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**(2000) 08 GAU CK 0018**

**Gauhati High Court**

**Case No:** Writ Appeal No. 10 of 1996 in Civil Rule No. 1317 of 1989

Union of India and Others

APPELLANT

Vs

Naresh Chandra Nath

RESPONDENT

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**Date of Decision:** Aug. 3, 2000

**Acts Referred:**

- Army Act, 1950 - Section 123(1), 164(1), 52
- Constitution of India, 1950 - Article 226, 227

**Citation:** (2000) 2 GLT 705

**Hon'ble Judges:** Brijesh Kumar, C.J; P.C. Phukan, J

**Bench:** Division Bench

**Advocate:** K.K. Mahanta, for the Appellant; R.P. Sarma, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

P.C. Phukan, J.

This Writ Appeal is directed against the judgment and order dated 8.11.1995 passed by the learned Single Judge in Civil Rule No. 1317 of 1989.

2. We have heard Mr. K.K. Mahanta, learned Senior Central Government Standing Counsel for the appellants, and Mr. R.P. Sarma, learned counsel for the respondent.

3. The facts in brief, shorn of details, and necessary for the disposal of this Appeal lie in a narrow compass.

4. The respondent in the rank of Lt. Col. Commanded 58 Forward Medical Stores Depot (FMSSD in short) from January, 1981 to September, 1985. He did not resort to local purchase of medicines till September, 1983, when the then DDG (E&S) Med Dte, Army HQ suggested that shortage of medicines could be made up by resorting to local purchase when any item was not available through Armed Forces Medical Store Depot (AFMSSD in short), Lucknow. In respect of the local purchases during the period from September, 1983 to September, 1985, adoption of irregular procedure,

deficiency in items of Medical Stores, and other discrepancies came to light when Lt. Col. RP Kakoti as Presiding Officer of a Board of Officers carried out stock verification from 19.4.1985 to 26.5.1985. On 22.12.1985 the respondent was charged with :

"SUCH AN OFFENCE AS IS MENTIONED IN CLAUSE (f) OF SECTION 52 OF THE ARMY ACT WITH INTENT TO DEFRAUD

in that he,

at Gauhati during the period 01 Sep 83 to Sept. 85 while being the Officer Commanding 58 FMSD, with intent to defraud caused payment to be made by Area Accounts Office Shillong to M/s Ideal Trading Corporation, Gauhati in respect of locally purchased medicine/stores on the basis of the contingent bills of the above mentioned firm pertaining to the CRVs as detailed in Appendix "A" attached well knowing that the medicines/stores In respect of the same had not been supplied by the said M/s Ideal Trading Corporation, Guwahati.

Place : C/o 99 APO

(D.Bardoloi)

Dated: 22 Dec  
85.  
Brig.

Commanding 151 Base Hospital."

5. The trial commenced before the General Court Martial (GCM in short) on 31.12.1985. Since 31.12.1985 happened to be the date of retirement of the respondent, Section 123(1) of the Army Act, 1950 was invoked. In the trial, besides exhibiting a large number of documents, as many as 11 witnesses were examined in support of the charge. The respondent declined to adduce any evidence. He, however, submitted a written statement pleading innocence. The GCM found the respondent guilty of the charge with the exception of Sl.No. 16 Appendix "A" to the charge sheet relating to CRV/MS/112A/6/84 dated 7.6.1984 for Rs. 2835. The charge sheet related to total number of 37 CRVs (Certificate Receipt Vouchers). By an order dated 22.1.1986 the respondent was sentenced to be cashiered and to suffer Rigorous Imprisonment for 3 (three) months subject to confirmation. The respondent presented a post-confirmation petition u/s 164(1) of the Army Act to the Chief of Army Staff, who confirmed the findings of the GCM but commuted the sentence of cashiering and three months; rigorous imprisonment to dismissal from service by his order dtd 27.11.1986, This was communicated to the respondent vide Annexure-B dated 12.12.1986, and it was promulgated on 15.12.1986 vide Annexure-C. The respondent's petition u/s 164(2) of the Army Act to the Central Government was also rejected. This was communicated to him vide Annexure-D

dated 28.9.1988. The respondent filed the instant writ petition on 23.8.1989. In paragraph 42 thereof, the respondent explained that because of his ill health, financial constraints and serious ailment of his parents, he could not file this Writ Petition earlier. The learned Single Judge allowed the writ petition and quashed the sentence given by the General Court Martial and the order of confirmation dated 12.12.1986, 15.12.1986 and the order dated 28.9.1988 (Annexures - C, D and E to the writ application). Hence, this Writ Appeal.

