

(2011) 03 AP CK 0067

In the Andhra Pradesh High Court

Case No : Contempt Case No. 997 of 2010

Dr. Subhendu Sen (VSM) Ex-Lieutenant Colonel (Army)

APPELLANT

Vs

Sri Pradeep Kumar, Secretary, Ministry of Defence,
Government of India

RESPONDENT

Date of Decision : 01-03-2011

Acts Referred:

Andhra Pradesh High Court Writ Proceedings Rules, 1977 — Rule 21
Army Act, 1950 — Section 164(2)
Contempt of Courts Act, 1971 — Section 10, 12, 20
Pension Regulations for Army, 1961 — Regulation 16

Citation : (2011) 03 AP CK 0067

Hon'ble Judges : V.V.S. Rao, J;Ramesh Ranganathan, J

Bench : Division Bench

**Advocate : G. Ramachandra Rao, for the Appellant; Ponnam Ashok Goud,
Assistant Solicitor General, for the Respondent**

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The Petitioner served in the Army Medical Corp from 1969 to 1993. While he was the Lieutenant Colonel, he was court marshalled for four charges. He was exonerated on first charge. He was however, found guilty of three charges, which included misappropriation and absence without leave. The General Court Martial awarded the punishment to be cashiered and to forfeit four years of his past service for the purpose of loss of pension. The confirming authority remitted the matter for re-consideration of first charge. In obedience thereto, the General Court Martial reassembled and confirmed their earlier finding on the first charge but, in their proceedings dated 07.05.1994, imposed the punishment of forfeiture of arrears of pay and allowances and other public money due to him at the time of cashiering. The Petitioner's appeal u/s 164(2) of the Army Act, 1950 failed. He assailed the same in W.P. No. 27714 of 1996. The same was allowed setting aside the order of the General Court Martial.

2. During its pendency, the Petitioner was issued a show cause notice as to why

his pensionary benefits should not be withheld. The Petitioner submitted his explanation on 20.09.1995. The Government of India passed orders on 24.12.1996 forfeiting all pensionary benefits. The Petitioner then filed W.P. No. 3923 of 1998 challenging the order dated 24.12.1996 of the Government of India. By order, dated 18.08.2009, a learned single Judge of this Court set aside the said order and directed the Government of India to re-consider the issue afresh under Regulation 16(a) of the Pension Regulations for the Army, 1961 (the Regulations, for brevity) in the light of the observations made in the Order of the learned Single Judge as well as the decision of the Full Bench of the Delhi High Court in *Brig.A.K. Malhotra (Retd) v. Union of India* 1997 (2) LIC 2005. The writ appeal, being W.A. No. 1966 of 1999, was disposed of by the Division Bench of this Court comprising one of us (Justice Ramesh Ranganathan) on 30.06.2008. The Government of India and three others filed Review W.A.M.P. No. 2655 of 2008. The same was also disposed of by this Court on 27.02.2009 directing the Government to consider the matter under Regulation 16(a) of the Regulations. This contempt case is filed alleging that the Respondents failed to comply with the directions issued by this Court in the said review petition.

3. The order of the learned single Judge, dated 18.08.1999 in W.P. No. 3923 of 1998, merged in the order of the Division Bench dated 30.06.2008 in W.A. No. 1966 of 1999. It is not clear whether the said order was stayed by this Court, when the Government filed review application. Be that as it is, the review application was disposed of on 27.02.2009. This contempt case was presented in the Registry on 28.06.2010. Section 20 of the Contempt of Courts Act, 1971 (Contempt Act, for brevity) bars a Court from "initiating any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed". This Court, while disposing of the review application, directed the Government of India to consider the matter under Regulation 16(a) of the Regulations without reference to the observations made in the judgment of the Delhi High Court in *Brig. A.K. Malhotra*. This Court did not fix any time for complying with the order, but as per Rule 21 of the Andhra Pradesh High Court Writ Proceedings Rules, 1977, "unless the Court otherwise directs, the direction or order made or the Rule absolute issued by the High Court shall be implemented within two months of the receipt of the order". In strict sense, the Government of India was required to consider the case of the Petitioner and pass an order under Regulation 16(a) on or before 26th April, 2009. In other words, the Petitioner ought to have filed the contempt case under Sections 10 and 12 of the Contempt Act before expiry of period of one year i.e., by 25th April, 2010. The contempt case filed on 28.06.2010 is, therefore, barred by limitation. We are supported by the decision of the Supreme Court in *Pallav Sheth Vs. Custodian and Others*,

4. In the cited case, the apex Court considered the question whether Section 20 of the Contempt Act, prohibited action being taken after expiry of a period of one year from the date on which the contempt was alleged to have been committed.

