Anup Kumar Sinha Chowdhury Vs Union of India and Others

Court: Calcutta High Court

Date of Decision: May 16, 1990

Acts Referred: Army Act, 1950 â€" Section 133, 52(f)
Constitution of India, 1950 â€" Article 134, 136, 136(2), 20, 226

Citation: 94 CWN 1107

Hon'ble Judges: A.M. Bhatacharjee, J

Bench: Single Bench

Advocate: Anindya Mitra and A.N. Mukherjee, for the Appellant;A. Sengupta, for the Respondent

Final Decision: Allowed

Judgement

A.M. Bhattacharjee, J.
Article 227 the Constitution, conferring extensive powers of superintendence on the High Court over all Courts

and tribunals throughout the territories in relation to which it exercises jurisdiction specifically excludes, under clause thereof, any Court or tribunal

constituted by or under any law relating to the Armed Forces, from such power of superintendence. Article 136 of the Constitution, conferring

comprehensive powers on the Supreme Court to grant special leave to appeal from the judgment, decree, determination, sentence or order in any

cause or matter passed or made by any court or tribunal in the terriroty of India, also specifically excludes under clause (2) thereof, any court or

tribunal constituted by or under any law relating to the Armed Forces, from the operation of that Article.

2. But Article 226 of the Constitution, empowering the High Court to issue appropriate writs, directions or orders to any person or authority

including the Government, for the enforcement of the rights conferred by Part III of the Constitution or for any other purpose, does not contain any

such prohibition or limitation. When the Constitution itself engrafted such express exception is clear words in Article 136 and also in Article 227,

but not in Article 226 immediately preceding Article 227, imposition of the very same embargo in Article 226 would amount almost to

interpolation. The conclusion, therefore, is irresistible that even though Court Martial under the Army Act, 1950 is not amendable to the appellate

Jurisdiction of the Supreme Court under Article 13o or the supervisory jurisdiction of the High Court under Article 227, it must nevertheless yield

to the writ Jurisdiction of the High Court under Article 226.

3. It appears that U. C. Banerjee, J. of this Court has also come to the same conclusion in Lt. Col. Amal Sankar Bhaduri v. Union of India (9)

CWN 631) and the process of reasoning evolved by him therein with forceful felicity cannot but compel my unqualified concurrence. If also

appears that the Madhya Pradesh High Court in Subhash Chandra Sarkar Vs. Union of India (UOI) and Others, has also expressed the same

view.

4. Banerjee, J. in Amal Sankar Bhaduri (supra) was sitting singly and I may not that in another thought-provoking judgment of Banerjee, J., also

rendered singly, in Bharat Process v. Bharat Process (1987-1 Calcutta High Court Notes 389), his Lordship has made spirited endeavour to

relieve all of us, while sitting singly, of the obligation to follow any earlier judgment of any single-Judge as a matter of course. I am afraid that such a

course, even if permissible, may not be desirable, for if contrary judgments start pouring out from Benches of co-ordinate jurisdictions, the law may

be bereft of the much needed certainty, the position would be exasparating for all concerned and flabbergasting for the subordinate courts in

particular. But mere is the high authority of Sir Asutosh also in AIR 1921 Cal 169 in favour of the view of Banerjee, J. in Bharat Process (supra).

But even if the view of Banerjee, J. in Amal Sankar Bhaduri (supra) is not binding on me by reason of its authority, I choose to be bound by it by

the authority of its reasons.

5. But it is one thing that the High Courts has power to issue writs to Courts Martial; it is entirely a different thing as to when and now and to what

extent that power is to be exercised. The a anxiety so clearly demonstrated by the Constitution in Article 136(2) and Article 227(4) to ensure that

these Courts and tribunals are not to be interfered with even by the Supreme Court in appeal and the High Court in supervisory jurisdiction must

be kept in view and taken into serious consideration even when jurisdiction is exercised by the High Court under Article 226.

6. The Army Act, 1950 does not provide for any appeal to the High Court against the orders passed by a Court Martial and since no appeal to

the High Court is available, no appeal to the Supreme Court would also be available under the general provisions of Article 134 providing for

appeals from the High Court to the Supreme Court in criminal matters. The Army Act not providing for any appeal to the High Court, no appeal

being available under Article 134 to the Supreme Court, the special appellate jurisdiction of the Supreme Court under Article 136 and the

supervisory jurisdiction of the High Court having been expressly shut out by -the Constitution itself, there should be no room for doubt that the

intention of the Constitution itself, leaves no room for doubt that the intention of the Constitution and the laws is manifest that the proceedings and

determination of the Courts Martial are not be interferred with, as Jar as possible. This must be lost sight of by the High Court even when its

powers are invoked under Article 226 for interference with Courts Martial. To borrow from Shakespeare, it may be good to have giant''s power,

but it is not good to use it as a giant.

7. The Courts and tribunals constituted under the law relating to the Armed Forces could not obviously be excluded from the Writ Jurisdiction of

the High Court. It is true that the Fundamental Rights conferred by Part III of the Constitution can be restricted or even abrogated by Parliament

by law in exercise of the powers under Article 33 in respect of the Armed Forces. Such restriction or abrogation may be necessary in the national

interest and that is why even Lord Buddha, the great pioneer of the first eglatarian principles and philosophy in the world, had to provide that

prayajya or monk-hood was to be denied to the Army. But until such abrogation or restriction is made, the members of the Armed Forces enjoy

all the Fundamental Rights and, therefore, if any case before a Court Martial, one is being prosecuted, say, under an ex post facto law in violation

of Article 20, or in gross violation of some other provisions of the Constitution or the laws, he, as already noted, having no right to appeal to the

High Court or the Supreme Court or to invoke the supervisory jurisdiction of the High Court under Article 227, or its ordinary criminal revisional

jurisdiction, it would have been sheer tyranny to deny him the right to invoke the Writ Jurisdiction also lb enable him to get such serious illegalities

forestalled.