6. It is not disputed by the respondent and has been amply proved by the prosecution that during the relevant period, the respondent caused payment to be made to M/s Ideal Trading Corporation in respect of locally purchased medicines/stores on the basis contingent bills of the aforesaid firm pertaining to 36 nos. of CRVs (except the one pertaining to CRV dated 7.6.1984 for Rs. 2835) although the medicines/stores in respect of the same had not been supplied in full as per Army specification and some items had not been supplied at all. Therefore, the short question that falls for consideration is whether the respondent did so "with intent to defraud" within the meaning of Clause (f) of Section 52 of the Army Act. The relevant portion of Section 52 reads as under :

"52. Offences in respect of property. - Any person subject to this Act who commits any of the following offences, that is to say:

(a) ....

(b) .....

(c) .....

(d) ....

(e) .....

(f). does any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person;

shall, on conviction by Court Martial, be liable to suffer imprisonment for a term which may extend to ten years or such less punishment as is in this Act mentioned."

Two ingredients of "intent to defraud" are explained in note u/s 52 of the Army Act as (1) deceit or an intention to deceive or in some cases mere secrecy; and (2) either actual injury or possible injury by means of that deceit or secrecy.

7. Mr. Sarma, learned counsel for the respondent, has strenuously argued that the prosecution has miserably failed to prove that the respondent had any intention to defraud. On the other hand, Mr. Mahanta, learned Senior Central Government Standing Counsel appearing for the appellants, submits that the evidence on record as well as the respondent's admission in the instant writ petition and in his written statement filed before the General Court Martial clearly established the intent to

defraud, and to cause wrongful gain to the firm M/s Ideal Trading Corporation.

8. In paragraph 9 of the writ petition, the respondent said, "after the supply orders were placed to the supplier, the medicines used to be inspected and received and thereafter bills for payment were processed through and payments made." But what he said in the subsequent paragraphs reveals that payments were made even when the medicines had not been supplied in full as per Army specification and he had the knowledge of such short supply and non-supply while causing such payments to be made, and that he did so violating the prescribed procedure and accepted norms. In paragraph 10 of the writ petition, the respondent said, "that your petitioner had to encounter certain difficulties in making local purchase, as the medicines supplied by the firm/farms whose quotation/quotation has/have been accepted, were not found to be of good standard. As such the petitioner had to refuse such sub-standard medicines to the suppliers for replacement or direct them to refund the payment made to them". This shows that full payments were made in spite of supply of sub-standard medicines and rejection of the same. What is worse, the supply order, Certificate Receipts Vouchers (CRVs), the contingent bills etc. were not amended for the rejected and returned medicines and instead a register, named "Local Purchase Book" (Ext.S in the GCM proceedings) was opened in respect of replacements given by suppliers as is evident from the statement of the respondent in para 11 of his writ petition. Also in paragraph 11 of his written statement filed before the GCM, the respondent said "In the best interest of service and expeditious procurement of medical stores, I have followed a deviation in the procedure without any mala fide or fraudulent intention, and that, the CRVs were prepared as per the supply orders, and part receipt of locally purchased items were processed through Local Purchase Book, Ext.S.". This is a clear admission that the respondent violated the prescribed procedure and caused full payments to be made knowing fully well that the medicines/stores in question had not been supplied in full. Certificate Receipt Vouchers (CRVs) are required to be prepared on the basis of medicines/stores actually supplied and received and not as per supply orders as had been done at the instance of the respondent. PW. 1 Lt. Col. R P Kakoty, Presiding Officer of the Board of Offices carrying out stock verification, deposed that in 37 transactions in all 273 items were locally purchased, and at the time of preparation of the CRVs of those 273 items, only 2 items had been received in full, one item in part, and the rest 270 items had not been received at all. The respondent said that part receipts of locally purchased items were processed through local purchase book Ext.S. Such a Book/Register is unheard-of. The list of Registers required to be maintained in the Unit does not Include such a Register. Intriguingly, at the instance of the respondent this so called Local Purchase Book Ext.S was never shown to the Auditors, nor was produced before the Board of Officers carrying out the Stock Verification from 19.4.1985 to 26.4.1985 vide evidence of PW. 5 and other prosecution witnesses. What is more, the respondent even went to the extent of making an abortive attempt to destroy this Local Purchase Book Ext.S. It is in

