
(2002) 03 DEL CK 0015
In the Delhi High Court
Case No : CWP No. 4450 of 2000

Colonel Aniltej Singh Dhaliwal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-03-2002

Acts Referred:

Citation : (2002) 64 DRJ 854

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : R.S. Randhawa, for the Appellant; Rekha Palli, for the Respondent

Final Decision : Allowed

Judgement

Vikramajit Sen, J.—The Petitioner prays that the Respondents/Army Authorities be directed to reinstate him into service; they be directed to release his arrears of pay and allowances and all other consequential benefits; that they be further directed to release "TA/DA and other allowances for requiring him to report back for duty". The response of the Respondents is that "there is no requirement of an order for reinstatement since the conviction by General Court Martial (for short "GCM") and subsequent promulgations are wiped off by the Order of the Hon"ble Supreme Court and the Petitioner is still subject to the Army Act as per Section 2(2)." However subsequently it has been pleaded by the Respondent in paragraph 13 of the Counter Affidavit that "it is denied that as a result of the Apex Court's decision Petitioner is deemed to be in service and as such is required to be reinstated is contradictory. That the Petitioner is not deemed to be in service but as a result of setting aside of the conviction of cashiering and 8 months RI, there is no legal conviction against the Petitioner and he is still very much subject to the Army Act vide Section 2(2) as brought out clearly in para 7 above. That to this extent the very purpose of the Petitioner's writ petition as adverted is infructuous and for this sole reason the petition is not maintainable before this Hon"ble Court."

2. It appears that the Petitioner, while serving in the rank of Colonel in the Army, was served with a Charge-Sheet enumerating nine Charges allegedly committed by him during the year 1995. A GCM was held from 1.7.1995 to 10.11.1995 which found the Petitioner guilty of four charges viz. 2nd, 3rd, 8th and 9th; he was acquitted on the remaining five charges. The petitioner was sentenced to eight months rigorous imprisonment together with cashiering. These findings and sentences were assailed by the Petitioner in the High Court of Sikkim in Crl. W.P. 1/1995 in which interim orders staying the proceedings were passed, and he was also granted bail. It is Petitioner's submission that he remained in service. It is not in contest that till that date the sentence had not been promulgated; as specifically required by the Army Act. By orders dated 8.9.1996, the Sikkim High Court set aside the impugned sentence passed by the GCM and set aside all subsequent steps and decisions taken by the Respondents. It is the Petitioner's submission that as a consequence of the High Court Judgment he did not remain under any disability with effect from this date, and this legal position is not disputed.

3. The Respondents challenged the decision of the High Court before the Hon'ble Supreme Court in SLP No. 3191/1996. On 10.10.1996 the Hon'ble Supreme Court granted interim stay of the impugned Judgment. Thereupon, the Respondents promulgated the sentence passed by the GCM on 6.12.1996 thereby giving effect the sentence of cashiering. The SLP was finally disposed of on 12.12.1997, partly modifying the Judgment of the High Court of Sikkim. The Hon'ble Supreme Court reversed the decision on the 2nd, 3rd and 8th Charges, set aside the sentence awarded by the GCM and remitted the case back to the GCM for passing appropriate sentence on the afore-mentioned three Charges. It also appears that the Apex Court observed that prima facie the sentence awarded by the GCM appeared to be too severe.

4. Thereafter the Respondents herein filed I.A. 5633/1998 seeking the permission of the Hon'ble Supreme Court to pass sentence on the Petitioner without the assembling of the General Court Martial. This application was dismissed on 10.5.1999. In response to the Respondent's communication to the Petitioner calling upon him to be available at Gangtok to appear before the GCM, his response was that since his cashiering had been given effect to consequent upon the promulgation of the sentence on 6.12.1996, the Petitioner ceased to be in Army service. The Petitioner requested that he should be reinstated, so that the Respondents could assume authority/jurisdiction over him, and he would forthwith appear before the GCM.

