

(1995) 05 DEL CK 0051

In the Delhi High Court

Case No : Civil Writ Petition No. 1144 of 1994

Jaideep Singh Sandhu

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 08-05-1995

Acts Referred:

Citation : (1995) 3 AD 1137 : (1995) 34 DRJ 307

Hon'ble Judges : M. Jagannadha Rao, C.J;Ramesh Chand Jain, J

Bench : Division Bench

Advocate : B.P. Ojha, Meera Bhatia, Gajendra Kumar and Ajay Tyagi, for the Appellant;

Judgement

M.J. Rao, C.J.

(1) The petitioner has moved this petition for quashing the Central Government order dated 1st September, 1995 granting maintenance to petitioner's wife and minor child. The Government of India passed an order on 1st September, 1993 granting maintenance to the petitioner's wife and his son of Rs. 1280.00 and Rs. 320.00 respectively from September, 1993, totalling Rs. 1600.00 per month. The compensation was awarded in exercise of the powers conferred u/s 90(i) of the Army Act 1950 (46 of 1950). The order reads as follows:

"TO The Chief of the Army Staff, New Delhi.

SUBJECT: Grant of Maintenance Allowance to Smt. Seema Sandhu wife of IC-41377Y Capt. J.S. Sandhu, 10 Armd. Regt.

IN exercise of the powers conferred u/s 90(1) of the Army Act 1950(46/1950) I am directed to convey the sanction of the President to the recovery of Rs. 1600.00 per month(Rupees one thousand and six hundred only) (Rs. 1280.00 for wife and Rs. 320.00 for her son) commencing from September, 1993 (i.e. from the emoluments of August 1993 onwards) from the pay and allowances of IC-41377Y Capt J.S. Sandhu of 10 Armefremilted d Regt for maintenance of his

wife and a male child.

2.The maintenance allowance will be remitted to the lady till her marriage with the officer subsists and in respect of minor son it will be remitted till he attains the age of majority.

3.The amount as and when recovered will be remitted at the expense of the officer direct to Smt. Seema Sandhu, w/o Capt. J.S. Sandhu, H-6, Vikas Puri, New Delhi-18 or any other address she may intimate from time to time.

Yours faithfully

SD/-

(D. R. Sharma)

UNDER Secretary to the Government submitted of India."

(2) This order is impugned in the writ petition impleading as respondents, the Union of India and other authorities and his wife.

(3) The petitioner argued the case in person and submitted that in view of the later part of Note 22 referable to Section 90(i) of the Army Act, the power u/s 90 cannot be exercised for deducting maintenance for petitioner's wife and son unless the wife and son obtain a decree for maintenance from a competent Civil Court.

(4) The petitioner contended that this conclusion followed from Section 33 of the Army Act which says that the rights and privileges of the army personnel granted here are in addition to those covered by any other law, here, the Hindu Adoptions and Maintenance Act, 1956 or Hindu Marriage Act, 1955. The petitioner also referred to Section 28 of the Act which provides immunity from attachment of salary by direction of any civil or revenue court or any revenue officer in respect of pay and allowances of any person subject to the Army Act. Though section 25 of the Act permits deductions to be made as ordered by or under the Act or any other Act, petitioner contends that no deductions can be made from pay and allowances in view of provisions of Section 28 and 33 of the Act, unless there is a decree or order of the Court. It is contended that the later part of Note 22 below Section 90(i) requires that unless a decree is passed by a competent civil court, no deductions can be made. Reference is also made to Regulation 532 of Service Regulations issued under the authority of Government of India and it is contended that salary is not moveable property within the meaning of Section 421 of the Cr.P.C. and that it cannot be attached.

(5) In order to get at the relevant rules and regulations applicable to the case, we requested Shri B.P. Ojha, Advocate to assist us as amicus Curiae and he has given us the necessary and valuable information and also made his submissions objectively and we are grateful to him.

(6) We have also heard the learned counsel for the Union of India and Army

authorities and the counsel for the wife and son of the petitioner.

(7) The following points arise for consideration in the writ petition:

(1) Whether the power conferred by the provisions of Section 90(i) of the Army Act, 1950 for imposing a penal deduction from the pay and allowances of an Army officer towards the maintenance of his wife and children cannot be exercised unless there is a decree for maintenance and whether the Note 22 has statutory force and can prevail ?

(2) Whether, in view of Section 28 and 33 of the Act. the power u/s 90(i) cannot be exercised unless there is a decree/order of the Civil Court.

(3) Whether Regulation 532 of the Regulations read with Section 421(1) of the Cr.P.C. prohibits deductions u/s 90(i) before the salary becomes due.

(4) Whether, on the facts of the case, the order of deduction is fair and proper or is otherwise vitiated ?

