

HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) No. 3110/2008 & CM No. 4067/2009

Date of Decision: April 24, 2009

Chauthmal Vijay Bhika (Through his wife) ... Petitioner
Through: Mr. Mohan Kumar, Adv.

Versus

UOI & Ors. ... Respondents
Through: Dr. Ashwani Bhardwaj,
Adv. for the respondents.

CORAM:

HON'BLE MR. JUSTICE B.N. CHATURVEDI
HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether reporters of local paper may be allowed to see the judgment? Yes
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the Digest? Yes

JUDGMENT

S. L. BHAYANA, J.

The petitioner has filed the present writ petition under Article 226 of the Constitution of India for issue of appropriate writ, order or direction in the nature of certiorari or mandamus and challenging the action of respondent No.4 to convene a General Court Martial (hereinafter to be referred as "GCM") in respect of petitioner at Umroi Cantt., Meghalaya on 28th April, 2008 as arbitrary and illegal and further to direct the respondents to assemble the Court Martial at New Delhi.

2. A perusal of the petition unfolds these averments that the petitioner has joined the Army in the year 1994 as a

recruit and after training and due attestation joined the 3rd Battalion of the Mahar Regiment in the rank of Sepoy and in due course, was promoted to the rank of Lance Naik. The petitioner claims to have put in around 14 years of service in the Army.

3. On November 2004, the petitioner's Unit, i.e. 3rd Mahar Battalion came to New Delhi to go on a U.N. Mission to Congo. On 2nd August 2005, the petitioner applied for leave since his father was seriously ill. However, he was not granted leave after being interviewed through proper channel. This is the Petitioner's claim that a verbal sanction had been given by Subedar Maj (Rear) to go on Casual Leave for 6 days on 9th August 2005. However, upon his return, he was not allowed to enter the unit premises. Subsequently, he was informed by the respondents that his name has been deleted from the list of persons going to Congo on UN Mission.

4. On 20th September 2005, the petitioner wrote a letter to Chief Vigilance Commission (for short 'CVC') highlighting certain corrupt and improper practices in his Unit. The Army Headquarter ordered a Court of Inquiry at Delhi to investigate into the petitioner's complaint. Petitioner alleges that the inquiry was completed without any opportunity given to him as per requirement of Rule 180 of the Army Rules (for short "the Rules").

5. The petitioner had filed a writ petition in this Court against the denial of his place in the UN Mission vide WP (C) No.1918/2006. In the counter affidavit filed in that case, the respondents had submitted that the petitioner absented himself from 09th to 16th August 2005 and thus became ineligible for proceeding on the UN Mission to Congo under the provisions of Para 453 of Regulations for Army.

6. It is further the case of the petitioner that without finalization of disciplinary case he was moved to a different formation in eastern command.

On August 2007 the petitioner was moved to HQ 24 Mountain Brigade in Meghalaya. Finally in September 2007 the petitioner was attached to 15 Jat Regiment, which is his present Unit and moved to Umroi Cantt. The petitioner approached the authorities to shift the venue of the disciplinary proceedings, GCM at Delhi because of non-availability of witnesses and other evidence at Umroi Cantt., Meghalaya.

On 19th April 2008 the petitioner was informed that the General Court Martial against petitioner is being assembled at Umroi Cantt on 28th April 2008.

7. On the strength of these facts, the learned counsel for the petitioner has argued that the action of the respondents directing the assembly of GCM at Umroi cantt is an arbitrary one, and the use of Section 124 of Army Act, 1950 by the

respondents is inappropriate, arbitrary and illegal. The learned counsel for the petitioner further contended that since the alleged offence/ incidents took place in Delhi, the cause of action had arisen in Delhi and the entire gamut of evidence on the subject is available in Delhi and conducting GCM at any other place would put the petitioner at disadvantage and seriously affect the petitioner's defence and therefore is a denial of fairness of procedure. The court of inquiry in the subject matter has also taken place in Delhi. The petitioner has submitted that he is holding the rank of Sepoy and financially is not in a position to defray the cost for calling the witnesses from Delhi to Umroi Cantt. and he is not able to find a lawyer and it is further alleged that the respondents have turned down his request for providing him with a lawyer. Further, he alleges Umroi Cantt to be a remote and militant infested area. Last aspect contended by the learned counsel for the petitioner is that Section 124 Army Act read with Para 452 (C) and Para 453 (I) of Regulations says that defence of a person cannot be jeopardized by shifting a trial by Court Martial. Again the learned counsel contended that the petitioner deserves a fair trial to prove his innocence and conducting the GCM at such a remote place will put him to disadvantage.

