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BACHAN SINGH

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 3110 of 2004)

B

JULY 10, 2008

[C.K. THAKKER AND LOKESHWAR SINGH PANTA,
JJ.]

C

Army Act, 1950 – ss. 63 and 109 – Court On allegation of crossing international border – Delinquent official held guilty and sentenced to two years imprisonment – Also dismissed from service – Sentence confirmed – Single Judge of High Court under writ jurisdiction set aside the court martial – Division Bench of High Court set aside order of Single Judge –

D

On appeal, held: There was no illegality or irregularity in the General Court Martial – It was fairly and properly conducted in accordance with law by competent authority – Single Judge of High Court was not right in minutely examining the records as if sitting in appeal – Judicial review under Article 226 is not directed against the decision, but the decision making process – Constitution of India, 1950 – Article 226 – Army Rules, 1954 – rr. 23 (1), (2), (3), (4) and 6.

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A General Court-Martial, under the Army Act, 1950 was convened by the competent authority u/s 109 of the Act to try the appellant u/s 63 of the Act. The allegation against the appellant was that he had gone across the International Border. After conclusion of the proceedings, appellant was held guilty of the charge and was sentenced to two years imprisonment and was also dismissed from service. The sentence was confirmed by the Confirming Authority.

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Single Judge of High Court in writ petition, set aside the Court-Martial and subsequent confirmation of sentence. In Letters Patent Appeal, Division Bench of High Court, set aside the order of Single Judge. Hence the present appeal.

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Dismissing the appeal, the Court

HELD: 1.1 Division Bench of the High Court was justified in setting aside the order of the Single Judge who was not justified in setting aside the well-reasoned order of the General Court Martial (GCM) which was based upon proper and fair appreciation of the evidence of the material witnesses, statement made voluntarily by the appellant before it, other material and subsequent order of the confirming authority. [678-F,G]

1.2. Single Judge of High Court completely misdirected himself in coming to the conclusion that the proceedings held by GCM were inconsistent with the provisions of the Army Act and the finding of the Court-Martial was not in accordance with the law. The proceedings of the GCM to be quite immaculate where trial was fair and every possible opportunity was afforded to the appellant to defend his case. [681-D,E,F]

1.3. The appellant was afforded full opportunity of cross examining the witnesses but he did not avail of the said opportunity. Despite giving warning to the appellant to the effect that he was not obliged to make any confessional statement, the appellant made written confessional statement. The appellant made additional statement in addition to first summary of evidence in the presence of witnesses. It appears from the record that second additional summary of evidence was in compliance with Army Rules 23(1), 23(2), 23(3), 23(4) and 23(6) in which the appellant did confess his guilt. [680-G,H 681-A,B]

1.4. Under Section 109 of the Army Act, a GCM may be convened by the Central Government or the Chief of the Army Staff or by any officer empowered in this behalf by warrant of the Chief of the Army Staff. There is nothing in Section 109 which requires the Chief of the Army Staff to issue a warrant for each specific case. A general warrant for convening GCM under the Act has been issued

A by the Chief of the Army Staff under Section 109 whereby
all the officers not being under the rank of a Field Officer,
commanding the 16 Corps are empowered to convene
GCM for the trial of any person under his command who
is subject to Military Law authorized by A-1 warrant duly
B signed by the Chief of the Army Staff. In the present case,
the order convening the assembly of GCM under the Act
proves that the GCM has been convened by a competent
authority in accordance with the provisions of Section 109
of the Army Act. The members of the GCM were selected
C and appointed in compliance to Section 113 of the Act.
Thus, the respondents have fully complied with the re-
quirement of law. [679-A,B,C] [680-B,C,D]

2. The findings and reasonings recorded by the
Single Judge of High Court are not based upon proper
D assessment of the facts of the case and it was not neces-
sary for the Single Judge to have minutely examined the
record of the GCM as if he was sitting in appeal. In pro-
ceedings under Article 226 of the Constitution, the High
Court cannot sit as a Court of appeal over the findings
E recorded by the GCM. Judicial Review under Article 226
of the Constitution is not directed against the decision
but is confined to the decision-making process. Judicial
review is not an appeal but a review of the manner in which
the decision is made. The court sits in judgment only on
F the correctness of the decision making process and not
on the correctness of the decision itself. Thus, there was
no irregularity or illegality in the GCM which was fairly and
properly conducted by most qualified members holding
very high ranks in Army hierarchy. [682-D,E,F,G]

G *Union of India and Ors. v. IC 14827 Major A. Hussain*
AIR 1998 SC 577 – referred to.