Referring to the relevant case law, the Court held that Section 20 has to be construed in a manner which would avoid hardship both as regards the litigant as also by placing a pointless fetter on the part of the Court to punish for its contempt, and that action must be initiated either by filing an application or by the Court suo motu within a period of one year from the date on which the contempt is alleged to have been committed. The relevant observations are as follows (para 44 of AIR).

Action for contempt is divisible into two categories, namely, that initiated suo motu by the court and that instituted otherwise than on the court's own motion. The mode of initiation in each case would necessarily be different. While in the case of suo motu proceedings, it is the court itself which must initiate by issuing a notice, in the other cases initiation can only be by a party filing an application. In our opinion, therefore, the proper construction to be placed on Section 20 must be that action must be initiated, either by filing of an application or by the court issuing notice suo motu, within a period of one year from the date on which the contempt is alleged to have been committed.

5. Sri G. Ramachandra Rao, counsel for Petitioner, however, submits that after obtaining a copy of the order in review application, the Petitioner made representation on 28.04.2009, in vain. The Petitioner then sent a notice dated 01.07.2009 through his lawyer to the first Respondent requesting him to consider the matter in the light of the directions given by this Court. In response to which, the office of the Head Quarters of MoD, Adjutant General Branch, sent a reply dated 18.09.2009 informing that the Petitioner's pension case is under active consideration. In the meanwhile, Army Recruiting Office, Secunderabad, asked the Petitioner to furnish details of his financial status and other aspects. The Petitioner submitted an affidavit dated 07.08.2009 furnishing the required details. Thereafter, there was correspondence between the Petitioner and the Office of the Deputy Director, AG", PS-5, and Director, OIC, MPRS (O) informing that the Petitioner's representation was sent to concerned office for necessary action. But no orders were passed and therefore, Petitioner filed the instant contempt case.

6. Whether the Petitioner's persuasion with the authorities saves limitation? We are afraid it would not. Admittedly the Petitioner sent representation only on 28.04.2009 requesting the Respondents to comply with the orders of the Court. This was certainly beyond the two months period. Secondly, as held by the seven-Judge Bench of the Supreme Court in *S.S. Rathore Vs. State of Madhya Pradesh*, submission of memorial or representation to the Head of the Establishment shall not be taken into consideration in the matter of fixing limitation and that a citizen is not expected to keep away from the Courts merely by making representations to the authorities. Any person who succeeded in the Court can wait for the period ordered during which the order has to be complied with and then immediately has to file a contempt case before the Court. No person can file a contempt case after expiry of a period of one year. Therefore, we are not able to accept the

submission of the counsel for the Petitioner.

7. An Advocate, representing the Assistant Solicitor General, has placed before this Court a copy of the letter, dated 02.02.2011 passed by the Adjutant General, which reads as under.

MOST IMMEDIATE/COURT CASE

All. Dte Gen of Per Services

Adjutant General's Branch

Integrated HQ of MOD (Army)

New Delhi - 110011.

MR-03152/S-189/MPRS(O)/NE/06/2011/AG/PS-4(Legal)

02.02.2011

PCDA (P) Allahabad

IMPLEMENTATION OF HON'BLE HIGH COURT AT HYDERABAD

ORDER DATED 27.2.2009 RWAMP No. 2655/2008 IN WA No. 1966/99

FILED BY UOI V/S

MR-03152 LT COL(RETD) SUBHENDU SEN

1. I am directed to refer to the above cited Court Order and to convey the sanction of the President of India for grant of 70% (seventy percent only) pensionary benefits to MR-03152 LT Col (Retd) Subhendu Sen w.e.f. 29.4.2009 (from the date of his mercy petition) after due consideration of his mercy petition dt.29 Apr 09 afresh under Pension Regulations 16(a) as directed by the Hon'ble Court Order dated 27 Feb 2009.

