HIGH COURT OF TRIPURA
AGARTALA

W.A. No.52/2018

The Union of India & others

----Appellant(s)

Versus

Shibu Limbu

-----Respondent(s)

For Appellant(s) : Mr. Bidyut Majumder, Asstt. S.G.

For Respondent(s) : Mr. P.K. Biswas, Sr. Advocate,
Mr. P. Majumder, Advocate.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

Order

01/12/2020
(Akil Kureshi, C.J.)

This appeal is filed by the Union of India and its officers to challenge the judgment of the learned Single Judge dated 13.03.2018 in writ petition being WP(C) No.710 of 2017. The respondent herein was the original petitioner. He was the employee of Assam Rifles. Against him proceedings were initiated under Sections 49 and 55 of the Assam Rifles Act, 2006. In the writ petition he had made following substantive prayers:

> "(iii) Issues Rule calling upon the respondents to show cause as to why a Writ in the nature of Mandamus:

(i) quashing and setting-aside of the findings of the COI and SOE

(ii) quashing and setting-aside of the impugned charge sheet dated 16th May, 2017 by IGAR(N)

(iii) And upon hearing the parties further be pleased to make the Rule absolute, issuing direction to the respondents;"

2. The learned Single Judge by the impugned judgment considered following two issues:

"(i) Whether by denying the opportunities to cross-examination in the Court of Inquiry the respondents had violated any substantive right of the petitioner to his serious detriment and whether the opportunity of cross-examination by means of questionnaire in writing in respect of the 'manuscripts' statement of Mr. C.C. Mathew at the time of recording Summary of Evidence is adequate to meet the requirement of affording the opportunity of cross-examination as prescribed? and

(ii) Whether the GARC has the jurisdiction to try the offence punishable under Section 7 of the Prevention of Corruption Act, 1988?"

3. Question No.(ii) was held in favour of the Union of India. Resultantly, the petitioner's challenge to the jurisdiction of the authorities under the Assam Rifles Act to try an offence punishable under the Prevention of Corruption Act, 1988 was turned down. However, there was

another issue which the petitioner had raised and which the learned Single Judge examined at considerable length. Briefly, the case of the petitioner was that statement of one Mr. C.C. Mathew was relied upon by the authorities without producing him as a witness and allowing the petitioner to cross-examine the said witness. The department on the other hand had relied on an order dated 16.05.2015 in which the officer recording summary of evidence had come to the conclusion that the attendance of the said witness who was resident of Kerala was not feasible owing to loss of time involved and a perceived risk of life by the witness. Instead he offered to the petitioner a cross-examination through written questions which the petitioner declined.

4. Learned Single Judge in the impugned judgment in respect of this controversy held and observed as under:

> "[43] The basic tenet based on which the principle of crossexamination has been structured is that the cross-examination is the process whereby a party seeks (a) to test the veracity and accuracy of evidence in chief given by a witness called for another party and (b) to elicit from that witness any relevant facts which may be favourable to the case of the cross-examiner. Crossexamination designed solely to discredit the witness and to destroy or reduce his credibility, is something known as 'impeachment' and is perfectly permissible. A witness is compellable to answer any

question put in cross-examination whether directed to an issue in the case i.e. to the substance of evidence or to his credit as the witness subject to the rule of evidence. The conjoint reading of the entire Rule 49 of the Assam Rifles Rules, 2010 would lead to a dichotomy and as such, it requires a harmonious construction. The words appearing in Rule 49(6) of the Assam Rifles Rules, 2010 where the phrase, a witness cannot be compelled to attend cannot be interpreted as the person who has not attended the proceeding. If any witness for any reason avoids summons to appear for recording of his evidence, the procedure as laid down in Section 111 of the Assam Rifles Act including sub Section 3 of Section 111, shall strictly be followed inasmuch as Rule 49 (2) of the Assam Rifles Rules, 2010 clearly provides that the witness shall give the evidence 'in the presence of the accused' and the accused 'shall have right to cross-examine' all witnesses who give evidence against him and the question together with the answers thereto shall be added to the evidence recorded. No interpretation of provision can be sustained if such interpretation renders another substantive provision otiose. If the procedure as adopted on the purported construction of Rule 49(6) is accepted by this court that would render Rule 49(2) of the said rules otiose. The exception that has been sought to be curved out, has to be interpreted harmoniously without doing any violence to the other provisions appearing under Rule 49 of the said rules. Thus, a witness who cannot be compelled to attend is the witness who suffers from such disability which deters him from attending the proceeding to testify. If the witness is not available or his attendance cannot

