
(2007) 07 CAL CK 0021
In the Calcutta High Court
Case No : FMA No. 31 of 1990

Ghisulal Tailor

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-07-2007

Acts Referred:

Air Force Act, 1950 — Section 38(1), 39

Citation : (2007) 3 CALLT 463 : (2007) 4 CHN 205

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Kunal Chatterjee, Usha Doshi and Manish Rai, for the Appellant; Mintu Kumar Goswami, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—The appellant/writ petitioner was a member of the Indian Air Force. He was on leave on and from May 31, 1983 to July 15, 1983. He overstayed up to June 11, 1984 when he was apprehended and proceeded with in a Court martial proceeding. He was awarded the following punishment:

(I) To be reduced to the rank

(II) To be dismissed from service

(III) To suffer rigorous imprisonment for eighteen months.

2. He, however, did not have to suffer rigorous punishment for eighteen months as he by that time suffered punishment for twenty-four months. He approached this Court at a stage when the final order of punishment was not confirmed by the appropriate authority.

3. It was the case of the appellant that after completion of fifteen years service coupled with the extended period of six years, he expressed his unwillingness to have further extension and prayed for his discharge which was initially withheld by the authority. According to him, since he was unwilling to serve the Force for further extended period the authority was not entitled to force him to serve the

Union for further period. It was also his case that he had to overstay because of his ailment. The authority asked him to treat himself to any nearby military hospital and/or Government hospital close to his native place where he was overstaying. Since there was no military hospital near to his place of residence, he got himself treated in a Government hospital and produced all documents of his treatment before the authority. He initially sent a telegram to the authority for extension of his leave which was denied by the authority. The authority asked him to join immediately which he could not do because of his ailment. It was also the case of the appellant that after recovery when he was proceeding towards his place of work, he was apprehended by a driver of the Force in the nearby railway station where he was waiting in the platform to board the train for New Delhi from where he was supposed to proceed to his place of work at Kalaikunda. He was kept under close arrest at Jodhpur wherefrom he was taken to Kalaikunda. He was kept under close arrest at Jodhpur wherefrom he was taken to Kalaikunda. He was kept under arrest for twenty-four months and ultimately, he was awarded punishment as recorded above.

4. The respondents however, contended before His Lordship that he was proceed within the Court martial proceeding on two charges, i.e. desertion in terms of Section 38(1) of the Air Force Act and for overstay in terms of Section 39(b) of the said Act. He was exonerated from the second charge, however, punished after holding him guilty in respect of the first charge.

5. The learned Single Judge negated the contentions of the respondents. His Lordship was of the view that once the appellant expressed his unwillingness to serve the Force for further extended period, he should have been discharged. His Lordship also held that the order of discharge initially issued in favour of the appellant should not have been cancelled by the authority and such cancellation was wrongful. His Lordship ultimately quashed the order of cancellation after holding that he stood discharged on the basis of No Objection Certificate with regard to discharge issued by the authority on April 4, 1983. In view of His Lordship's decision the original order of discharge issued on February 1, 1984 stood revived.

6. Initially, there had been an ad interim order of stay granted by the learned Single Judge. Being aggrieved by, and dissatisfied with, the said interim order the respondents filed an appeal before the Division Bench. The Division Bench disposed of the appeal by judgment and order dated January 29, 1985 inter alia permitting the respondents to proceed with the Court martial proceeding and continued the ad interim stay granted by the learned Single Judge for a period of two months from that date.

6A. On perusal of the order of the Division Bench it appears that the Division Bench did take notice of the fact that during the pendency of the writ petition the Court martial proceeding was completed and an order was passed on December 12, 1984 holding him guilty on the first charge while exonerating him on the second charge. The said order was subject to confirmation of the higher authority

which was awaiting at that time.

7. The appellant/writ petitioner brought the said order to the notice of the Court by way of a supplementary affidavit affirmed on May 2, 1985. The learned Single Judge delivered his judgment and order on June 11, 1986. Soon thereafter, the respondent authorities confirmed the finding of the Court martial proceeding and awarded punishment by an order dated June 21, 1986.

8. The respondent authorities did not prefer any appeal from the order of the learned Single Judge whereby the order of cancellation of the original order of discharge was quashed. The appellant/writ petitioner, preferred the instant appeal on the ground that His Lordship should have interfered with the order of the District Court Martial proceeding to grant complete relief to the writ petitioner. Pertinent to note, His Lordship did not feel inclined to interfere with the order of the District Court Martial proceeding as the same was pending for confirmation by the higher authority.