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 3110
of 2004

H From the Final Judgment and Order dated 5.2.2002 of

the High Court of Jammu and Kashmir at Jammu in L.P.A. No. 284 of 1997 A

D.K. Garg, B.S. Billowaria and P.V. Yogeswaran for the Appellant.

Parag P. Tripathi, ASG, Rekha Pandey, Varun Sarin (for B.V. Balaram Das) and B. Krishna Prasad for the Respondents. B

The Judgment of the Court was delivered by

LOKESHWAR SINGH PANTA, J. 1. Bachan Singh - appellant is aggrieved by the judgment and order dated February 5, 2002 passed by the Division Bench of the High Court of Jammu and Kashmir at Jammu allowing the LPA (SW) No. 284/97 filed by the respondents herein against the judgment dated November 20, 1996 of the learned Single Judge of the High Court whereby the learned Single Judge allowed SWP No. 14-A/1984 filed by the appellant and quashed the General Court-Martial held against him including confirmation of sentence passed upon him by the General Court-Martial and the appellant is relegated back to the position he had on the date of passing of the order with all the benefits under the Rules. C
D

2. A General Court-Martial (GCM) under the Army Act, 1950 (for short 'the Act') was convened by the competent authority on January 4, 1982 under Section 109 of the Act to try the appellant holding the rank of Sepoy in Second Battalion, the Dogra Regiment in the Army. E
F

3. The allegations against the appellant for which he was suspected to be tried by GCM were:-

"No.3973649A Sep Bachan Singh of 2DOGRA is resident of village Paragwal, Tehsil Akhnoor, District Jammu (J&K) S/o Shri Dharam Singh and step son of Smt. Gyano Devi, second wife of Shri Dharam Singh. G

Sep. Bachan Singh studied in Govt. Lower High School, Paragwal upto the 9th. He was enrolled in the Army on 11 Oct. 75 to Meerut in the Dogra Regt. He is married to H

A Smt. Veena Kumari D/o Shri Durga Singh resident of Village Chargarwar, Tehsil Jammu, District Jammu (J&K). Sep Bachan Singh proceeded on annual leave w.e.f. 16 Jan 80 to 15 Mar 80 to his home station village Paragwal, Tehsil Akhnoor.

B Shri Bachan Singh S/o Shri Waryam Singh resident of Village Najwal, Tehsil Akhnoor, District Jammu (J&K) which is about 3 kms. from village Paragwal is related to Sep Bachan Singh. Sep Bachan Singh's step mother Smt. Gyano Devi is the younger sister of Shri Rattan Singh's mother Smt. Vidya Devi.

C During the month of Feb 80 Smt. Vidya Devi had gone over to Sep Bachan Singh's house and invited him and his wife over to her place. On 12 Mar 80 Sep Bachan Singh along with his wife Smt. Veena Devi and his three months old son went to Smt. Vidya Devi's house.

D Shri Rattan Singh and Sep Bachan Singh consumed country liquor that night. At about 2130 hours Shri Rattan Singh and Sep Bachan Singh went out for a walk and while waling crossed the border into PAK territory where they were met by two PAK FIU staff at Post DERA. PAK if he was in possession of his identity card. Sep Bachan Singh gave his name as Narinder Singh son of Shri Surjeet Singh, his unit as 16 J&K LI located at MIZORAM. PAK FIU staff gave Rs. 200/- Sep Bachan Singh when he reached his home. The next day, 13 Mar 80, Sep Bachan Singh with his family left for his home.