8. Per contra, the learned counsel for the respondents has refuted all the above contentions of the petitioner. The respondents have refuted the claim of the petitioner that he was

enrolled with the Army in the year 1994. The respondents have explained that the petitioner was enrolled on 25th February, 1995.

The Sub-stratum of the respondents' case is that the petitioner is a habitual offender, which is evident from the punishments awarded to him enclosed as Annexure P-2. According to the respondents, petitioner was posted to the 3rd battalion of the Mahar regiment which was deployed on a United Nations mission in Democratic Republic of Congo (MONUC) from February, 2005 to March, 2006. The unit concentrated at Delhi in November 2004 for pre-induction preparations which included inter alia selection of personnel. The petitioner was nominated for the U.N. mission in the second six monthly rotation of the unit based on the selection carried out according to the Qualitative Requirements laid down by the Army headquarters. In fact, the formalities like opening of Non-resident Employee Account, medical examination, passport and visa in respect to the petitioner were completed and his name was included in the list forwarded to the ministry of defence, Government of India. The learned counsel for respondents submitted that the petitioner absented himself without leave from 09th to 16th August 2005 and as such he had committed an offence under Section 39(a) Army Act and therefore liable for disciplinary action and thus he became ineligible for proceeding on the United Nation's mission under

Para 453 of the Army Regulations. The impugned Para 453 states "that no individual can be posted away from his unit/formation against whom a disciplinary case is pending till disposal of the case". The petitioner was declared unfit for induction to the mission by the board of officers to make selections, which has been convened on 15th August, 2005. Respondent No.4 submits that since the petitioner was placed under Headquarters, Delhi area for all administrative and disciplinary matter, he could not be posted away under a different command.

9. In the light of the defence taken by the respondents, the learned counsel for the respondents has further opposed the allegation of the petitioner that he proceeded on leave on a verbal sanction from Subedar Dilip Ghewande, and has contended that the same could not be proved by any witnesses or written record. In fact, the petitioner did not approach the authorities including the commanding officer for leave and absented himself at his own will. The learned counsel for respondents submitted that in fact it was the then officer commanding, rear, Captain Ajay Kumar who realized that the petitioner was illegally absent; therefore he contacted him on cell phone asking him/petitioner to return. However, the petitioner paid no heed to him. The petitioner was well aware of his illegal absence as well as consequences of his absence.

10. The learned counsel for the respondents further explained that even before the petitioner could be punished for the offence of absenting himself without leave, he filed a complaint against the then commanding officer and it was due to this reason it was legally not possible to pursue his case by the same commanding officer as it would bound to cause prejudice and result in grave miscarriage of justice to him. The respondents contended that allegations levied by the petitioner against the unit and the officers are an afterthought due to his frustration on being excluded from the UN mission.

In response to the petitioner's contention, learned counsel for the respondents averred that a court of inquiry was ordered by HQ Delhi area by order dated 19th February 2006 and upon finalization of the inquiry, a suitable disciplinary action was asked to be initiated against the petitioner for committing the following offences:

- “1. For making false accusations against superior authority punishable under Section 56 (a) of the Army Act.
2. Making correspondence in violation of para 557 of the regulations of the Army 1987.
3. For being absented without leave with effect from 9th – 16th august 2005 punishable under Section 39 (a) of the Army Act 1950.”

The respondent has thus refuted the claim of petitioner that he was being moved to a different command without finalization of court of inquiry.

