SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Dev Anand Singh Vs. Union of India and ors.

Dev Anand Singh Vs. Union of India and ors.

SooperKanoon Citation : sooperkanoon.com/899347

Court : Jammu and Kashmir

Decided On : Jul-31-1985

Reported in : 1987CriLJ8

Judge : Mazhar Ali Shah, J.

Appellant : Dev Anand Singh

Respondent : Union of India and ors.

Judgement :
ORDER

Mazhar Ali Shah, J.

1. The present Habeas Corpus Writ Petition was registered on a Jail Petition filed by the petitioner Dev Anand Singh, subsequent to which a detailed petition has been filed under Article 226 of the Constitution of India read with Section 103 of the Constitution of Jammu and Kashmir praying for the quashing of the sentence imposed on the petitioner by the General Court Martial sentencing the petitioner for a period of eight years' Rigorous Imprisonment and also dismissing him from the service pursuant to the said conviction. The petitioner admittedly joined the Indian Army as Sepoy/GD on July 31, 1976 and after completing the requisite training in March 1977 was attached to 12 J & K Rifles. The petitioner proceeded on leave from 2-2-1979, he was taken into custody by B.S.F. personnel on March 16, 1979 and was interrogated upon, thereafter freed from them. On completion of

his annual leave, when the petitioner joined his Unit of April 3, 1979 was sent for by the Officer Commanding on April 7, 1979 and was taken into custody by the Military Intelligence Bureau on the same day. It is submitted that he remained in solitary confinement upto June 2, 1979 and was subjected to torture and third degree methods. It is also pointed out that while in custody he was forced to sign on a number of blank sheets and also on some English written papers, the petitioner is illiterate, he can neither read nor write English. He was not allowed to meet his relations till January 1980 and was not permitted even to see his counsel and as such was condemned unheard. The petitioner was found by the General Court Martial guilty of offences Under Sections 63 and 69 of the Army Act and Section 3(1)(c) of the Indian Official Secrets Act, 1923. Being aggrieved against the said conviction, the present Habeas Corpus Petition has been filed challenging the conviction on various grounds.

2. At the time of hearing, learned Counsel for the petitioner precisely raised the following three contentions:

(i) That the offence charged against the petitioner being as offence under the Indian Official Secrets Act, 1923, the conviction is bad for the want of sanction Under Section 13 of the said Act and also the same being a Civil Offence should have been tried by an ordinary Criminal Court and not by the General Court Martial.

(ii) That Under Section 152 of the Army Act, 1959, the trial by a Court Martial is deemed to be a judicial proceedings within the meaning of Sections 193 and 228 of the IPC; as such the trial is vitiated as the provisions of Cr. P.C. as well as of Section 133 of the Evidence Act are violated, the finding of guilty is based on an alleged retracted confession made to a person in authority which stood uncorroborated and caused substantial failure of justice, and

(iii) That the petitioner has already undergone seven years of imprisonment, he is entitled to be set off against the sentence of imprisonment, the period of detention undergone by the petitioner before the order of conviction as required Under Section 428 of the Cr. P.C.

3. The petition is contested by the respondents in their counter affidavit, the respondents have refuted the allegations made by the petitioners regarding torture and refusal of meeting with the family members of the petitioner. It is pointed out that on 20th Jan. 1979, petitioner was granted leave for five days upto 25th Jan. 1979 and subsequent from 3rd Feb. to 3rd April, 1979 in between on 16th March, 1979 near Bakarpur post, the petitioner was arrested under certain suspicious circumstances, but after the establishment of his identity, he was released on the same date. On joining duty after availing the leave on 4th April, 1979, the petitioner was interviewed by his commanding Officer as he was suspected to have been involved in certain acts of espionage against India for Pakistan. On account of the said involvement he was questioned by the appropriate military authorities and was subsequently taken in military custody from 2nd June, 1979 till the date of the commencement of his trial by the General Court Martial on 7th Nov. 1979. On the said charge of espionage activities, a Summary of Evidence under the provisions of the Army Rules was recorded by the Commanding Officer in accordance with Army Rules 22, which established against the petitioner, the charge of espionage and the Summary of Evidence was strictly conducted under the Army Act and the Rules in presence of the petitioner on 30th Oct. 1979 and the regular trial commenced before the General Court Martial on 7th of Nov. 1979. The petitioner was asked as to whether he wanted particular officer to be assigned to represent him as his defending officer during trial, which he was provided. During the trial the petitioner voluntarily made a plea of guilty in respect of both the charges levelled against him. It is also submitted that the conviction of the petitioner is not based on his confessional statement, but is based on sufficient corroborative evidence also, the petitioner was, therefore, convicted by the General Court Martial Under Sections 63 and 69 of the Army Act, 1950 (hereinafter called the Act). It is also denied that the provisions of Official Secrets Act for the grant of sanction are attracted in the present case. It is also submitted that the petitioner had an alternative remedy to file a petition Under Section 164 of the Act against the order of conviction. Having failed to avail that remedy, the petitioner is not entitled to be heard in the writ petition.