8. Our Constitution and the laws have unmistakably manifested their intention to make the Courts Martial extra-ordinary tribunals of Special

Jurisdiction. They have been brought out of the ambit of the general criminal procedure laid down in the Code of Criminal Procedure and the

provisions of that Code relating to trial, appeal, revision and all that are not applicable to a Court Martial. Even the general law of evidence as

contained in the Evidence Act does not apply ex proprio vigore and those have been made applicable only by the Army Act itself u/s 133 thereof,

but subject to the provisions of that Act. No appeal has been provided to the High Court or the Supreme Court or any other ordinary criminal

court. And, as already noted, the supervisory jurisdiction of the High Court under Article 227 and the special appellate jurisdiction of the Supreme

Court under Article 136 have been ousted. In that backdrop, the supervisory jurisdiction of the High Court under its Writ jurisdiction under Article

226, even though available, must be exorcised with extreme care and caution in tune and accord with that scheme of non-interference with Court

Martial as far as possible. The two learned Judges 63 the Madhya Pradesh High Court in Subhash Chandra Sarkar Vs. Union of India (UOI) and

Others, and also the third learned Judge, to whom the matter was thereafter referred to as a result of difference of opinion between the two learned

Judges, have all agreed that the High Court in its Writ Jurisdiction would interfere, not for any and every infraction of law, but only when the Court

Martial has acted without or in excess of jurisdiction or has acted in flagrant contravention of the rules of natural justice or has committed an error

apparent on the face of the record. In Capt. Harish Uppal Vs. Union of India (UOI) and Others, , the Supreme Court has also held (at 262) that

though the provisions of Article 32 can be invoked in respect of a proceeding or decision by a Court Martial, ""the Court cannot go into the

evidence in support of the charge against the petitioner"". I would also accordingly hold that in the exercise of the Writ Jurisdiction of this Court, it

would not be proper to consider as to whether the materials on record were sufficient to warrant the framing of the charge against the petitioner.

9. It is true that Banerjee, J. in Amal Sankar Bhaduri (supra) has quashed the change on the ground that the same was perverse which would mean

that the learned Judge found the charge to be based on ''no evidence''. I have already indicated that, for the reasons stated hereinbefore, a charge

in a Court Martial proceeding is not be quashed in Writ Jurisdiction on the ground that the evidence or the materials on record are not sufficient to

sustain a charge. But even accepting that a charge in Court Martial proceeding can be so quashed by the High Court in its Writ Jurisdiction, all that

Mr. Mitra. appearing for the petitioner urged was, not that there was no evidence, but that from the summary of evidence it could not be

concluded beyond all reasonable doubt that the acts alleged to have been committed by the accused were done ""with intent to defraud"" within the

meaning of Section 52(f) of the Army Act to warrant a conviction thereunder. There is a fundamental difference of approach in framing a charge

and in deciding the guilt of the accused. A charge can always be framed if the evidence is such that the Court may (not that must) presume the guilt,

though a conviction can be made only when the Court cannot but must presume the guilt. Probability, and not inevitability, of guilt is good enough

to justify the framing of the charge. As Rule 37 of the army Rules would indicate, the officer concerned is to ""satisfy himself that the evidence

justifies a trial"" and not that the evidence, even at that stage, must inevitably warrant a conviction. The summary of evidence clearly indicated that

there was good Reasons for the satisfaction of the officer concerned as to the justification for a trial at least and, as would appear from the relevant

records, the officer concerned has also recorded such satisfaction in express Word. The provisions of Rule 32(2) of the Army Rules, 1954 may

also be taken note of in this connection which provides that ""in the construction of a charge-sheet or charge, there shall be presumed in favour of

supporting the same every proposition which has reasonably be presumed to be impliedly included, though not expressed therein"". So even

governing myself by the decision of Banerjee, J. in Amal Sankar Bhaduri (supra), the Writ Petition cannot succeed as the charge cannot be held to

be perverse in the sense of being founded on ''no evidence''. It must, however, be noted that in Amal Sankar Bhaduri (supra), Banerjee, J. also

held the Court Martial itself to have been illegally constituted in violation of Rule 40 of the Army Rules, having been manned by officers not

qualified for the purpose according to law and fiat must also go a long way to distinguish that case from the case at hand.

10. It also appears from the records of the Court Martial produced before me that the Court assembled on 25/1/90 and has proceeded with the

trial on a large number of dates, as many as ten witnesses have been examined by the prosecution and cross-examined by the defence and after the

case for the prosecution was closed, in April, 1990, the accused offered his plea of ''no case'' under Rule 57 and on consideration of his plea, one

of the charges was dropped and the accused was asked to enter on his defence. I do not think that it would be just or proper to allow the accused

to assail the charge at this stage, and he should be directed to participate in the rest of proceeding. For all these reasons as stated hereinbefore, I

must reject the Writ Petition, which I hereby do, and vacate all interim orders, if any and direct the Court Martial to proceed with the trial in

accordance with law and as expeditiously as possible. No cost.