

**(1990) 05 CAL CK 0028**

**Calcutta High Court**

**Case No:** Matter No. 1098 of 1990

Anup Kumar Sinha Chowdhury

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision:** May 16, 1990

**Acts Referred:**

- Army Act, 1950 - Section 133, 52(f)
- Constitution of India, 1950 - Article 134, 136, 136(2), 20, 226

**Citation:** 94 CWN 1107

**Hon'ble Judges:** A.M. Bhattacharjee, J

**Bench:** Single Bench

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

**Final Decision:** Allowed

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### **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 territory 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 136 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 exasperating 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 how and to what extent that power is to be exercised. The 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 to be interfered with, as far 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 egalitarian 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 to 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 exercised 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 of 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 charge 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.