

Delhi High Court

R.S. Kalra (Major) vs Union Of India & Ors. on 26 May, 2000

Equivalent citations: 2000 VAD Delhi 569, 2000 (56) DRJ 528

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Bench: A Sikri

ORDER A.K. Sikri, J.

1. Petitioner was commanding 203 Army Engineer Regiment as a Lt.Col. in 1972. On 14.11.1972 he was tried and convicted by GCM under sections 47 & 63 of Army Act and was sentenced to forfeiture of seniority of substantive rank of Major for two years and severe reprimand by the GCM vide order dated 22.11.1972. Petitioner was tried on two counts:-

(a) That on 26.2.1972 while commanding 203 Army Engineer Regiment, petitioner improperly exposed Capt. A.K. Mathur to hazards of sailing knowing well that he had no previous experience of sailing, he was a nonswimmer and was not equipped with life jacket.

(b) That on 5.5.1972 petitioner used Criminal Force to Lt. R.K. Sharma of the same regiment by hitting him on the face with a rolled up file.

2. This sentence dated 22.11.1972 was confirmed by respondent No.3 on 3.4.1973. Petitioner preferred an appeal under section 164 of the Army Act to the Chief of Army Staff namely respondent No.2. This was however rejected by respondent No.2 and decision was conveyed to the petitioner vide order dated 11.3.1974. Petitioner preferred yet another appeal to the Central Government namely respondent No.1 and in response he received reply dated 5.9.1974 to the effect that since he had already exhausted his right to appeal under the Army Act no cognizance could be taken of such an appeal filed by the petitioner before the Central Government. Thereafter the petitioner filed this petition in which he is seeking quashing of orders dated 5.9.1974, 11.3.1974, 8.7.1972 and 3.4.1973. He has further prayed for directions to respondents to reinstate him in his original rank of Lt.Col. with all benefits. It may be pointed out that the petitioner was attached to another unit under Army Instruction 106 of 1960 and asked to relinquish acting rank of Lt.Col. after 21 days on the basis of an illegal order dated 8.7.1972. He has further prayed in the petition that in the event his pleas are accepted he should be reinstated in his original rank of Lt.Col. w.e.f. 21st August 1972 till the age of his normal retirement on attaining the age of 52 years as per revised rules and regulations for Lt.Col. rank.

3. Main contentions advanced by the petitioner, which formed the basis of challenge to the aforesaid orders, are as under:-

1) The composition of GCM was in violation of Army Rule 40(2) read with defense Services Regulation (DSR) for the Army para 459(B). It was submitted that the GCM should consist of the officers who are holding or have held command appointments and equal ranks. The petitioner was Commanding Officer of corps unit as defined in Army Rule 187 (3) (f). The respondents are trying in their counter affidavit to twist the fact that the petitioner was not a CO (Commanding Officer) of a corps but was an OC (Officer Commanding) of 203 Army Engineer Regiment. Army Rule 187(3)(f)

defines 'Corps' as 'Every other unit composed wholly or partly of persons subject to Army Act.' Petitioner in support of his submission relied upon the judgment of Supreme Court in the case of Lt.Col. P.P.S.Bedi & others Vs. UOI . Despite that GCM formed consisted of four Majors and only one Colonel where as 95 Lt.Col. were available in Delhi area with the convening authority i.e. General Officer Commanding Delhi Area (respondent No.4) as per telephone directory of Delhi Area 1972. The certificate regarding non-availability of eligible officers i.e. Lt.Col. to serve on the GCM was neither attached to the proceedings nor given to the petitioner at the time of his assignment. The respondents are belied from the fact that on one hand they are alleging that para 459(b) of the Regulations was not attracted in the petitioner's case and on the other it is alleged by the respondents in their counter affidavit in reply to 'Ground-B' that a certificate in compliance of para 459 was attached. The certificate, if thus, attached was a later date and is an attempt by the respondents to mislead this Court. The petitioner was thus denied his right of representation and objections to the members of the Court under Army Rule 34. The respondents ignored their statutory duties and positive provisions of law, that is, the petitioner's right to know what all was against him and it was the duty of Presiding Officer under Army Rule 76(2) to see that the petitioner does not suffer any disadvantage in consequence of his position as a person under trial or of his ignorance.