be procured without any undue expenditure or money, the said provision has to be understood in terms of Section 33 of the Indian Evidence Act, substantively pari materia, where it has been provided that when the witnesses are dead or cannot be found or are incapable of giving evidence or are kept of the way by adverse party or if their presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable, their evidence can be utilized if the evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, 'if the proceeding was between the same parties or their representative in interest. Thus, the proper interpretation of the words or the provision [Rule 49(6)] shall be that only if the officer authorized by law has recorded the statement in absence of the accused under any compelling circumstances and despite the accused being given the opportunity of cross-examining that witness, but the accused did not appear deliberately despite having received due notice, in that event the said statement so recorded and certified by the said officer may be placed in the Summary of Evidence. Otherwise, such evidence will have no value. That can be treated as the document which has, again to be admitted through the prescribed process of law.

[44] Having observed thus, this Court is of the considered opinion that the manuscript of Mr. C.C. Mathew has not been taken in the evidence [Summary of Evidence] as per the procedure laid down under Rule 49 of the Assam Rifles Rules, 2010 and hence, the said statement shall be taken out from the Summary of Evidence. However, the

> authorized officer who is recording the evidence is given liberty to procure attendance of Mr. C.C. Mathew following the procedure as laid down and to record his statement and to afford due opportunity to the petitioner for cross-examining the said witness before it is taken in the Summary of Evidence. The said statement [manuscript] of Mr. C.C. Mathew cannot be treated as the evidence within the meaning of Rule 49(2) of the Assam Rifles Rules, 2010."

5. It is this limited extent that Union of India feels aggrieved by the judgment of the learned Single Judge. Contention of the Union of India is that the procedure adopted is in consonance with Rule 49(6) of Assam Rifles Rules whereas the contention of the counsel for the original petitioner is that in absence of the presence of the witness and full opportunity of cross-examining such witness to the accused reliance on any statement made by the witness would be wholly impermissible and plainly in violation of basic requirements of natural justice and the basic principles of criminal jurisprudence.

6. In our opinion, at this stage it is not necessary to go into this question. The proceedings under the Assam Rifles Act are still pending. No final decision is rendered by the Court Martial constituted under the Act. What final decision the said body will take is not possible for us to foresee. Whether any statement stated to have been made by Mr. Mathew will be

taken into consideration and whether the refusal of the petitioner to participate in written question cross-examination procedure would be held against him are the issues not possible, nor necessary to go into. Ordinarily interference in such proceedings at interim stage would be exceptional. At interim stages of such proceedings deciding issues would delay the final outcome which is not desirable. Of course when a question of very jurisdiction of the authority arises, the Court may be called upon and would go into such an issue even before the finality of the proceedings.

7. At this stage, therefore, we are not inclined to thrash out the legal issues which, as noted earlier, may or may not arise eventually.

8. In the result, appeal is allowed by reversing the findings and conclusions of the learned Single Judge in above quoted paragraphs no.43 and 44. It is, however, made clear that this does not amount to accepting the legal contentions of the Union of India regarding the admissibility or manner of recording of a statement of Mr. Mathew. Such an issue is kept open. If eventually the decision of the Court Martial is against the petitioner, it would be open for him to defend the same before appropriate forum on all grounds available.

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9. Appeal disposed of in above terms. Interim relief granted earlier is vacated.

10. Pending application(s), if any, also stands disposed of.

(S.G. CHATTOPADHYAY), J **(AKIL KURESHI), CJ**

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