evidence that after the enquiry against the respondent started, he suggested to his staff to destroy the Local Purchase Book Ext.S. PW.3 Hav/Pharm Prakash Chand deposed that before the commencement of the Court of Enquiry, the respondent asked him to hand over Ext-S for destruction. PW.5 Sub/Pharm Jagdish Ram deposed that on 9.5.1985 respondent told him that since the Court of Enquiry was about to commence, the extra register Ext-S should be destroyed, and on his refusal the respondent forcibly sent him on Casual Leave and continued to send messages asking him whether he would destroy Ext-S. PW.6 Lt K.C. Jha, Administrative and Stores Officer, did not know about the existence of Ext.-S till 9.5.1985 on which date the respondent called PW.3 Prakash Chand and PW.5 Jagdish Ram and suggested to them in his presence that Ext-S be destroyed. PW.8 Shri NK Sendwar, Section Officer in the office of the Area Accounts Office, deposed that on 9.5.1985 the respondent called him to his residence and in his presence asked PW.5 Jagdish Ram to destroy the register Ext.S.

9. Now, the procedure for local purchase of medicines/stores based upon instructions issued by the Army Headquarters is narrated by PW.10 Lt. O.P. Arya, Officer-in-charge of medicines/stores in 151 Base Hospital. The same procedure was to be followed for local purchase of medicines/stores for the 58 FMSD. Local purchase is carried out by a Board of Officers. Letters Inviting Quotations are received by post and are opened in presence of the Board of Officers. The Presiding Officer and members of the Board of Officers sign on the Board proceedings. A comparative statement is prepared and supply order is placed to the lowest bidder firm. The representative of such firm delivers the medicines with pre-receipted bills. The medicines are inspected and checked as per Army specification by the Board of Officers and the Commandant, and the same are taken on charge with the help of receipt vouchers. The documents are sent to the CDA for payment to the Firm with a copy to the Depot which issues NA (Non-availability certificate). The procedure followed by the respondent was quite different from the one stated above. PW.2 Hav/G.S. Gupta was entrusted by the respondent to handle the matter in respect of local purchase of medicines. According to him, whenever NA was received, he used to take the same to the respondent who gave him a draft letter for inviting quotations. He typed it out and gave it to the respondent. After 4/5 days the respondent gave him 3 quotations and pre-receipted bills. On 10/12 occasions PW.2 accompanied the respondent with NA, some blank papers and carbon to the office of M/s Ideal Trading Corporation where typist of the Firm typed out quotations and pad of the said Firm and then handed over the quotations to another clerk who prepared another set of quotations by enhancing rate of each item, and yet another clerk prepared the third set of quotation enhancing the rates further. In cross-examination, PW. 2 reiterated that all the quotations were filled in the premises of M/s Ideal Trading Corporation, and signatures of the contractors were also filled in all the quotations there. PW. 2 added that the proprietor of M/s Ideal Trading Corporation affixed his Firm Stamp and signed on some undated blank