9. The appeal was heard by us on the abovementioned dates as well today.

10. Mr. Kunal Chatterjee, learned Counsel appearing for the appellant has contended before us that the learned Single Judge while holding that the writ petitioner was entitled to be discharged on the basis of the original order of discharge dated February 1, 1984, should have interfered with the finding of the District Court Martial proceeding as well as the impugned punishment proposed by them. Mr. Chatterjee also contends that when the authority came to a finding that there was sufficient cause which prevented the petitioner from joining his duty and thereby exonerated him from the second charge of unauthorized absence, they should have followed the same logic while deciding on the first charge.

11. Mr. Chatterjee further contends that even if it is held that he was arrested properly in the nearby railway station, the authority failed to consider the fact that he was apprehended by a person who did not have any authority to apprehend him. Moreover, his assertion that he was waiting in the platform to board the train for New Delhi to join his place of work after recovery, could not be confronted by the authorities.

12. In support of his contentions Mr. Chatterjee has relied upon the following decisions:

(I) Pasupuleti Venkateswarlu Vs. The Motor and General Traders,

(II) Capt. Virendra Kumar through his wife Vs. Chief of The Army Staff, New Delhi,

13. Mr. Mintu Goswami, learned Counsel appearing for the respondents while opposing the appeal has contended as follows:

(I) The writ petition pertains to challenge to the Court martial proceeding at a stage when the proceeding was not over. Hence, the subsequent order passed in

the Court martial proceeding and that too confirmed after the judgment and order of the learned Single Judge, cannot be questioned in this appeal.

(II) "Desertion" u/s 38(1) of the Air Force Act, 1950 and overstaying leave unauthorizedly as defined u/s 39(b) of the said Act 1950 are two distinct eventualities which were gone into by the Court martial authorities. Challenge to the said decision would be an issue on merit which should be decided in a future proceeding as the same was not a subject-matter before the learned Single Judge. Moreover, the order of confirmation was passed after pronouncement of the judgment and order of the learned Single Judge.

(III) The petitioner approached this Court by filing the writ petition particularly on the ground that the charges were barred by limitation. Such plea was negated by His Lordship as would appear from the judgment and order of His Lordship. Hence His Lordship should not have allowed the writ petition by quashing the order of cancellation of the order of discharge. In any event, the petitioner is not entitled to extend the scope of the writ proceeding at the appeal stage bringing on record the subsequent events.

14. Mr. Goswami in support of his contentions has relied upon two decisions of the Apex Court reported in 2006 volume 2 Supreme Court Cases page 584 (South Bengal State Transport Corporation v. Sapan Kumar Mitra and Ors.) and 2006 AIR Supreme Court Weekly page 5834 (B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. and Ors.).

15. Mr. Goswami has also relied on an unreported decision of the Division Bench of this Court in FMA No. 1666 of 2003 (Union of India and Ors. v. Ananda Kumar Saha and Anr.).

16. It is true that the writ petition was filed at a stage when the Court martial proceeding was pending. The petitioner approached this Court challenging the same principally on the ground of limitation. The learned Judge negated such contention. We however, find that apart from the plea of limitation the appellant/petitioner also challenged the order of cancellation of the order of discharge as we find from Grounds V and VIII of the petition. In the prayer portion the petitioner challenged the Court martial proceeding. If we read the entire petition along with the prayer, we would find that on merits the petitioner did contend that after the order of discharge he could not have been proceeded with. To support such contention he also questioned the validity of the order of cancellation. We find from the order of the Division Bench passed on January 29, 1985 that the order of the Court martial proceeding passed on December 12, 1984 already came in the record. It is not unknown that subsequent facts are brought during pendency of a proceeding to assist the Court to come to a logical conclusion. It might be by amending the writ petition or by filing supplementary affidavit. The petitioner adopted the second course as we find herein.

17. It is true that the order of confirmation was not placed before the learned Single Judge. His Lordship was right in quashing the order of cancellation as after

discharge from service after twenty-one years, the respondent authorities were not entitled to compel a member of the Force to serve them for the extended period as such extension would be on mutual agreement. In any event, we do not wish to make any comment in absence of any appeal or cross-objection filed on the same issue by the respondents.

18. This leaves us with the sole question as to whether the order of confirmation could be brought for consideration of the Court of Appeal, although the same was passed after disposal of the writ petition. While hearing a writ appeal we get an extended jurisdiction of the Writ Court. The Writ Court being a Court of Equity, must take into consideration all relevant factors brought before it to do proper and substantial justice. We find support from the observation of the Apex Court in the case of *Pasupuleti Venkateswarlu* (supra). Relevant observation of the Apex Court is quoted below:

It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the hand-maid and not the mistress of the judicial process. If a fact arising after the *lis* has come to Court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice subject, of course to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the Trial Court. If the litigation spends, the power exists, absent other special circumstances repelling resort to that course in law of justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right of remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed.

