, they attached the petitioner back to the Indian Army and Court Martial Proceedings were initiated by a competent authority at Delhi. Therefore, in our opinion, this argument will not vitiate the court martial proceedings initiated against the petitioner.

24. Next question comes whether in the Court Martial proceedings the prosecution has been able to establish the guilt of the accused or not. It is admitted that a charge against the petitioner was framed that he was in possession of a live hand grenade, therefore, he was charged under Section 5 of the Explosive Substance Act, 1908, and, in the charge sheet the number of the Hand Grenade HE 36 Lot No. 610H KF-77. Therefore, the gravamen of the charge relates to possession of Hand Grenade HE 36 Lot No. 610H KF-77, which is said to be explosive substance, but, strangely enough in the finding, which has been reproduced above, the authorities has deleted the lot No. HE 36 Lot No. 610H KF-77. The offence said to have been committed by possessing explosives under suspicious circumstances and in the final finding given by the Court Martial, the Court Martial authorities says the reference of HE-36 Lot No. 610H KF- 77 may be deleted. The net result is that when the accused was charged for a particular substance, which is said to be an explosive substance and finding recorded by the Court Martial authorities that delete this number of hand grenade, meaning thereby, the basis of which the accused has been charged for possessing a particular explosive and reference of that particular explosive has been deleted from the final finding, then, what remains of the offence. The offence is possessing of explosive substance of hand grenade No. HE36 Lot No. 610H KF-77, but, that grenade No. He36 Lot No. 610H KF-77 already taken out, then, what was in possession of the petitioner, which is said to be an explosive substance. We fail to understand the wisdom of the Court Martial authorities that when the subject matter of the offence was the possession of a hand grenade, which is said to be an explosive substance, and that reference of hand grenade is deleted from the charge, then the truncated charge will reads as under:

at Delhi Cantt, on 01 Dec 84, was in possession of Hand Grenade [..... ..], an explosive substance, under suspicious circumstances.

This doesnt make a sense at all. The allegation was that he was in possession of a particular substance and that substance was hand grenade No. HE 36 Lot No. 610H KF-77. When that hand grenade itself is taken out from the charge sheet, then, what was that explosive substance for which the accused can be found guilty. The net result is the finding is totally defective. That means, defective in the

sense that when the accused is not found guilty for possession of the hand grenade HE 36 Lot NO. 610H KF-77, then no offence pertaining to this hand grenade is stand proved. The gravamen of charge is possession of a particular explosive substance, when that explosive substance is not established the whole charge fails on the face of it. This goes to the root of the matter and the whole prosecution fails on this account.

25. Though, the learned counsel for the petitioner argued that this hand grenade, whether it has a explosive substance or not, no evidence was lead by explosive expert. It is unfortunate that the person who seized the explosive Col. AS Sundaram (PW- 15) admitted that though it was kept in his custody, no proper sealing was done, no independent witnesses were examined and so much so he admitted that this hand grenade was summoned by his higher authorities and the hand grenade which was received back did not bear same number or marking. He admitted categorically that hand grenade, which bears the number, which was seized, and sent to higher authorities, when it was received back the hand grenade bears different number i.e. same hand grenade was not returned.

26. PW- 14 Major KG Nair who shared the same tent with the petitioner gave the tent 180 lbs and subsequently it was found to be EPIP tent. There was a contradiction between the two, but, that is not much material. What is material is the basic thing which we have pointed above that the charge or which the petitioner was sent for Court Martial and Finding which has come from the Court Martial authorities clearly indicates that the substance which was subject matter of the offence has been not established and, therefore, Court Martial authorities has modified the charge, though, finding the petitioner guilt, but, recorded the charge with the exception of the words and figures Lot No. 610H KF 77. Therefore, this has proved fatal to the whole prosecution case. When the subject matter for which the incumbent has been found guilty is not established, then, what remains in the charge. Therefore, without going to other details, as argued by learned counsel for the petitioner, the very fact that subject matter for which the petitioner is found to have possessing that explosive substance is not there, then, nothing remains to be established. Consequently, finding guilty of the accused by the Court Martial authorities is totally illegal and unsustainable in law.

27. Before parting with the case, we would like to observe that in conduct of Court Martial proceedings some elementary mistakes are committed. Neither the Judge Advocate, who advises the Court Martial proceedings, has, at any time, experience of conducting sessions trial, as a result of which he could not properly advise the Court Martial authorities nor the prosecutors are properly trained to conduct such criminal trials. As per Section 152 of the Army Act, 1950 Court Martial under the provisions of the Army Act shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code and the Court Martial shall be deemed to be court within the meaning of Sections 345 and 346 of the Code of Criminal Procedure, 1973. For such matters, a properly trained prosecutor is required. This is highlighted in this case that such elementary mistakes were committed in conduct of the criminal prosecution. Therefore, the authorities, should appoint proper prosecutors for conducting such criminal cases in Court Martial proceedings, likewise, a trained Presiding Officer, who knows how to conduct the criminal trial or a Judge Advocate who had an experience of conducting the criminal trials.

28. We have seen number of Court Martial cases, which have come before this Tribunal and we find that most of the elementary mistakes were committed in conduct of the criminal trials under Court Martial proceedings. Now a proper appeal lies against the court martial proceedings before this Tribunal, the Tribunal has to examine all the procedure as well as substance of the criminal trial like in Court of Appeal, including appreciation of the evidence, and our experience is that the trials in the Court Martial proceedings relating to civil offence like murder or other penal code offences or offences under the other acts are not properly conducted like a regular criminal trial. The result is that they will turn into acquittal. Therefore, now in changed situation, when the Court Martial proceedings are amenable to regular appeal under the Act, the authorities have to undertake the overall review of conducting Court Martial trials pertaining to offences under penal code or other civil offences by a competent prosecutor, who has experience of trial as well as the Presiding Officer should also be a trained person, who has seen the trials conducted by Sessions Court, so that they can appreciate the difference between the two and regulate the Court Martial proceedings as if they are conducting a criminal trial before sessions. Such Presiding Officers should be sent

for training in a criminal court, where trials are conducted, likewise, the Prosecutors and the Judge Advocate. Therefore, the matter requires a serious consideration of overhauling of the procedure.

29. Another important feature, which we would like to highlight that before presenting the matter for Court Martial three tier proceedings are taken, first, a preliminary enquiry, then, at the charge stage, and, thirdly summary of evidence, ultimately the matter goes to Court Martial. Therefore, this is a four tier exercise, which is also cumbersome, time consuming and totally unwarranted. Once the investigation is done, then, the case should be immediately taken before the Court and Court find prima facie charges, then, either Court may send it to session court for trial or if authorities want to try by Court Martial, then, it can apply before the Court. The preliminary enquiry at three stages, i.e. Court of Inquiry, framing of charge and summary of evidence is a useless exercise and it creates more confusion and lot of time consuming also. Therefore, this exercise should be shorten like a criminal trial, so that the proceedings of Court Martial can be expedited.

30. As a result of our above discussion we find that charge has not been brought home against the accused, therefore, he is entitled to be acquitted and accordingly we acquit accused of all the charges and set aside the order of Court Martial dated 18th November, 1987 as well as the confirmation order. No order as to costs.

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