

CASE NO.:
Appeal (civil) 2949-2950 of 2001

PETITIONER:
Union of India & Ors.

RESPONDENT:
Ranbir Singh Rathaur & Ors. etc.etc.

DATE OF JUDGMENT: 22/03/2006

BENCH:
ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

These two appeals are directed against the common judgment of a Division Bench of the Delhi High Court. By the impugned judgment the High Court disposed of two writ petitions CW No. 3063 of 1995 filed by respondent\026Ranbir Singh Rathaur and CW No. 4082 of 1995 filed by Ashok Kumar Rana. Alongwith these two writ petitions seven Letter Patent Appeals were also disposed of. These LPAs. are the subject matter of challenge in Civil Appeal Nos.2951-57 of 2001 which were de-linked from the present two appeals by order dated 14.2.2006. The LPAs. and these writ petitions filed before the High Court were linked in the sense that in all these cases concerned writ petitioners were dismissed from service by the present appellants. They were all working at the relevant point of time in 168 Infantry Brigade, deployed in a place called Samba in the border areas. By the impugned judgment the High Court held that the proceedings initiated against the writ petitioners forming subject matter of the present appeals were void in law and the orders passed against these and the other officers who were appellants in the LPAs were vitiated being without any material and being a camouflage. The relevant portion of the High Court's order reads as follows :

"Accordingly we declare that the proceedings initiated against the petitioners in the two writ petitions are void in law and the orders passed against the other officers, the appellants in L.P.As are vitiated being without any material and being camouflage. Having dropped the idea not to conclude Court Martial proceedings knowing fully well that the officers were likely to be acquitted, without producing relevant record before the concerned authority orders of termination were passed flouting all norms. The appellants in the LPAs and the petitioners in the two writ petitions are entitled to all the consequential benefits. We also hereby declare that the orders passed against the appellants in the LPAs are void in law and the conviction and sentence by the GOMs against the writ petitioners are void in law. Consequently, the

judgment of the learned Single Judge which are set aside and the writ petitions in those are allowed and the Latent Patent Appeals stand allowed and the two writ petitions also stand allowed. All the writ petitions stand allowed to the above extent indicated and other reliefs prayed for cannot be considered by this Court and it is for the law makers to attend to the same. There shall be no order as to costs.

The respondents shall grant consequential reliefs to all the officers including all monetary benefits within a period of four months from today."

Factual background as highlighted by the appellants is essentially as follows:

In February 1971 Gunner Sarwan Dass was cultivated by Pakistan Intelligence. In 1972 Capt. Ghalwat & Gnr. Sarwan Dass crossed the international border. In 1973 Cap. Ghalwat & Gnr. Sarwan Dass were posted in Babina (MP). In 1974 Gnr. Aya Singh was cultivated by Gnr. Sarwan Dass for Pak intelligence. Capt. Nagial was then cultivated by Aya Singh for Pak intelligence. In 1975 for the first time the espionage racket came to be noticed. Aya Singh and Sarwan Dass were arrested. In 1976-1977 pursuant to the investigation 3 more Jawans were arrested. They corroborated the involvement of Sarwan Dass. Sarwan Dass and Aya Singh on further interrogation disclosed the names of Capt. Ghalwat & Capt. Nagial. In 1976-77 Capt. Ghalwat & Capt. Nagial were tried by General Court Martial and were convicted. Ghalwat was cashiered and given 14 years RI. Nagial was given 7 years RI and was also cashiered. In addition, 12 jawans were tried and they were given RI of various descriptions and were dismissed from services. Aya Singh and Sarwan Dass were also among the 12 jawans tried and held guilty. Later in 1978 it was discovered that Aya Singh was holding back certain relevant information relating to espionage activities under certain alleged threat and pressure. Wife of Aya Singh came to be killed. Reeling under the shock of the circumstances, he made further disclosures wherein he named Capt. Rathaur and Capt. A.K. Rana, the respondents in these appeals and he disclosed that he was receiving threats that if he disclosed anything his wife would be killed. Accordingly, in 1978 Capt. Rathaur and Capt. A.K. Rana were interrogated. As a result, 42 Army personnel were arrested. The 42 Army personnel included 19 officers, 4 junior commissioned officers (JCOs) and 19 Other Ranks (ORs.)