2. The PCDA (P), Allahabad is also requested to work out the amount involved in implementation of the above cited Court Order and intimate the same to this Ministry to shat ex-post-facto sanction for "Charged Expenditure" may be accorded. A copy of the PPO issued may also be furnished to this HQ.

4. This letter issues with the concurrence of Min of Defence (Fin/Pen) vide their UO No. 395/Fin/Pen/11 dated 02 Feb 2011.

(Sanjeev Kala)

Dy. Dir, PS-4 9Legal)

For Adjutant General

8. A plain reading of the above would show that the same was passed in implementation of the order of this Court in Review W.A.M.P. No. 2655 of 2008 and that the President of India had sanctioned grant of 70% pensionary benefits

to the Petitioner with effect from 29.04.2009 under Regulation 16(a) of the Regulations and that PCDA (P), Allahabad, was requested to work out the amount involved in implementation of the Court order and intimate the same to the Ministry for ex post facto sanction. This is certainly an order in consideration of the mandamus issued by this Court. The Petitioner's counsel, however, submits that the said order is not in accordance with the true letter and spirit of the mandamus issued by this Court and also Regulation 16(a) of the Regulations. We are afraid, the Court cannot go into this question in contempt proceedings. The Respondents passed necessary orders as directed by this Court. Whether the orders are passed in accordance with the directions by this Court cannot be subject matter of a contempt case. If so advised, the Petitioner has to seek redressal elsewhere as it might itself provide a fresh cause of action. We are well supported by the decisions of the Supreme Court in *J. Parihar Vs. Ganpat Duggar and others*, *Chhotu Ram Vs. Urvashi Gulati and Another*, and *Anil Ratan Sarkar and Others Vs. HIRAK GHOSH and Others*,

9. In *Ganpat Duggar*, the Division Bench of Rajasthan High Court took the view that when an order passed - in that case preparation of seniority list - after the judgment of the Court; even if such order is wrong and not in conformity with the directions of the Court, it cannot be considered to be in willful violation of the order. The appeal before the Supreme Court was rejected observing as under (para 6 of SCC).

...whether it is in conformity with the directions issued by the earlier Benches. It is seen that once there is an order passed by the Government on the basis of the directions issued by the court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions. But that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. But that cannot be considered to be the willful violation of the order. After re-exercising the judicial review in contempt proceedings, a fresh direction by the learned Single Judge cannot be given to redraw the seniority list.

(emphasis supplied)

10. In *Chhotu Ram* (which was followed in *Anil Ratan Sarkar*), the Supreme Court was dealing with a similar case. The Supreme Court in its earlier decision in *Chhotu Ram v. State of Haryana*, (2000) 10 SCC 399 directed the Respondent therein to consider the case of *Chhotu Ram* for promotion to the post of Sub-Divisional Officer in Haryana Service of Engineers Class II, on the basis that he was qualified by the cut off dated 1-1-1980. The Supreme Court also directed to give all consequential benefits, if he was considered fit for promotion as in September, 1980. The case of the Petitioner therein was considered, and by order dated 20-11-2000, the Government rejected the case of *Chhotu Ram* on the ground that his name did not find a place for promotion in the list of sub-Divisional Officer, and his claim does not hold good. Before the Supreme Court,

two questions were raised. The first question was as to the burden of standard of proof required. It was held that "it would be too hazardous to sentence in exercise of contempt jurisdiction on mere probabilities", and further ruled that the proceedings under the Contempt of Courts Act being quasi-criminal, the breach alleged, has to be established beyond reasonable doubt. The second question was whether the contemnors therein committed contempt in spite of the fact that the case of Chhotu Ram was considered and rejected. Answering the issue in the negative, the Supreme Court observed:

...This Court by reason of the order dated 8-10-1999 did not issue a mandate but issued a direction for consideration only. In the event, however, the matter being not considered or in the event consideration was effected in a manner to whittle down the claim of the Petitioner, initiation of the proceedings cannot but be said to be justified. But in the event, however, contextual facts depict that the consideration was effected in accordance with the normal rules, practice and procedure and upon such consideration, no promotion could be offered to the Petitioner, question of there being any act of contempt would not arise....

11. For the reasons as above, it cannot be said that the Respondents wilfully disobeyed the order of this Court. If so advised, the Petitioner may seek judicial review of the order, dated 02.02.2011. This contempt case is devoid of any merit and is accordingly dismissed.