POINTS 1 and 2

(8) The impugned order of deduction from salary towards maintenance refers to Section 90(i) of the Army Act, 1950. The provision reads as under:- "Section 90: Deduction from pay and allowances of officers: The following penal deductions may be made from the pay and allowances of an officer, that is to say,"

(A).....

(B).....

(C).....

(D).....

(E).....

(E).....

(F).....

(G).....

(H).....

(I) any sum required by order of the Central Government to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the cost of any relief given by the said Government to the said wife or child."

(9) Note 22 which is given below Section 90(i) reads thus:

"22. Clause (i)-(a) This clause, like clause (i) of AA. s.91, was enacted mainly in order to prevent any financial hardship being caused to the wife or children by the provisions of AA. s.28 under which pay and allowances of a person subject to AA cannot be attached in satisfaction of any decree of a civil court. In other

words, if in a suit for maintenance or payment of alimony a civil court grants a decree in favor of the wife or children, the amount decreed can be deducted from the pay and allowances of a person and paid to the wife or children under this clause. Such being the intention, deductions should not, as a rule, be ordered under this clause or clause (i) of Aa s.91 except to give effect to a decree for maintenance granted by a civil court.

(B)See notes to AA. s.28."

(10) As we are dealing with Point 2 along with Point 1, it will be convenient to refer to Sections 25, 28 and 33 of the Army Act, which read as under: Section 25. Authorised deductions only to be made from pay:- The pay of every person subject to this Act due to him as such under any regulation for the time being in force shall be paid without any deduction other than the deductions authorised by or under this or any other Act.

"Section 28. Immunity from attachment: Neither the arms, clothes, equipment, accoutrements or necessities of any person subject to this Act, nor any animal used by him for the discharge of his duty, shall be seized, nor shall the pay and allowances of any such person or any part thereof be attached, by direction of any civil or revenue court or any revenue officer in satisfaction of any decree or order enforceable against him.

SECTION 33. Saving of rights and privileges under other laws The rights and privileges specified in the preceding sections of this Chapter shall be in addition to, and not in derogation of, any other rights and privileges conferred on persons subject to this Act or on members of the regular Army, Navy and Air Force generally by any other law for the time being in force.

(11) Analysing the above provisions, we find that Sections 25 and 90 deal with deductions from the pay and allowance of person governed by the Army Act, 1950 while Sections 28 confers immunity from attachment. Section 33 says that the rights and privileges specified in the preceding sections of the chapter are in addition to and not in derogation of any other rights and privileges conferred on persons subject to the Army Act etc. by any other law for the time being in force. The scheme of Sections 25 and 90 appears to be that so far as those governed by the Army Act, 1950, are concerned, deductions from their pay can be made only by the Central Government and not by way of attachment orders passed by the Civil Courts. The right to have the deductions made only by the Government is a special right conferred on the personnel. The non-attachability of the pay and allowances whether pursuant to a maintenance decree or any other money decree, is again a special privilege. The policy appears to be to keep these issues under the complete control of the Government so that the army personnel are able to perform their functions and duties for the benefit of the country.

(12) The power to make deductions u/s 90(i) is vested in the Government and the statute does not say that the said power is to be exercised only in Cases where decrees/orders are obtained by the wife and children (legitimate or

illegitimate) from a Court of law. Going by the plain meaning of the Section 90(i), no such restriction can be implied. There appears to us to be a clear legislative policy behind the provisions of Section 90(i). It may be that where a decree/order is passed by a civil court towards maintenance, the beneficiary under the decree/order can produce the same before the Government and seek a deduction u/s 90(i) by the Government. But it is not difficult to visualise situations where the wife and children (or where the children are the sole claimants) are not able to approach a Civil Court for various reasons or even where they have moved the Court, they have not been able to get interim or final relief expeditiously. It is not the legislative intention that the wife and children should suffer in the interregnum. The substantive rights of maintenance which spring from the provisions of, say, here, the Hindu Marriage Act, 1955, have not been interfered with. The rights conferred on the wife/children by other laws for maintenance can be enforced not merely by moving a Civil Court but also by moving the Government u/s 90(i). The only restriction is that the deduction is to be made only by the Government as stated in Sections 25 and 90, and there can be no attachment by way of a Court decree/order. The rights and privileges of the army personnel and the rights of the wife and children have to be harmonised. Sections 28 and 29 are not restrictions on the right of the wife/children from moving the Government u/s 90(i). They are only restrictions on their right to enforce a decree/order of a Civil Court in cases where they are able to and have, in fact, moved a Civil Court and obtained a decree/order. In other words, Section 90(i) is an independent power and applies not only to cases where decrees/orders are obtained in the Civil Courts but also when such decrees/orders have not been obtained. Provisions in Section 28 and 90 have to be construed, harmoniously with provisions of Sections 28 & 29.