5. The Respondents once again approached the Hon'ble Supreme Court by means of I.A. 7422/99 in which it was prayed that the Court be pleased to (a) direct the Petitioner to present himself before the GCM and participate in the proceedings so that appropriate orders on the question of sentence may be considered and passed by the GCM and (b) in the alternative to permit the Respondents to pass appropriate orders on the question of sentence in exercise

of the powers vested u/s 163 of the Army Act, 1950, after modifying the Court's previous order dated 10.5.1999. This application was vehemently opposed by the Petitioner herein in the Apex Court. A perusal of the Petitioner's Reply discloses that he had relied on Section 153 of the Army Act which provides that no findings or sentence passed by a GCM shall be valid unless they are promulgated u/s 71 of the Army Rules. In paragraph 7, it has been pleaded by the Petitioner as follows:

"That the humble submission of the respondent herein is that only a person subject to the Army Act is amenable to the jurisdiction of a Court Martial and for making the respondent to submit to the jurisdiction of a Court Martial it was essential to reinstate him into the service as he had been ordered to be cashiered earlier which had been promulgated to him. On account of setting aside of the sentence, passed by the Court Martial, by this Hon'ble Court, the respondent was deemed to be in service. The respondent herein, as such, requested for supplying of the order of his reinstatement. The respondent further prayed that upon his reinstatement he would be entitled to arrears of pay and allowances for the intervening period and that he would also be required to be paid T.A. and the Railway Warrants for his move from Chandigarh to Gangtok. A copy of this communication, dated July 23, 1999, though available with the appellants and having not been annexed by them, is being annexed herewith as Annexure Rule 4. It was then that the respondent received a telegraphic communication that reassembly of the GCM was postponed and the fresh date will be intimated later. A copy of this communication is enclosed herewith as Annexure Rule 5. The respondent was then requested to attend GCM on August 16, 1999. he received after the date of re-assembly on August 16, 1999. thereafter, the respondent was sent a communication dated September 10, 1999, asking him to attend the proceedings on October 05, 1999. It was intimated to the petitioner that the cost of his conveyance will be borne by the State and reimbursed in accordance with the existing rules. The respondent through his letter dated September 18, 1999 informed the appellants that he had not been received any clarification to paras 2 to 6 of his letter dated July 23, 1999 (Annexure Rule 4). He further requested the appellants to send an order of reinstatement so that he could report for further proceedings before the GCM. A copy of this communication, dated September 18, 1999, is at Annexure Rule 6. The respondent through his communication dated October 28, 1999 again informed the appellants that his request made in paragraphs 2 to 6 of Annexure Rule 4 may be fulfilled to enable him to report for further proceedings. A copy of this letter, dated October 28, 1999, is enclosed herewith as Annexure Rule 7. Respondent then received a telegram on October 30, 1999, a copy whereof is at Annexure Rule 8. The appellants wrote a letter dated October 21, 1999 requiring the respondent to attend the proceedings on November 11, 1999. In response thereto, the respondent wrote a letter to the appellants on november 03, 1999, copy whereof is enclosed herewith as Annexure Rule 9. The respondent clearly brought out in this letter that he would not legally become amenable to the

jurisdiction of the trial unless he was reinstated and contested the claim of the appellants that question of this reinstatement would be considered after his trial, which was not understood. The respondent also expressed his apprehension that his fate already stood decided. The respondent had further expressed his eager that he would immediately report to the trial occasion the moment he received his reinstatement order, which was legally necessary to make him amenable to the jurisdiction of the trial. Therefore, the respondent received a communication that the General Court Martial has been adjourned sine die.

In view of the foregoing, it is clearly made out that the respondent is always willing to submit himself to trial for further proceedings. He, however, has prayed for that the proceedings be conducted in a legal and proper manner, which is not being appreciated. The appellants are in a hurry to hold the reassembly of GCM without reinstating the respondent and again pass a sentence dismissing him from service to avoid their liability for the period from December, 1996 till date when the fresh sentence is passed. This cannot be legally done as unless the respondent is reinstated into service and he becomes subject to the Act he cannot be dealt with by a Court Martial. This simple situation is not being appreciated and understood. As per the apprehension of the respondent it is being done purposely to avoid liability for the period from the date he was arbitrarily removed from service despite the order of the High Court in his favor till the re-assembly of Court Martial and award of fresh sentence."