papers leaving sufficient space for the items of NA to be filled up later for preparing contractor's bill. They (respondent and PW. 2) came back with those papers. The respondent himself put the dates in those papers left undated, and to make the hand-writing different, PW. 2 also put dates in some of those papers. PW. 6 Lt. K.C. Jha deposed that as per Army Headquarter's letter he was appointed Administrative and Stores Officer, but in reality he was not allowed by the respondent to perform his duties as in-charge of Medical Stores. When insisted, the respondent asked PW. 6 to perform duties as per his verbal orders given from time to time. Even when the respondent had gone on annual leave in October, 1984 PW.6 was not handed over charge, but the respondent remained in Station and continued to attend office. PW.6 further stated that only once he saw 3 quotations in closed but unsealed envelopes and on all other occasions he had no knowledge as to whether quotations were received in envelope. In the General Court Martial, when the attention of PW. 6 was drawn to the fact that he had been signing false certificates, as quotations were not received in sealed envelope and were not opened in his presence, he explained that he signed the certificates as respondent told him that he (respondent) had already signed the certificates and hence there would be no harm for his (PW. 6) signing the same.

10. Thus, there is clinching evidence about flagrant violation of the prescribed procedure by the respondent to cause wrongful gain to the firm M/s Ideal Trading Corporation by causing payment to be made to the said firm in respect of locally purchased medicines/stores not supplied in full by the said firm, his maintaining an unauthorized register called Local Purchase Book Ext.S and keeping his junior PW. 6 Lt K.C. Jha, Administrative and Stores Officer, in the dark about the existence of such a Register, his persistent refusal to allow PW. 6 to perform his duties assigned by the Army Headquarters as in-charge of medical stores, his deliberate with-holding of Local Purchase Book Ext.S from the Auditors and the Board of Officers carrying out Stock verification, and ultimately his abortive attempt to destroy the Local Purchase Book Ext.S before the General Court Martial commenced to keep the transactions of local purchase of medicines/stores behind a veil of secrecy. All this runs counter to the plea of the respondent that he caused payments to be made to the M/s Ideal Trading Corporation in spite of short supply and non-supply of a number of Items of medicines by the said firm and in doing so he deviated from the prescribed procedure without any mala fide or fraudulent Intention.

11. In view of the above, the contention of Mr. Mahanta, learned Senior Central Govt. Standing Counsel appearing for the appellants, that even assuming, but not conceding that the learned Single Judge was competent to re-appreciate the evidence as have been done in the Instant case, the learned Single Judge has not given any reason whatsoever for rejecting the evidence of prosecution witnesses and has suddenly come to the conclusion that it is a case of no evidence cannot be brushed aside as of no substance. It is, however, settled law that the power of Judicial review under Article 226 of the Constitution does not extend to

re-appreciation of the evidence like a Court of Appeal. In view of the evidence discussed above, it cannot be said that the finding of the General Court Martial was based on no evidence.

12. In paragraph 33 of the Writ Petition, the respondent states that GCM and the confirming authority overlooked the well settled principles of law that mere breach of procedure and rules does not surely mean fraud or criminality as given in paragraphs 17 and 19 of the Judgment given by the Supreme Court in the case of Union of India v. J.S. Khanna and Anr. reported in (1972) 2 SCC 873.

13. To show that the decision in the above mentioned case reported in (1972) 2 SCC 873 is clearly distinguishable, the paras 17 and 19 thereof referred to above are reproduced below:

"17. There were next the statements of some witnesses suggesting that in respect of certain items prices higher than those quoted by other firms had been paid to Manik Motor Works. According to the calculations made by counsel, the difference same to R. 1,400 and odd only in respect of all the thirteen orders in question. But goods of the value of Rs. 32,000 and odd out of Rs. 40,000 and odd worth of goods were, as aforesaid, ordered by Brig. Mani in respect of which neither Khanna nor Lala could be held responsible. Out of the difference of Rs. 1,400 only, a small portion of it could be attributed to the supply orders placed by Khanna. In this connection Lala obviously could not be said to be responsible as it was not his duty to place the orders. Besides, the mere fact that in some cases prices higher than those quoted by the other firms were paid cannot, without anything more, lead to the conclusion of any fraudulent Intent or conspiracy.