Out of the 19 officers, 3 officers were tried by General Court Martial, two were convicted, namely, Capt. Ranbir Singh Rathaur and Capt. A.K. Rana and one was acquitted. Capt. Ranbir Singh Rathaur and Capt. A.K. Rana were sentenced to RI for 14 years each and were cashiered. Against 13 officers, disciplinary actions were initiated. However, a decision was taken not to try them and administrative order under Section 18 of Army Act, 1950 (in short the 'Act') was passed terminating their services.

Present appeals relate to the 2 officers punished by General Court Martial and the de-linked appeals relate to 7 officers out of 13 officers whose services were terminated under Section 18 of the Act. The remaining 3 officers were not

found blameworthy and no action was taken against them and they continued in the Army. Out of 4 JCOs services of (3 JCOs) were terminated administratively and against 1 officer no action was taken. Out of 19 others, 6 were tried by General Court Martial and were convicted and sentenced for various descriptions of imprisonment. Services of 9 others were terminated by administrative order and the rest 4 were let off and no action was taken against them.

At this juncture it would be appropriate to take note of previous litigations.

On 22.10.1980 Criminal Writ Petition No. 90 of 1980 was filed by Ex Captain Rana. On 4.6.1981 Criminal Writ Petition No. 90 of 1981 came to be dismissed by the Division Bench of Delhi High Court. It was observed that a number of points were raised on points of law and jurisdiction. It did not want these matters to be left undecided, therefore, arguments were heard on these points and were dealt with.

On 19.2.1982, SLP (Crl.) No.2320 of 1981 filed by Capt. A.K. Rana against the order dated 4.6.1981 came to be dismissed.

On 17.10.1995 CWP No. 4082 of 1995 was filed by Capt. AK Rana before the Delhi High Court. On 21.12.2000 the impugned judgment was passed.

On 24.8.1978 Capt. Ranbir Singh Rathaur was arrested and taken into custody on the basis of information collected by the Military Intelligence that Ranbir Singh Rathaur had been indulging in acts of espionage by passing secret and classified military information to agents of a foreign country. On 28.3.1979 Smt. Swaran Rathaur, wife of Capt. Ranbir Singh Rathaur filed a Habeas Corpus Petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') in this Court being Criminal Writ Petition No. 294/79, inter alia, seeking the following reliefs:

- (a) That Ranbir Singh Rathaur be forthwith produced before this Hon'ble Court.
- (b) That the Petitioner in the said writ petition, her lawyers and medical advisors be permitted to interview the said Capt. Rathaur in conditions controlled by this Hon'ble Court and proper medical care and facilities may be furnished to him.

On 12.4.1979 General Court Martial was convened against Capt. Rathaur. On 17.4.1979 two charges were framed against Capt. R.S. Rathaur for offences under Section 69 of the Act, read with Section 3(1)(c) of the Official Secrets Act, 1923 (in short 'Secrets Act').

The Union of India filed a Counter Affidavit in Crl. WP No. 294 of 1979, inter alia, pointing out that detenu was being tried by a General Court Martial and that sanction to the detention was given by the Chief of Army Staff and the Government. On 27.4.1979 this Court vide Order dated 27.4.1979 dismissed the Writ Petition No. 294/1979 as infructuous. This Court observed that:

"It has also not been disputed that the proceedings of the Court Martial have started and the detenu has been allowed to appoint a counsel of his own choice who is at the moment representing the detenu. In these

circumstances, therefore, the Habeas Corpus Petition had become infructuous and does not merit any interference by this Court."

As regards the allegations of torture it was recorded that the Additional Solicitor General produced before the Court a record of the doctor who had examined the detenu thoroughly and found that the complaints made by him were without substance.

However, the petitioner was given liberty to make an application before the Military authorities for examination by the Principal of the Medical College, Jammu. Such examination by a civil doctor was not to be taken as casting any reflection or aspersion on the impartiality or incompetence of the doctor of the Military Department. With these observations the petition was dismissed.

On 2.8.1979 Rathaur was convicted and sentenced to 14 years rigorous imprisonment. In 1981 Rathaur filed a Criminal Writ Petition being CrI.W.P. No. 9 of 1981 in the Delhi High Court challenging the Court Martial proceedings. On 23.3.1982 the High Court vide its order dated 23.3.1982 dismissed the petition of Rathaur relying upon its earlier decision in Criminal Writ No. 90 of 1980 dated 4.6.1981. In 1985 SLP (CrI.) 3573/85 against the Order dated 23.3.1982 of the High Court in CrI.W.P. No. 9 of 1981 was filed by RS Rathaur. In 1985 Rathaur filed a Writ Petition in this Court being Criminal Writ Petition No.1577 of 1985 again challenging the legality of the court martial proceedings, the sentence passed and the confirmation thereof. It was alleged that the court martial proceedings and sentence passed were arbitrary, illegal and that the procedure followed was in violation of the Act and the rules made thereunder.