11. Learned counsel for the respondents apprised this court that the petitioner was attached with 4/9 Gorkha Rifles for finalization of disciplinary action. The charges were heard by commanding officer Gorkha Rifles and the case was adjourned for evidence to be recorded in writing. The summary of evidence was recorded without prejudice and forwarded to the Deputy Judge Adjutant General, Headquarters 4 corps for advice. The General Officer commanding 21 mountain division on April 10, 2008 ordered assembly of GCM.

The learned counsel for the respondents has alleged that the petitioner has failed to produce any evidence either oral or documentary to support his allegations against the respondents. Respondent No. 4 has refuted the petitioner's claim that he was arbitrarily moved to a different command and has submitted that the petitioner was part of the 3rd Mahar regiment and when the said regiment returned from Congo UN Mission, it got posted to the Eastern command and thus the petitioner moved with the unit as well. He was not posted anywhere in contravention to Para 453 of the Regulations for the Army. Further, the petitioner was attached with 4/9 Gorkha Rifles as it was located in the Umroi Military Station where his parent unit 3 Mahar was also located.

12. The respondents also refuted the claim of petitioner that Umroi Cantt. is militant infested and has submitted that

Umroi is a peace Cantt. where all requirements including that of a lawyer can be fulfilled. In fact, the petitioner was attached to the Gorkha Rifles with a view to give him a fair chance to defend himself.

The learned counsel for the respondents has submitted that the subject of the GCM is a unit affair and involves men in army and thus petitioner's request for civilian witnesses is questionable. The respondents have submitted that the GCM is being conducted at Umroi Cant., where the petitioner's present and parent unit is located, so that a fair trial can be carried out and petitioner gets maximum chance to defend himself.

13. We have heard learned counsels for both the parties at length and also have gone through written submissions of both the parties.

14. Whether the court martial should assemble at Delhi instead of Umroi Cantt is the only short question falling for consideration in this writ petition.

15. Section 124 of the Army Act, 1950 clarifies the legal position in this regard. It says, "Place of Trial: any person subject to this act who commits any offence against it may be tried and punished for such offence in any place whatever."

The above provision clearly posits that the action of respondent cannot be said to be illegal or arbitrary.

16. In the background of the petitioner's contention that he was moved to Eastern command and then to 4/9 Gorkha Rifles is in contravention of Para 453 of Army Regulations, we took note of the said Para 453 and the submissions of the respondents. Respondent has submitted that after the petitioner's unit 3 Mahar came back from the UN mission in Congo, the petitioner moved with his unit only. The petitioner was attached to 4/9 Gorkha regiment in Umroi military station where his parent unit was located. He was shifted to twang in Arunachal Pradesh because the summary of evidence was being recorded there. As soon as the recording was complete, he was again shifted back to Umroi. We hold no qualms in upholding the submission of the respondent that the petitioner moved with his unit only, and was not posted anywhere other than his unit or command or contrary to the aforesaid Para 453 of military regulations.

The petitioner has alleged that he would not get a fair trial if the GCM proceedings take place at Umroi. However, the fact cannot be neglected that the respondents have taken care that the GCM proceedings take place at the location of his parent unit which is Umroi Station. This way the petitioner could produce witnesses from his parent unit to ensure maximum fairness. It is seen that the order is not without jurisdiction and has been passed after compliance of the due procedure. The action of the respondents is completely in conformity with the

law and is not required to be interfered with by the court. Records do not reflect breach of any rules as well as the principles of natural justice. Petitioner was unauthorisedly absent. Armed forces are required to maintain discipline and unauthorized absence cannot be ignored particularly when petitioner is unable to produce /place on record any plausible explanation much less a sufficient reason for his unauthorized absence.

17. We also fail to see any merit in the petitioner's allegation that he has been discriminated against in his selection for the UN Mission. It is clear from the counter affidavit of the respondents that not only he was selected, but also the formalities regarding his moving to Congo had also been initiated.

18. In view of the aforesaid reasons, we find no merit in respect of any of the aspects urged on behalf of the petitioner.

19. The writ petition being devoid of any merit is hereby dismissed.

20. No costs.

S.L. BHAYANA, J.

B.N. CHATURVEDI, J.

April 24, 2009