18. \*\*\* \*\*\* \*\*\*

19. There were next the statements suggesting that in some cases supplies were made even before : (a) the date of orders; or (b) the date when delivery had to be made. This fact might again excite suspicion. But a closer scrutiny dispels such a suspicion. What appears to have happened was that if an article was needed urgently, a spot inquiry of its availability could be made and an oral order placed. The dealer would send a credit voucher and the article in question. We saw a few of such vouchers and found that none of them mentioned the price as the price was not at that stage fixed. The price, it appears, was fixed later on and it was then that a written supply order was Issued to the dealer. That was why in some cases the dates in the vouchers were earlier than those of the supply orders. Such a procedure might not be in accordance with the rules prescribed for purchases. But a breach of that procedure does not surely mean fraud or any other criminality."

14. The instant case is not one of mere breach of procedure as is abundantly clear from the discussion made in the preceding paragraphs. Mr. Mahanta, learned senior C.G.S.C. contends that the learned Single Judge on the one hand held that there was no procedural illegality and on the other concluded that the findings of

the General Court Martial were unacceptable and set aside the same. Such conclusion is contradictory inasmuch as judicial review is directed against the decision making process and not the decision. Mr. Mahanta further contends that the learned Single Judge committed manifest error of law apparent on the face of the record in purporting to the act as a court of appeal against the findings of the General Court Martial by re-appreciating the evidence on record. In support of his contention, Mr. Mahanata has placed reliance on the decision in Himmatsingh Chahar's case reported in MIL LJ 1999 SC 1 wherein the Apex Court held -

"4. In view of the rival submissions at the Bar the short question that arises for consideration is what would be the extent of the jurisdiction in exercising power under Article 226 of the Constitution over the findings of the Authority in Court Martial proceeding ? The Defence personnel serving in Army, Navy or Air Force when commit any offence are dealt with by the special provisions contained in the Army Act or the Navy Act or the Air Force Act and not by the normal procedure Code, The said Navy Act is a complete code by itself and prescribes the procedure to be followed in case it decided that an officer should be tried by Court Martial. The Act also provides sufficient safeguard by way of further appeal to the Chief of the Staff and then ultimately to the Union Government.

5. Since the entire procedure is provided in the Act itself and the Act also provides for a further consideration by the Chief of the Naval Staff and then by the Union Government then ordinarily there should be a finality to the findings arrived at by the Competent Authority in the Court Martial Proceedings. It is of course true that notwithstanding the finality attached to the orders of the Competent Authority in the Court Martial Proceedings the High Court is entitled to exercise its power of judicial review by invoking jurisdiction under Article 226 but that would be for a limited purpose of finding out whether there has been infraction of any mandatory provisions of the Act prescribing the procedure which has caused gross miscarriage of justice or for finding out that whether there has been violation of the principles of natural justice which vitiates the entire proceedings or that the authority exercising the jurisdiction had not been vested with jurisdiction under the said Act. The said power of judicial review cannot be a power of an Appellate Authority permitting the High Court to re-appreciate the evidence and in coming to a conclusion that the evidence is insufficient for the conclusion arrived at by the Competent Authorities in Court Martial Proceedings. At any rate it cannot be higher than the jurisdiction of the High Court exercised under Article 227 against an order of an inferior Tribunal. This being the parameter for exercise of power of judicial review against the findings of a Competent Authority in a Court Martial Proceedings, and applying the same to the impugned judgment of the High Court we have no hesitation to come to the conclusion that the High Court over-stepped its jurisdiction in trying to re-appreciate the evidence."



15. In the instant case, it cannot be said that there has been infraction of any mandatory provisions of the Act prescribing the procedure, or that there has been any violation of principles of natural justice or that the authorities concerned exercised jurisdiction not vested in them or that findings of the Authority are recorded without there being any material whatsoever. The learned Single Judge overstepped the jurisdiction by re-appreciating the evidence on record.

16. In the result, the impugned judgment and order dated 8.11.1995 passed by the learned Single Judge are set aside. The Writ petition is dismissed. The Writ Appeal stands allowed. In the facts and circumstances of the case, parties are left to bear their own costs.