Prayer (B) of the Writ Petition reads as under :

"Issue a writ order or directions in the nature of certiorari calling for the entire proceedings of the General Court Martial and quash the conviction and sentence of the Petitioner and the order of COAS confirming the said conviction and sentence."

On 10.2.1986 the Special leave Petition preferred by Capt. Rathaur to this Court being SLP (CrI.) No.3573 of 1985 against the Order dated 23.3.1982 of the High Court in CrI.W.P.No. 9 of 1981 was dismissed. On 28.4.1986 this Court dismissed the Criminal Writ Petition No. 1577 of 1985. This Court observed that the case was not a fit case for calling for the records or for re-opening the matter and hearing it. On the prayer of the Counsel for Rathaur, this Court directed that the records be preserved for one more year.

On 23.1.1987 the Review Petition filed by Rathaur in respect of the order of this Court dated 10.2.1986 in SLP (CrI.) No.3573 of 1986 and the order dated 28.4.1986 in Criminal Writ Petition No.1577 of 1985 (Review Petition Nos. 493 of 1986 and 463 of 1986 respectively) were dismissed.

The order reads as under :

"We have gone through the Review

Petitions and connected papers. We find no merit in the Review Petitions which are accordingly dismissed."

In May 1989 Rathaur was released from custody. In 1995 Rathaur again challenged the validity of the Court Martial proceedings which had been conclusively decided by this Court, by filing a fresh Writ Petition being CWP No. 3063 of 1995. Rathaur, inter alia, prayed for quashing of the same General Court Martial proceedings. Prayer (1) of Writ Petition is extracted below:

"(1) To issue a Writ of Mandamus and any other appropriate Writ, Order or direction, inter alia commanding the Respondent Nos. 1 and 2 in accordance with Section 165 of the Army Act, 1950 to annul the proceedings of the General Court Martial affecting the petitioner as they are malafide, irrational, unjust and illegal and there has been a failure of justice."

On 17.10.1996 the present appellants filed an affidavit taking the preliminary objection relating to the maintainability of the Writ Petition in view of the fact that the earlier Writ Petition of Rathaur had already been dismissed by the High Court on 23.3.1982 and the Special Leave Petition as well as Review Petitions preferred against the same were also dismissed by this Court.

It is also pertinent to note that this Court vide order dated 28.4.1986 had dismissed Criminal Writ petition No.1577 of 1985 challenging the very same General Court Martial Proceedings.

The appellant also submitted that they would file a detailed counter affidavit on merits after the issue of maintainability is decided.

On 14.8.1998 the Hon'ble High Court after hearing the matter at length was pleased to reserve the judgment.

On 22.3.1985 all the writ petitions challenging orders under Section 18 of the Act were dismissed.

In 1985, one of the writ petitioners Sri N.D. Sharma filed LPA being LPA No. 116 of 1985 against the order of dismissal. On 19.8.1986 the said LPA came to be disposed of by quashing the 5% cut, however, orders of termination of services were maintained.

In 1986 Sri N.D. Sharma preferred SLP(C) No. 13195 of 1986 against the order dated 19.8.1986. On 27.2.1987 SLP(C) No. 13195 of 1986 was dismissed. In 1992 Sri N.D. Sharma filed a fresh Writ Petition being Civil Writ Petition No. 3107 of 1992 before Delhi High Court. On 7.9.1992 Writ Petition No. 3107 of 1992 was dismissed on the ground of delay. In 1995 writ petition No. 4585 of 1995 was dismissed.

Similar petition has been dismissed by the Division Bench in the case of Subhash Juneja v. Union of India (CW 271/95) as the said petitioner tried to re-open the decision which had attained finality. In 1997, Review Petition was filed

against the order of dismissal being RP No. 5897 of 1997. On 7.11.1997 RP No. 5897 was dismissed.

In 1987-1994 the balance 7 officers filed LPAs.

It was contended by the present appellants that these LPAs were covered by the order in the case of Sri N.D. Sharma. The matter came to be referred to a Full Bench of the High Court to ascertain:

"Whether the order of termination passed by and in the name of the President u/s 18 r/w Art. 310 invoking the doctrine of pleasure of the President can be challenged on the ground that it is camouflage and as such violative of principles of natural justice and the fundamental right guaranteed under Article 14?"