6. The Respondent's application, as the previous one, was again dismissed on 31.1.2000.

7. The neat question of law is whether the Petitioner is justified in demanding his reinstatement as a pre-condition for appearing before the GCM as and when it is constituted. Since all the arguments raised by the Respondents in this had also been pleaded and argued before the Hon"ble Supreme Court, the matter stands concluded by the principles of res judicata. Had the Petitioner preferred an application before the Hon"ble Supreme Court seeking prayers similar to those contained in this Writ Petition, the controversy may have ended these. However, the fact remains that the application of the Respondents was dismissed, which is unquestionably indicative of the fact that Hon"ble Supreme Court had declined to direct the Petitioner to present himself before the GCM without his reinstatement. The relevant provision is Section 2(2) of the Army Act 1950 sates that every person subject to this Act shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service. It is certainly arguable that the Respondents ought to have been obtained specific orders from the Apex Court before promulgating the sentence against the Petitioner, but since there is strictly no legal impediment in taking this action on the stay of the judgment of the Sikkim High Court, the matter must be laid to rest with these observations. When Section 71 of the Act is adverted to it will be evident that punishment can only be inflicted on persons subject to the Army Act and convicted by court martial. It is palpably clear that the prevarication in the

pleadings of the Respondents in paragraph 13 of the Counter Affidavit, discloses the Respondents' intention of escaping or avoiding the payment of pecuniary and other benefits to the Petitioner. The Respondent cannot be permitted to approbate and reprobate. It is unintelligible how the Respondents can in the same breath state that the Petitioner cannot be deemed to be in service and yet maintain that he remains in service because of Court's Orders. Ms. Palli, learned Counsel appearing for the Respondents has contended that only a sentence has to be pronounced. Quite obviously, the Respondents had themselves appreciated and encountered the obstacle in the path of the GCM in completing this task, firstly, in the absence of the Petitioner, and secondly, by securing his presence without his reinstatement. This was the only reason for the Respondents approaching the Hon'ble Supreme Court after their SLP had been partially allowed. Reliance has been placed by Mr. Randhawa, learned Counsel appearing for the Petitioner with justification on a decision of a Division Bench of this Court in *S.P. Saxena v. Union of India*, 87 (2000) DLT 282 (DB), in which a writ of certiorari was issued quashing the impugned removal order and directing that the Petitioner should be reinstated. I am unable to appreciate the argument advanced on behalf of the Respondents that the decision in *R. Rajender Singh v. Depot Manager, A.P.S.R.T.C.*, 2000 (2) SLR 649, which was passed in the contest of Section 11A of the Industrial Disputes Act, 1947, can be applied to the present case. It is inescapably evident that the first step in the completion of the inchoate sentencing proceedings is the Petitioner's reinstatement. If any other action, such as suspension or non-payment of back wages etc. is envisaged under the Army Act and Rules, the authorities are not precluded from pursuing them. It is, however, clarified that learned Counsel for the Respondent has not brought any such provisions to notice and Therefore, the foregoing observations should not be construed as permission granted by this Court.

8. Accordingly, the Writ Petition is allowed. Since the Hon'ble Supreme Court in its Judgment in Criminal Appeal No. 825/1997 has set aside the Judgment of Sikkim High Court except with reference to its conclusion on the 9th Charge, and has set aside the sentence awarded by the GCM and has remitted the matter to the GCM for considering and passing an appropriate sentence on the basis of the findings on charges 2, 3 and 8, the presence of the Petitioner before the GCM is essential. For this to be achieved the Petitioner must be a person subject to the Army Act. Subsequent to the promulgation of his cashiering, by virtue of Section 2(2) of the Army Act, the Petitioner has ceased to be so subject, and to remove this impediment he would have to be reinstated. The Respondents are directed to reinstate the Petitioner with all consequential benefits.

9. In the circumstances of the case the parties shall bear their respective costs.