E On 15 Mar 80 Sep Bachan Singh left his village Paragwal to rejoin his unit. At 1830 hours 15 Mar 80, Sep Bachan Singh rejoined his unit, 2 DOGRA.

F On 04 Jul 80 Sep Bachan Singh under an escort proceeded to 168 ASC Bn on temp duty for interrogation at the Joint Interrogation Centre South C/o Det 4/290 Liaison Unit C/o 56 APO and returned back to the unit on

H

10 Aug 80.”

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The order convening the Court-Martial reads as under:-

“FORM OF ORDER FOR THE ASSEMBLY OF A
GENERAL COURT MARTIAL UNDER ARMY ACT

B

Orders by IC-5095P Major General K. Mahipat Sinhji
Officiating General Officer Commanding 16 Corps.

Place: Field

Date: 15 December, 1981.

No.3973649A Sepoy
Bachan Singh 2nd
Battalion The Dogra
Regiment

The details of officers men-
tioned below will assemble
at Field on the Sixteenth day
of December 1981 for the
purpose of trying by a Gen-
eral Court Martial the ac-
cused person named in the
margin (and such other per-
son or persons as may be
brought before them.)

C

D

The Senior Officer to sit as Presiding Officer.

E

MEMBERS

IC-7757L Brig. Talwar Harjeet – Cdr 191 Inf Bde

IC-12716L Lt. Col. Borkar, Mukand Narasinha –

OC 1890 Indep Lt Bty.

IC-28737L Maj Vohra, Satyendra Mohan – 2 SIKH

IC-25247M Capt Jagmal Singh – 37 Med Regt

IC-34139K Capt Ranjit Barkakoty – 81 Armd Regt.

F

WAITING MEMBERS

IC-13474A Lt Col. Brar, Surjit Singh – OC 28 EME Bn

IC-24826M Gill Mohanjit Singh – 8 CAV

IC-35033K Capt Hari Mohan Joshi – 374 Sig Regt

G

JUDGE ADVOCATE

IC-36504Y Maj Deosthale Jayant Kumar – DAJAG

HQ Northern Command

H

A is appointed Judge Advocate

PROSECUTOR

IC-29015L Maj Valentine, Joseph Melvin – 9 MADRAS
appointed prosecutor

B The accused will be warned, and all witnesses duly
required to attend.

The proceedings (of which only three copies are required)
will be forwarded to Headquarters, 16 Corps, through
DJAG Headquarters Northern Command.

C Signed this fifteenth day of December, 1981.

Sd/-

(R.K. Kashyap)

Lieutnant Colonel

D Assistant Ad-jutant General for
Officiating General Officer Commanding
16 Corps”

The charge sheet reads as under:-

E “CHARGE SHEET

The accused No. 3973649A Sep Bachan Singh, 2nd
Battalion The Dogra Regiment is charged with:-

F Army Act AN ACT PREJUDICIAL TO GOOD ORDER
AND Section 63 MILITARY DISCIPLINE

in that he,

G at Village Najwal (J&K) on 12 Mar 80, went across the
International Border to Post 'DERA' in Pakistan, alongwith
Shri Rattan Singh S/o Shri Waryam Singh of the said
village.

Sd/-

Station: Field

(Balwant Singh)

H Date: 12 Dec 81 Major

Officiating Commanding Officer A
2nd Batallion The Dogra Regiment

To be tried by a General Court Martial

Place : Field Sd/-

Date: 12 Dec 81

(R.K. Kashyap)

Lieutnant Colonel

Assistant Ad-jutant General for

Officiating General Officer Commanding C

16 Corps"

Section 63 of the Act reads as under:-

"Violation of good order and discipline:- Any person D
subject to this Act who is guilty of any act or omission
which, though not specified in this Act, is prejudicial to
good order and military discipline shall, on conviction by
court-martial, be liable to suffer imprisonment for a term
which may extend to seven years or such less punishment E
as is in this Act mentioned."