19. Mr. Goswami however, has tried to resist such attempt by citing the decision of the Apex Court in the case of *South Bengal State Transport Corporation* (supra). In the said case myself sitting singly disposed of a writ petition wherein a disciplinary proceeding was challenged by the delinquent on the ground that he was not served with relevant documents relied upon by the management before the Enquiry Officer. I quashed the order passed by the disciplinary authority. I also quashed the enquiry report. I however, permitted the authority to proceed *de novo* from, that stage after service of a copy of the preliminary enquiry report relied upon by the Corporation before the Enquiry Officer. The delinquent was not satisfied with the said order. He preferred an appeal before the Division Bench. The Division Bench, however, went into the merits of the matter and quashed the

final order and directed reinstatement with all back wages. In that backdrop the Apex Court observed that the Division Bench was wrong in going into the merits of the matter as the order was quashed by me holding that it was vitiated by procedural irregularity. The Apex Court restored my order after setting aside the decision of the Division Bench.

20. Mr. Goswami has relied upon paragraphs 14 and 16 of the said decision. He contends that his submission to the extent that the subsequent event should not be taken into consideration, finds support from the said decision of the Apex Court.

21. We have carefully perused the said decision. We are, however, unable to subscribe to the same view as we do not find any scope of application of the ratio decided therein in the instant case.

22. Mr. Goswami has also relied upon the decision of the Apex Court in the case of B.S.N. Joshi and Sons Ltd, (supra). Paragraph 38 of the said decision has been relied upon wherein the Apex Court observed that the point which was not argued before the learned Single Judge, should not be allowed to be argued before the Division Bench.

23. In the instant case the order of confirmation was not had when the learned Single Judge delivered his judgment. The learned Single Judge did not touch the order of the District Court Martial proceeding as it was awaiting consideration by the higher authority. The same was confirmed after the judgment had been delivered by His Lordship. We do not find any logic as to why we should shut our eyes on that score only on the ground that the subject-document came into being after delivery of the judgment by the learned Single Judge. As we say, Writ Court being a Court of Equity must consider each and every aspect brought before it to do complete justice to the litigant. If we dismiss the appeal permitting the appellant to question of order of punishment at this belated stage, we would be doing immense injustice as by this time more than two decades have passed. Hence, we, sitting in a Writ Court cannot, close our eyes and cannot refuse consideration of the final order of punishment.

24. If we have to accept Mr. Goswami's contention on the issue of maintainability, we are to discard the ratio decided in the case of Pasupuleti Venkateswarlu (supra). Sitting in a Court of Equity we have to do complete justice to the litigant instead of going into the nicety of law. To do complete justice we have to look into each and every aspect which was brought before us. We cannot be mere onlooker. We cannot keep any fact at bay on the ground of technicality. We should be failing in our duty if we give credence to the technicality to avoid a relevant factor required for doing justice in the matter.

25. Now, we examine the final order of confirmation. On a plain reading of the said order appearing at pages 216-217 of the paper book we would find that for the identical period when the delinquent overstayed, he was exonerated from the charge of unauthorized absence, meaning thereby the authority was satisfied

that he had sufficient cause for such unauthorized absence. If the authority was satisfied on that score, we are unable to find out any logic as to how the delinquent could be termed as a deserter for the identical period. Mr. Goswami has however, tried to contend that even after recovery he did not show his intention to join his duty. At least on evidence no such fact came up.

26. The learned Single Judge held that the appellant stood discharged on February 1, 1984. Such order was not appealed from by the respondent authorities. Hence, we safely take it that the authority was satisfied with the said order. We are unable to find out any logic that a person who stood discharged from service with effect from February 1, 1984, could be said to be a deserter I on June 11, 1984 when he was apprehended and was kept under close arrest until he was awarded final punishment referred to above. We are unable to give our approval to the final order of punishment. In any event, the delinquent already suffered imprisonment for twenty-four months. We cannot undo such sufferance of the delinquent.

27. The final order of discharge appearing at pages 216-217 is quashed and set aside. We affirm the decision of the learned Single Judge to the extent that the appellant stood discharged from service with effect from February 1, 1984.

28. The respondents are directed to extend all financial benefits to the appellant available in law after adjusting appropriate leave to his credit for the period when he was absenting himself. Such adjustment must be made in accordance with the rules applicable therefor.

29. The extension of such financial and/or other service benefits must be made within a period of eight weeks from date.

30. The appeal is disposed of accordingly without any order as to costs.

31. There would be an order of stay of operation of this judgment and order for a period of four weeks from date.

32. Urgent xerox certified copy of this order, if applied for, may be given to the parties on priority basis.

Tapas Kumar Giri, J.

33. I agree.