2) It was next contended that two separate Courts of Inquiry were held to investigate the two allegations. Procedure under Army Rule 180, wherein character or military reputation of the petitioner was involved, was not followed in both the cases. Courts of Inquiry were the foundations for investigating the allegations against the petitioner. Army Rule 180 is mandatory, if and when, Court of Inquiry is held as it is in the nature of preliminary investigations. The mandatory provision is to be followed when a person is liable to be charged with an indictable offence. Thus very process of taking disciplinary action against the petitioner was started on the basis of report of two Courts of Inquiry which have evidentiary value. Petitioner in support of his submissions relied upon the judgment of MP High Court in the case of R.P.Dwivedi & others Vs. COAS being CWP No. 4430/97. It is urged that GOC Delhi Area (respondent No.4) recommended on 21.6.1972 on the Court of Inquiry held on complaint of Lt.R.K.Sharma:

a) Severe displeasure of GOCinC West Comd. to be conveyed to the petitioner;

b) Petitioner should be posted out of 203 Army Engineer Regiment;

c) Lt. R.K. Sharma should also be posted out of 203 Army Engineer Regiment to foster respect for authority and in the interest of military efficiency.

4. The GOCin-C West Comd. (respondent No.3) on the contrary with complete non-applicability of mind, abuse of power and without even looking into the papers with prejudice, influenced and pre-determined mind directed disciplinary action against the petitioner on a Court of Inquiry held for purpose of investigation of the complaint lodged by Shri Gyan Chand Sharma, (Father of Lt.R.K.Sharma). It is submitted that no such enquiry was held and any order of GOC-in-C Western Command (respondent No.3) dated 8th July 1972 on Court of Inquiry not held or any orders emanating from such orders for attachment of the petitioner on 31.7.1972 and relinquishing of acting rank on 21st August, 1972 were conducted with prejudiced and pre-determined mind and are,

therefore, illegal and ultra vires. In Court of Inquiry in the allegation of exposing Capt.A.K.Mathur to hazards of sailing, the petitioner was made a witness against himself in violation of Army Rule 180 and not afforded opportunity to be present through out the enquiry and cross-examine witnesses. 'Justice is never a thing but quest'. It was the duty of the Court of Inquiry to observe a standard behaviour and obligation for natural justice and fair play. Court of Inquiry is not to curtail the rights of a petitioner. Petitioner in support of his submission relied upon the judgment of this Court in the case of Subedar Mewa Singh Vs. UOI & Ors. being CWP No. 231 of 1989.

3) It is urged that the petitioner was to remain on the strength of 203 Army Engineer Regiment against the appointment of Officer Commanding and no replacement was to be appointed until completion of the disciplinary proceedings vide Army Instruction 106 of 1960. Respondents No. 2 & 3 did not bother about these instructions and earmarked his junior for appointment on 3rd July 1972 itself when inquiry was in progress, ordered the petitioner to relinquish acting rank of Lt.Col. on 21st August 1972, struck him off appointment of Officer Commanding sometime in October/November 1972 and promoted and appointed his junior as Officer Commanding in February, 1973, well before completion of the disciplinary proceedings that is, confirmation of the GCM proceedings on 3rd April, 1973 and promulgation of sentence on 2nd May, 1973. The petitioner asked for documents and authority on violations of Army Instruction 106 of 1960 for his removal from the appointment of Officer Commanding 203 Army Engineer Regiment and filed petitions seeking redressal of his grievances but the respondents deliberately and with malafide intentions destroyed the records and did not give any reason for not giving copies of the petitioner's personal documentation like IAFF -3010 affecting his appointment and authority which are supposed to be maintained by the Army Hqrs. for the life time of the petitioner. The petitioner was thus removed from the appointment of Commanding Officer 203 Army Engineer Regiment with malafide intentions and inducement to his junior and asked to relinquish his acting rank of Lt.Col. on 21st August, 1972 resulting in penal consequences which is unconstitutional and ultra vires of the Act, Rules, Regulations and Army Instruction 106 of 1960. Petitioner in support of his submission relied upon the judgment of Punjab & Haryana High Court in the case of Lt. Col. Surjit Singh Vs. GOC 33 Mech. Div. & Ors. being CWP Bo.5303 of 1987.