4. learned Counsel for the petitioner in support of his contentions raised above laid great stress on the applicability of Official Secrets Act and submitted that the

charge levelled against the petitioner being a civil offence ought to have been tried in the ordinary criminal-court that too with a proper sanction as required Under Section 13(3) of the Official Secrets Act, which runs as follows :-

13(3) No court shall take cognizance of any offence under this Act unless upon complaint made by order of or under authority from, the (appropriate Government) or some officer empowered by the (Appropriate Government) in this behalf.

5. On a perusal of the provisions of Section 69 of the Act regarding Civil Offences, it transpires that a Court Martial has an exclusive jurisdiction to try the offences under the Act except those provided in Section 70 of the Act. Thus a General power is given to the General Court Martial to try an offence like the present one, the case of espionage against India and that of indiscipline against the Army Act, which are both triable Under Sections 63 and 69 of the Act, thus I find no force in the contention of the learned Counsel for the petitioner that the present case is governed only by the provisions of Official Secrets Act and should have been tried by a criminal court under the ordinary criminal law and offence of the said nature, by which the petitioner is charged is quite within the jurisdiction of the General Court Martial and as such no sanction as needed Under Section 13(3) of the Official Secrets Act is required. The conviction of the petitioner, therefore, cannot be quashed on the first point raised by the petitioner during the course of arguments, which is decided against the petitioner.

6. The second point raised with respect to the applicability of the procedure provided in the Cr. P.C. in accordance with Section 152 of the Army Act, 1959, it is no doubt true that the proceedings before the Court Martial are deemed to be judicial proceedings, but at the same time the scope of Section 152 of the Act is not so wide so as to cover even the trials held by the General Court Martial as for the trial of offences under the Army Act, a special comprehensive procedure has been provided duly supplemented by the rules framed under the Act and thus the contention of the learned Counsel for the petitioner in this respect also falls short of the requirement of law. On a bare reading of the provisions of J & K Code of Cr. P.C. 1989, Sub-section (2) of Section 1 of the said Code in Sub-clauses (a) provides the extent as follows: -

1(2) Extent-(a) It extends to the whole of Jammu and Kashmir State but in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

7. learned Counsel for the petitioner in support of his contention placed reliance on AIR 1960 J & K 145 : 1960 Cri LJ 1593 (2) (Bimla Devi v. G.L. Bakshi) : 1961 CriLJ828 E. G. Barsay v. State of Bombay, AIR 1977 J & K 81 : 1977 Cri U 1534 (FB) (Mahabir Singh v. State) and 1983 Kash LJ 279 : 1983 Cri LJ 1788 (Sewa Ram Nagial v. Union of India) and submitted that following the ratio decidendi of the above said authorities, it was incumbent on the General Court Martial to comply with the provisions of Section 133 of the Evidence Act, which stands violated in basing the conviction of the petitioner on the plea of guilty! In reply learned Counsel for the respondents submits that as pointed out in the counter affidavit and also duly supported on record that the plea of guilty is based on a voluntary confession and also stands corroborated by other evidence on record, which was taken in the presence of the petitioner. The stand taken by the learned Counsel for the petitioner stands falsified on record. It will be convenient to mention here that an opportunity was given to the learned Counsel for the petitioner to inspect the record, which was inspected by him by the order of the Court despite that nothing could be pointed out during the course of arguments to show that any of his contentions as mentioned above finds support from the record of enquiry, the order passed by the General Court Martial is by the responsible authorities of the Army and the affidavit sworn in by Lt. Col. I. C. Kewlani Commanding Officer stands unrebutted, I, therefore, find that all the above quoted authorities cited by the learned Counsel for the petitioner are of no help to him, they are neither applicable on the facts of the present case nor cover the point which he wanted to demonstrate, thus point No. 2 also has no legs to stand. It is, therefore, held that the conviction of the petitioner cannot be set aside in the present writ petition specially when this Court in a writ jurisdiction cannot sit as a Court of appeal to appreciate the evidence, it cannot be quashed in the circumstances of the present case. The petitioner ought to have taken recourse if he wanted to challenge the findings on facts before the appropriate forum Under

Section 164 of the Act. Having failed to do so, he is not entitled to any relief in the present petition.