4. After conclusion of the proceedings, the appellant was
held guilty of the charge and was sentenced to suffer two years
imprisonment and also dismissed from service by order dated
January 22, 1982 of the GCM. The sentence passed against F
the appellant was confirmed by the confirming authority as re-
quired under the Act. The appellant challenged his conviction
and sentence in SWP No. 14-A/1984 filed by him in the High
Court of Jammu and Kashmir at Jammu which as noted above,
was allowed by the learned Single Judge by order dated G
November 20, 1996. The ground which appealed to the learned
Single Judge in setting aside the Court-Martial and subsequent
confirmation of sentence may be stated from the relevant para-
graphs of the judgment of the learned Single Judge which are
as under:- M

A "I have gone through the record that was produced before
me today and also leafed through the statements made
by the witnesses before the General Court Martial. Not
even a single witness has deposed that he had seen or
had any knowledge of the petitioner having crossed ever
B the International Border. There is absolutely no evidence.

Learned counsel appearing for the respondents has
vehemently relied upon the statement made by the
accused/petitioner before the summary of evidence.
C According to him this statement was made voluntarily and
can be safely acted upon. I decline to agree with the learned
counsel for the reason, because, statements made before
summary of evidence cannot be relied upon in the first
instance. Even then I have gone through the statement of
D the petitioner/accused before the general court martial. In
that statement, the petitioner has vehemently stated that
the earlier statement made by him during the summary of
evidence was as a result of force exercised upon him
during interrogation. He has totally resiled from this
statement, did not own the same.

E I am tempted to refer to Article 20 of the Constitution read
with Section 27 of the Evidence Act. The statement
tendered by the accused/petitioner before the summary
of evidence has been destroyed and another statement
was later recorded. The general court martial has taken
F note of this statement and itself returned a finding in the
following manner:-

"The court decided to uphold the contention of defence
and not to admit the above document in evidence."

G General Court Martial seems to have sufficiently been
conscious of the loop-holes which the statement had and
it was because of these loop-holes that this confessional
statement was not acted upon. Suffice to say that there
is no evidence linking the petitioner/accused with the
H allegation under which he stands charged.

On the strength of the foregoing reasoning, I find the proceedings to be inconsistent with the provision of the Army Act and the finding of the court martial was not in accordance with the law. Therefore, the same is quashed and the petitioner is relegated back to the position he had on the date of passing of the order. He will be entitled to all the benefits under rules.”

5. Aggrieved by the said order of the learned Single Judge of the High Court, the Union of India and the officials concerned of the Army have preferred Letters Patent Appeal (SW) No. 284/94. By order dated February 5, 2002, the Division Bench of the High Court allowed the appeal and set aside the order passed by the learned Single Judge in SWP No. 14-A/1994. Hence, the appellants have preferred this appeal.

6. Mr. D.K. Garg, learned counsel appearing on behalf of the appellants in support of the judgment of the learned Single Judge, contended that the learned Single Judge has rightly quashed the GCM primarily on a ground that the GCM had been convened in violation of the mandate of Section 109 of the Act. According to the learned counsel, the GCM was not convened by the authority competent to do so in terms of Section 109. It was urged that there was no direct evidence produced on record of the GCM by the respondents to prove the guilt of the appellants for offence under Section 63 of the Act and in the absence of any evidence, the order of conviction and sentence imposed upon the appellants by the GCM was invalid, unsustainable and in violation of natural justice and in such circumstances the judgment of the learned Single Judge setting aside the order of the GCM could not have been interfered with by the Division Bench in Letters Patent Appeal. It was, therefore, submitted that the impugned order of the Division Bench of the High Court deserves to be set aside by restoring the order of the learned Single Judge.

7. Mr. Parag P. Tripathi, learned Additional Solicitor General for the respondents on the other hand, supported the order

A passed by the Division Bench of the High Court and submitted
that the High Court was right in allowing the Letters Patent Ap-
B peal and in making the order. He submitted that the learned
Single Judge has exceeded his jurisdiction under Article 226 of
the Constitution of India by setting aside the Court-Martial and
subsequent order of conviction and sentence recorded against
C the appellant which was later on confirmed by the competent
authority as envisaged under the Act and the Rules for violation
of good order and discipline in terms of Section 63 of the Act.
According to the learned counsel, this Court in exercise of its
power under Article 136 of the Constitution may ordinarily not
interfere with the order of the Division Bench.