4) The next contention of the petitioner was that the principle of natural justice was violated inasmuch as the petitioner was pitted against a legally qualified prosecutor and the petitioner was denied even a defending officer of his choice. The petitioner was not served with a notice by the convening officer, GOC Delhi Area (respondent No.4) under Army Rule 97(2) seven days before the commencement of trial that the prosecution will have a legally qualified officer. As is evident from respondents version that it was only when the Court assembled that the petitioner was informed that the prosecutor was law graduate. The Court also failed in its duty under Army Rule 76 and 105 to adjourn for 7 days on cognisance of the fact that notice of 7 days was not given to the accused to engage a counsel. The petitioner was never apprised of his right to seek an adjournment for 7 days to engage a counsel even after the Court had assembled. The petitioner was thus gravely prejudiced, including misjoinder of charges, in his defense due to above legal and judicial flaws in the procedure adopted by the convening officer (respondent No.4) as well as the Presiding Officer and Judge Advocate of the GCM.

5. Apart from the aforesaid legal submissions, petitioner has also tried to refute the charges levelled against him on the ground that these charges are false and the findings of the GCM are not proper inasmuch as respondents have not properly appreciated the evidence in this regard. The petitioner made detailed submissions in respect of each charge in his writ petition as well as written submissions.

6. In addition to the aforesaid submissions, petitioner also challenged the order of Central Government as well as Chief of Army Staff. In so far as the order of the Central Government dated 5.9.1974 is concerned, it was submitted that Central Government did not exercise its powers under section 165 of the Army Act on the revision petition filed by the petitioner and therefore failed to exercise its jurisdiction challenging the order dated 11.3.1974 of the respondent No.2 by which petitioners appeal was dismissed. It was submitted that respondent No.2 did not apply his mind on the appeals of the petitioner and complaint of Lt.R.K.Sharma and his father Shri Gyan Chand Sharma on the false accusations and contradictions in their complaints. A judicial review of Courts of Inquiry and non compliance of Army Rule 180 visavis violations of mandatory provisions of law in GCM proceeding were sufficient to set aside the proceedings. He further did not appreciate the conduct of various staff officers under him with regard to appointment of a junior officer as commanding officer in place of the petitioner during pendency of disciplinary proceedings in violation of Army Instruction 106 of 1960 and destruction of documents with regard appointments. The appeal of the petitioner was however rejected despite the violation of mandatory provisions of law.

7. The petitioner also submitted that such aforesaid impugned orders were passed in violation of mandatory provisions of law which were humiliating to the petitioner, petitioner sought premature retirement on 15.2.1974 which was accepted and became effective on 28.2.1975.

8. This matter was listed for arguments on number of dates but nobody appeared on behalf of respondents. On 16.12.1999 matter was heard in part and was adjourned to 23.12.1999 in the category of old cases. Thereafter the matter appeared regularly in the category of old matters. On 13.1.2000 as nobody appeared even on behalf of the petitioner, the writ petition was dismissed for nonprosecution. However immediately application for restoration was filed by the petitioner and on 20.1.2000 the said application was allowed and the writ petition was restored to its original number. Petitioner was directed to inform the counsel for the respondents in writing about the next date i.e. 27.1.2000. On 27.1.2000 also nobody appeared on behalf of the respondents inspite of information about the case having been given to the counsel for the respondents. Still the case was adjourned to 10.2.2000 and again petitioner was directed to inform the learned counsel for the respondents about the next date of hearing and file an affidavit to this effect. He did so.