8. Coming to the last and the third point of the petitioner regarding set off, the detention of pre-conviction period Under Section 428 of the Cr. P.C. the equivalent Section of which in the State Code is found in Section 397 A. period of detention undergone by the accused to be set off against the sentence of imprisonment. learned Counsel for the petitioner, in support of this contention placed on record an order of the Division Bench of this Court passed on Sept. 26, 1983 in an interim application titled as Ex. Havildar Gh. Mohammad Dar v. Union of India, where in Under Section 428 of the Cr. P.C. was moved praying a set off of 11 months of the pre-trial period of detention, their Lordships have directed the Superintendent of Jail, Srinagar, to set off the period of 11 months undergone by the petitioner under army custody against the period of sentence imposed on him by the Court Martial. It is further directed that Superintendent will also consider whether the petitioner is entitled to such remission as would entitle him to be set free. What happened to the main writ petition, out of which the above said interim application arises, it is not pointed out by the learned Counsel for the petitioner. In reply learned Counsel for the respondents placed his reliance on a reported Division Bench decision of the Madras High Court reported in 1984 Cri LJ 892 (T. S. Ramani v. Superintendent of Prisons, Central Jail, Madras) pointing out that where a person is convicted under the Army Act, the provisions of Section 428 of the Cr. P.C. shall not apply and he strenuously argued that such a set-off should not be allowed to the petitioner. In the said authority (Supra), their Lordships after a detailed discussion of the different provisions of the Army Act and Cr. P.C. have held that accused military personnel convicted and sentenced by Court Martial Under Section 64(e) of the Act, he is not entitled to set-off any pre-conviction detention Under Section 428 of the Cr. P.C. The copy of the order filed by the learned Counsel for the petitioner of the Division Bench of this Court on an interim application is of an interim nature and in my opinion no such arguments were advanced before the Division Bench regarding the applicability of the provisions of Section 428 of the Cr. P.C. However, without speculating on the said point, I leave the point open for the decision by a larger.Bench on the point of the applicability of set-off of the pre-conviction period of detention, which may be raised in any

appropriate case in future. As the authority of the Madras High Court has only a persuasive value and not of binding nature. In the instant case from the reading of the counter and the petition, it transpires that the petitioner is convicted to undergo a sentence of eight years R.I. Under Sections 63 and 69 of the Army Act. The maximum punishment provided Under Section 63 of the Army Act is to the effect:

which may extend to seven years or such less punishment as is in this Act mentioned.

Whereas Under Section 69 if the person is guilty of a Civil offence tried by a Court Martial on conviction under sub-section(a):

Section 69(a) If the offence is one which would be punishable under law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.

It has been pointed out by the learned Counsel for the respondents that the petitioner is convicted on the charge of espionage, about which no specific particulars are either shown in the counter or placed on record to find out that the offence with which the petitioner is charged squarely falls within the provisions of Section 5(3) of the Official-Secrets Act that he had in his possession or control any sketch, plan, model, article, note, document or information, which relates to munitions of war or any other provision of the Official Secrets Act, so as to punish the petitioner with imprisonment of any term, which may extend to imprisonment for life or for more than three years as provided under Sub-section (4) of Section 5 of the said Act. As such even if the conviction Under Section 63 of the Act is upheld, the sentence of imprisonment for a period of eight years R.I. cannot be upheld for the want of particulars as required under law, which are not placed before the Court by the respondents.

9. Viewed with he above said findings, I find that the maximum punishment as provided Under Section 63 of the Army Act being seven years, the imprisonment of eight years imposed on the petitioner does not hold water in the present case. The petitioner is, therefore, entitled to a reduction of one year sentence and the offfence charged against him being of espionage of a serious nature, the maximum sentence of seven years Under Section 63 of the Act read with Section 69 of the Act is hereby maintained. In view of the directions of the Division Bench of this Court in the interim application referred to above to the Superintendent Jail, where the petitioner is undergoing sentence, it is for the Superintendent to consider whether the petitioner is entitled to permissible remissions under the rules to set him free, if he has already undergone a period of seven years imprisonment including the remissions therein in accordance with the jail manual, the petitioner shall be set free if not wanted in any other case.

10. For the reasons stated herein above,' the Habeas Corpus Petition partly succeeds with the directions stated in the above paragraph, the petitioner is entitled to a reduction of one year of sentence out of eight years, which stands quashed to that extent and shall be set free if he has already undergone seven years imprisonment with remissions permissible under the Jail Manual, which may be decided by the Superintendent Jail, where the petitioner is undergoing the sentence, if not released so far.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com