8. Having heard the learned counsel and having gone
through the material on record and also the relevant provisions
of the Army Act and Rules, in our opinion, the Division Bench of
D the High Court was justified in setting aside the order of the
learned Single Judge who was not justified in setting aside the
well-reasoned order of the GCM which was based upon proper
and fair appreciation of the evidence of the material witnesses,
statement made voluntarily by the appellant before it, other
E material and subsequent order of the confirming authority.

9. The appellant's contention that the convening of the GCM
in this case is not valid because under Section 109 of the Act,
the GCM can be convened only by any officer who has been
appointed by a specific warrant in that connection by the Chief
F of the Army Staff must be rejected. Under Section 109 of the
Army Act, a GCM may be convened by the Central Government
or the Chief of the Army Staff or by any officer empowered in
this behalf by warrant of the Chief of the Army Staff. There is
nothing in Section 109 which requires the Chief of the Army
G Staff to issue a warrant for each specific case. A general war-
rant for convening GCM under the Act has been issued by the
Chief of the Army Staff under Section 109 whereby all the offic-
ers not being under the rank of a Field Officer, commanding the
16 Corps are empowered to convene GCM for the trial of any
H person under his command who is subject to Military Law au-

thorized by A-1 warrant duly signed by the Chief of the Army Staff was produced before the High Court which has been noticed and extracted in the judgment by the Division Bench. The warrant of authorization reads as under:-

“Warrant of convening of General Court Martial under the Army Act.

To,

The OFFICER NOT BEING UNDER THE RANK OF A FIELD OFFICER, COMMANDING THE XVI CORPS

In pursuance of the provisions of the Army Act, 1950 (XLVI of 1950). I do hereby empower you, or the officer on whom your command may devolve during your absence, not under the rank of Field Officer, from time to time as occasion may require, to convene General Courts-Martial for the trial, in accordance with the said Act and the Rules made thereunder, of any person under your command who is subject to military law and is charged with any offence mentioned in the said Act, and is liable to be tried by a General Court-Martial.

And for doing so, this shall be, as well to you as to all others whom it may concern, a sufficient warrant.

Given under my hand at NEW DELHI this twenty fourth day of JUNE 1972.

Sd/- General

CHIEF OF THE ARMY STAFF”

10. In the present case, the above said order dated 15th December, 1981 convening the assembly of GCM under the Act passed by IC-5095P Major General K. Mahipat Sinhji, Officiating General Officer Commanding 16 Corps clearly proves that the GCM has been convened by a competent authority in accordance with the provisions of Section 109 of the Army Act. The members of the GCM were selected and

A appointed in compliance to Section 113 of the Act. Thus, the respondents have fully complied with the requirement of law.

11. The record of the Court-Martial produced before us by the learned Additional Solicitor General would reveal that the GCM was held against the appellant on different dates at Udhampur. The record would disclose that the appellant had made voluntarily written confessional statement before the GCM admitting the allegations levelled against him in the charge sheet. On bare perusal of the GCM, it becomes quite clear that the proceedings were recorded by the GCM in the presence of the appellant, his defending officer and other witnesses. The statements of Major S.K. Sareen, Smt. Vidya Devi, Veena Kumari, Tara Chand, Rattan Singh, Prabhu Ram, Major S.B. Ambel, Pritam Singh, Capt. A.K. Chowdary, Major Amin Chand Bhattee were recorded by the GCM on behalf of the prosecution in support of the charge in the presence of the appellant. The appellant was afforded full opportunity of cross examining the witnesses but he did not avail of the said opportunity. It appears from the record that despite giving warning to the appellant to the effect that he was not obliged to make any confessional statement, the appellant made written confessional statement on October, 22, 1980. The appellant made additional statement in addition to first summary of evidence on 10th September, 1981 in the presence of witnesses namely IC-25616Y Major S.L. Gautam independent witness, Major Amin Chand Officer recording Summary of Evidence. It appears from the record that second additional summary of evidence recorded on 10th September, 1981 was in compliance with Army Rules 23(1), 23(2), 23(3), 23(4) and 23(6) in which the appellant did confess his guilt.