On 8.7.1994 the Full Court rendered its judgment in Ex. Maj.N.R. Ajwani & Ors. v. Union of India 55 (1994) SLT 217. It was held that:

(a) The concept of camouflage is a facet of judicial review and the Court would lift the veil in all cases where it appears that the power is used for collateral purposes under the cloak or garb of innocuous form of an order and determine the true character of the order under challenge.

(b) Therefore, an order under Section 18 of the Army Act read with Article 310 of the Constitution invoking the doctrine of pleasure of President is subject to judicial review to ascertain whether the same is exercised lawfully and not vitiated for mala fide or based on extraneous grounds and that order can be challenged on the ground that it is a camouflage."

In 1994 the Union of India preferred Special Leave Petition (Civil) Nos.18732-36 against the order of the Full Bench of the High Court. On 17.11.1994 Special Leave Petition (Civil) Nos.18732-36 was granted. Although the judgment of the Full Bench was not disturbed it was held that it is for the person who challenges the order passed u/s 18 on the ground of malafide to make out a prima facie case. It is only if he discharges the said burden, that the Government is called upon to show that the said order is not passed in its malafide exercise of powers.

On 2.5.1995 the High Court vide its order dated 2.5.1995 held that the issue of maintainability would be decided in the first instance. The High Court in this regard observed:

"We are of the view that first we should decide the batch whether fresh writ petitions are maintainable, then the question of going into the privilege claimed by the respondents will have to be decided."

On 8.3.1996 Division Bench of Delhi High Court dismissed similar petition. It was contended by the writ petitioner that the judgment of the Full Bench has given fresh cause of action to them to challenge the order of termination of service dated 3.3.1980 even if their challenge has been adjudicated upon till the Supreme Court. Earlier decisions were not based on lack of jurisdiction but it was not found to be a fit case of interference. It was held that the petitions are barred by the principles of res judicata and are accordingly dismissed. This order has been affirmed by this Court.

On 6.1.1997 the present appellants filed the affidavit bringing on record this order's dated 17.11.1994. It was submitted that it would be just and proper to decide the prima facie case, if any, in favour of the appellant/petitioners. It is only then the burden would shift to the respondent to show that the order had not been passed in malafide exercise of power.

On 14.8.1998 the relevant Original records pertaining to the case were shown to the Court. The order does not indicate that the records were insufficient or more papers were required to be produced. It is pertinent to note that all the LPAs and two abovesaid writ petitions were being taken up together for hearing by the High Court.

On 21.12.2000 the LPAs Nos.4/87, 43/87, 139/87, 148/87, 21/88, 77/93 and 86/1994 were allowed. It was, inter alia, observed by the High Court as follows:

(1) The case of the appellants and the case of the writ petitioners are interconnected and intertwined and they can be looked as a whole.

(2) Instead of producing all the relevant records, the respondent had produced only three flaps.

(3) Perusal of the Counter Affidavit in all cases gives the impression that the respondent had withheld material facts.

(4) Respondents have not placed any material justifying the action.

(5) Respondent think they are law unto themselves.

(6) Respondents have chosen not to produce the entire record.

(7) We may not have interfered in view of finality reached on an adjudication by this court provided the records were produced.

(8) On the consideration of all the facts and circumstances we are of the view that there is no other conclusion possible except to say that the orders are merely camouflage and have been passed for extraneous reasons under the innocuous form of orders of termination.

(9) The appellants in the LPA are entitled to all consequential benefits. Orders passed against the appellants in LPA are void.

On 3.1.2001 the counsel for the present appellant received back the files submitted to the High Court.

In these appeals, it has been urged as follows:-

(1) By application of the principles of res judicata, the writ petitions were not maintainable.

(2) The order dated 17.11.1994 of this Court has

been overlooked.

(3) Onus of proof wrongly shifted to the present appellant.

(4) The earlier adjudications have not been taken into account.

(5) Delay in filing the writ petitions has not been considered.

(6) Records were produced before the High Court; contrary to what has been recorded.