9. Still nobody appeared on behalf of the respondents even thereafter. In these circumstances, I had no option but to reserve the judgment on 10.3.2000.

10. I have gone through the pleadings, considered the submissions made by the petitioner and have noted the stand of the respondents as contained in the counter affidavit.

11. As far as other contentions of the petitioner namely two separate Courts of Inquiry could not be held or that principles of natural justice were violated as petitioner was pitted against a legally qualified prosecutor are concerned, it is seen that these contentions are raised in the written submissions but not in the writ petition, and therefore, respondents had no chance to meet these submissions in their counter affidavit. The same therefore cannot be considered at this stage. Petitioner had also made detailed submissions in the merits of the allegations and submitted that findings of the GCM were not proper inasmuch as respondents had not properly appreciated evidence in this regard. However, this Court under Article 226 of the Constitution is not sitting as an Appellate Authority over the findings of the GCM. It is not the function of this Court to reappraise the evidence. It cannot be said that the case was of 'no evidence'. Once that is the position, it is not permissible for this Court to substitute its own findings for that of GCM.

12. There is no dispute that as per Army Rule 40(2) read with para 459 (B) of the defense Services Regulations, GCM should consist of officers who are holding or have held command appointments and equal ranks. It is also not in dispute that GCM which was formed consisted of 4 Majors and 1 Colonel. The contention of the petitioner is that constituting the GCM with Majors and not Lt.Colonel, although available, was in violation of Army Rule 40(2). On the other hand, it is stated by the respondents in the counter affidavit that petitioner was not a commanding officer of the Corps. but was an officer commanding 203 of Army Engineer Regiment. However this contention of the respondents is not correct. Army Rule 187 (3) (f) defines 'Corps' as 'every other unit composed wholly or partly of persons subject to Army Act'. The unit of which the petitioner was officer commanding was admittedly a unit composed of persons subject to Army Act. Further, respondents in their counter affidavit could not refute that there were 95 Lt.Colonels available in Delhi area with the convening authority i.e. General Officer Commanding, Delhi Area. It has been held by Supreme Court in the case of Lt. Col. P.P.S. Bedi & Ors. Vs. UOI that for the composition of GCM, one must strive to secure services of officers of different Corps. or departments and not necessarily officers of the Corps. departments to which delinquent officer belongs. Moreover, I must notice contradictory stand taken by the respondents in the counter affidavit. On the one hand, it is stated that petitioner was not Commanding officer and therefore GCM consisted of 4 Majors and 1 Colonel was proper and para 459 (2) of the defense Services Regulations for the Army was not applicable. On the other hand, it is stated that as per para 459 (B) of the Regulations was complied with and certificate to the effect that no Lt.Col. was available, in compliance of para 459 was attached. It is thus clear that petitioner was denied his right of representation and objections to the members of the Corps. under Army Rule 34 and the composition of GCM being inviolative of Army Rule 40(2), any trial by them and consequent punishment imposed upon the petitioner is bad in law.

13. This writ petition is accordingly allowed. The impugned order of punishment dated 22.11.1972 as confirmed on 3.4.1973 is hereby set aside. Order dated 11.3.1974 rejecting the appeal of the petitioner is also set aside. However as the petitioner had sought premature retirement which was accepted and became effective on 28.2.1975 and as the impugned orders are quashed only on technical ground and fresh enquiry is not ordered keeping in view that the matter is almost 25 years old, the only relief to which the petitioner is held entitled to, in the facts and circumstances of this case, is that petitioner should be treated as retired from Army as Lt.Colonel and not as Major and be paid pension accordingly. However he will not be entitled to any other monetary benefits. His

pension as Lt.Colonel be fixed as on the date of his voluntary retirement as Lt.Colonel on the basis as if no such punishment was given and arrears of pension be paid to him within four months from today.

Writ petition is allowed in the aforesaid terms.

No order as to costs.