12. Chapter XII of the Act deals with Confirmation and Revision. Section 153 provides that no finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed as provided by this Act. Section 154 prescribes that the findings and sentences of gen-

eral courts-martial may be confirmed by the Central Govern- A
ment, or by any officer empowered in this behalf by warrant of
the Central Government. The record of the respondents shown
to us would establish that the findings of conviction and sen-
tences imposed upon the appellant by the GCM were confirmed B
by the competent authority in terms of Section 154 of the Act.
We find the proceedings of the GCM to be quite immaculate
where trial was fair and every possible opportunity was afforded
to the appellant to defend his case. After ourselves examining
the record of the court-martial, we find that the learned Single C
Judge, with respect to him, completely misdirected himself in
coming to the conclusion that the proceedings held by GCM
were inconsistent with the provisions of the Army Act and the
finding of the Court-Martial was not in accordance with the law.
The appellant was given opportunity to inspect whatever record D
he wanted, his wife and other witnesses were examined in his
presence and he had participated in the court-martial proceed-
ings without raising any objection. The GCM took into consid-
eration the relevant oral evidence of the material witnesses and
statement voluntarily made by the appellant and additional sum-
mary confessional statement duly signed by him in the pres- E
ence of Major S.L. Gautam and Major Amin Chand who have
also appended their signatures thereon and other materials
produced before it, found the appellant guilty of the charge and
convicted and sentenced him accordingly.

13. The appellant filed post confirmation petition against F
the order of the GCM under Section 164 of the Act, a copy
whereof has been shown to us by the learned counsel for the
appellant. We are informed by the learned Additional Solicitor
General that the said petition has been rejected by the compe-
tent authority and findings and sentences of the GCM recorded G
against the appellant were confirmed and the appellant was,
accordingly, informed about the decision so taken by the au-
thority. Indisputably, the appellant has neither challenged the
said order of the competent authority passed under the Statute
before the High Court in the writ petition nor was the order was H

A brought to the notice of the Division Bench by the appellant at the time of hearing and deciding the Letters Patent Appeal.

B 14. Having examined the above said order of the learned Single Judge, we find that the findings and reasonings recorded therein are not based upon proper assessment of the facts of the case and it was not necessary for the learned Single Judge to have minutely examined the record of the GCM as if he was sitting in appeal. We find that on merits, the learned Single Judge has not clearly and plainly said that there was no case against the appellant to hold him guilty of the offence charged. It is well-known and well-settled proposition of law that in proceedings C under Article 226 of the Constitution the High Court cannot sit as a Court of Appeal over the findings recorded by the GCM. D Judicial Review under Article 226 of the Constitution is not directed against the decision but is confined to the decision-making process. Judicial review is not an appeal but a review of the manner in which the decision is made. The court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself. Thus, examining the case of the appellant from all angles we are satisfied E that there was no irregularity or illegality in the GCM which was fairly and properly conducted by most qualified members holding very high ranks in Army hierarchy.

F 15. The Division Bench of the High Court in the impugned judgment while setting aside the judgment of the learned Single Judge has relied upon the decision of this Court in *Union of India & Ors. v. IC 14827 Major A. Hussain* [AIR 1998 SC 577] and observed that the High Court cannot re-appreciate the evidence recorded by the authorities and substitute by its own finding replacing the conclusion reached by the competent authority. G

H 16. Though the Division Bench of the High Court has not given detailed reason in its judgment for setting aside the judgment of the learned Single Judge, yet in substance we are of the opinion that the said judgment on merit warrants no interfer-

ence inasmuch as no illegality, infirmity or error of jurisdiction A
could be shown before us by the appellant.

17. In our view, there is no merit in the contentions taken
by the appellant.

18. For the reasons above stated, there is no merit in this B
appeal and it is, therefore, dismissed. There will be no order
as to costs.

K.K.T.

Appeal dismissed.