It was pointed out that the High Court lost sight of the factual background and on mere surmises and conjectures allowed the writ petitions; overlooking the fact that on same grounds the writ petitions had been earlier filed, were dismissed and even the writ petitions and the SLPs. filed in this Court were dismissed. On clearly erroneous premises that there was no material to justify the action, the High Court came to the conclusion as noted above. It is submitted that the High Court proceeded on the basis as if no material were produced before it and this is contrary to the actual position. In fact volumes of documents were filed which the High Court unfortunately did not take note of. This presumably happened because the judgment was reserved in 1998 and the impugned judgment was delivered in December, 2000. The judgment is full of erroneous conclusions factually, which shows complete non-application of mind. An observation has been made by the High Court that though finality in law is desirable justice is of foremost importance. It has not been even indicated as to in what manner the earlier proceeding suffered from legality. The legality of the Court Marshal proceedings which was assailed were challenged earlier and were rejected right up to this Court. To substantiate the plea that original documents were shown and the original files were filed reference has been made to the receipt. Reference has also been made to the order dated 14th August, 1998, which reads as follows:

"Synopsis have been placed on record.

Mr. Tikky states that by 17.8.1998, photocopy of the relevant record will be made available to Court. Originals have been shown to us.

Judgment reserved."

It was pointed out that the only basis for filing the fresh writ applications as is evident from the averments made in the writ petitions is that some press reports had stated about irregularities in holding people guilty of espionage and the orders passed in the cases which formed the subject matter of challenge in the LPAs. The subject matter of the writ petitions which were under consideration in the LPAs were entirely different and had no connection with the legality of the Court Marshal proceedings.

In response, learned counsel for the respondent submitted that there was a great amount of manipulation and objectionable activities which subsequently came to light and on that basis the writ petitions were filed before the High Court and have been rightly allowed. In spite of opportunity as noted by the High Court, relevant documents were not produced. The stand that documents were filed before the High Court is refuted.

On a bare reading of the High Court's order and the averments in the writ petitions, one thing is crystal clear that there was no definite allegation against any person who was

responsible for the so called manipulation. It is also not clear as to who were the parties in the writ petitions filed. In the grounds indicated in the writ petitions it was stated that there is no bar or impediment on the High Court reviewing the petitioner's case as also connected cases to enquire into the validity of the acts done against the writ petitioner. Therefore, it was an accepted position that the writ petitioners wanted review of the High Court's order, which is clearly impermissible. No ground for seeking such review apparently was made out. In any event we feel that the High Court's approach is clearly erroneous. The present appellants in the counter affidavit filed had raised a preliminary objection as regards the maintainability of the writ petitions and had requested the High Court to grant further opportunity if the necessity so arises to file a detailed counter affidavit after the preliminary objections were decided. The High Court in fact in one of the orders clearly indicated that the preliminary objections were to be decided first. But strangely it did not do so. It reserved the judgment and delivered the final judgment after about three years. There is also dispute as to whether the relevant documents were produced. What baffles us is that the High Court records with original documents were shown to it and the Bench wanted the copies to be filed. In the impugned judgment the High Court proceeded on the basis as if only a few pages of the files were shown. If that was really the case, there was no necessity for the High Court to direct the present appellants to file copies. If after perusal of the documents the High Court felt that these were not sufficient the same would have been stated. But that does not appear to have been done. The High Court also had not discussed as to how the matters which stood concluded could be reopened in the manner done. No sufficient grounds have been even indicated as to why the High Court felt it necessary to do so. To say that though finality had been achieved justice stood at a higher pedestal is not an answer to the basic question as to whether the High Court was competent to re-open the whole issue which had become concluded. The persons whom the High Court felt were responsible for alleged manipulation or persons behind false implication were not impleaded as parties. Newspaper reports are not to be considered as evidence. The authenticity of the newspaper reports was not established by the writ-petitioners. Even otherwise, this could not have been done in a writ petition, as disputed questions of fact were apparently involved. The matters which the High Court found to have been established were really not so. The conclusions were based on untested materials, and the writ-petitioners had not established them by evidence. Since the High Court has not dealt with the matter in the proper perspective we feel it would be proper for the High Court to re-hear the matter. The High Court shall first decide the preliminary objections raised by the present appellants about the non-maintainability of the writ petitions. Normally such a course is not to be adopted. But in view of the peculiar facts involved, it would be the appropriate course to be adopted in the present case. Therefore, we remit the matter to the High Court for fresh hearing. We make it clear that whatever we have observed should not be treated to be the conclusive findings on the subject matter of controversy. The appeals are allowed without any order as to costs. Since the matter is pending since long, we request the High Court to dispose of the matter as early as practicable, preferably within four months from the date of receipt of the judgment. No costs.