(13) It is argued that the latter part of Note 22 below Section 90(i) suggests that "DEDUCTIONS should not, as a rule, be ordered under this clause or clause (i) of Army Act S.91 except to give effect to a decree for maintenance granted by a civil court" and a decree is a condition for exercise of power u/s 90(i). We do not find any justification for the restriction so imposed by the latter part of Note 22 on the powers u/s 90(i). While it may be true, as stated in the earlier part of Note 22 that when a decree/order is passed by a competent court for maintenance of the wife and children, the said court can because it cannot attach the salary of the officer in view of Section 28 - send its decree/order to the Government for enabling action to be taken u/s 90(i) read with the first part of the Note, there is, in our opinion, no such precondition of obtaining a decree/order, if the powers of the Government u/s 90(i) are invoked even at the stage no decree/order is passed. The power to deduct can be exercised not only when there is a decree/order but it can also be exercised when there is no such decree/order. This is clearly because of the legislative policy behind Section 90. As stated above, it is not difficult to imagine that in several cases the wife and children (or the children alone), may not be in a position to approach a court of law for obtaining a decree/order for maintenance. It is also possible that even

when they approach a court, the matters may prolong for long periods. The husband might raise various issues to prolong the passing of a decree/order. Surely the maintenance of the wife and children of an Army officer cannot be postponed on account of such contingencies. In our opinion, that is the reason why Parliament enacted Section 90(i) to give an independent power of deduction. To give any other interpretation would, in our opinion, lead to untold hardship to the wife and children, if they have been neglected or deserted by the officer without sufficient cause, and if they are not able to get relief from the civil court expeditiously. The Courts must interpret these beneficent provisions with a view to carry out the purpose of Section 90(i). We are, therefore, of the view that the latter part of the Note 22 runs counter to the above principle and must be declared to be not enforceable against the wife and children, legitimate or illegitimate, of the Army officer.

(14) Several rulings have been placed before us to say that the "Notes" below the sections control the sections. In *Tara Singh and Others Vs. State of Rajasthan and Others*, , it is stated that the function of the "Notes" is to provide procedure and to control discretion. The real purpose of the Notes is that when rules are silent, the notes will fill up the gaps. The Supreme Court referred to *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, and to *T.G. Shivacharana Singh and Others Vs. The State of Mysore*, to say that notes which are appended to the rules are of aid not only in applying the rules but also to interpreting the true import of the rules. The notes to the rules make explicit what is implied in the rules. In the *H.C. Sarin vs. Union of India* AIR 1976 S.C. 1688, it was stated that even if the note is treated as merely based on the executive instructions and not as part of the rule itself, the concerned authority is obliged to follow the note and cannot go against it. At the most, it has a discretion in the matter.

(15) We are of the view that these decisions of the Supreme Court cannot help the petitioner. The notes are not part of the statute or of the rules but are intended to guide the concerned authority. The "notes" have to be normally followed especially if they are for the benefit of the person or class of persons for whom they are intended. But, if they are in conflict with the statute or statutory rules, they cannot prevail. Now in so far as the rule permits deductions according to a decree/order, the rule has to be followed in as much as the civil court cannot straightaway attach the salary. This is clear from Section 28 of the Act. But where the parties have not been able to move a court or where the court is yet to pass a decree or order, it is not intended by the legislature that the wife and dependants are to remain without any financial assistance. After all the right of maintenance is prescribed by the Hindu Adoptions and Maintenance Act, 1956 or the Hindu Marriage Act, 1955 and that right can be exercised by invoking the authorities u/s 90 of the Act also, in addition to resorting to a civil or revenue court or a revenue officer. That, in our view, is the proper way of harmonising the rights of the Army personnel on the one hand, and the rights of the wife and children on the other.

(16) In Major D.K. Nanda vs. Union of India AIR 1989 J& K 64, it has been held that Section 90(i) does not offend Articles 20 & 21 of the Constitution of India and that deductions are not violative of Article 14 as there is no arbitrary power vested in the authority inasmuch as sufficient safeguards are found in the Act to control the power of the Government. There is no chance of discrimination in deciding the quantum of maintenance. An opportunity has to be provided to the officer before deductions are made ... 1988 (1) R L.R. 910.

(17) Before we part with this aspect of the matter, we have to make it clear that the authority exercising power u/s 90(i) must act reasonably and fairly apart from giving a reasonable opportunity to the Army personnel concerned. The right to maintenance, even if it is not enforced through a court of law, is to be governed by the general principles specified in the substantive law applicable to the parties, here, the Hindu Adoptions & Maintenance Act, 1956 and the Hindu Marriage Act, 1955. This aspect, on facts, will be considered under Point 4.

(18) We Therefore, hold on Points 1 and 2 against the petitioner.

POINT 3

(19) The defense Services Regulations (Vol. 1) (Revised Ed. 1987) deals with "Civil Proceedings" in Chapter XIII. Regulation 532 refers to "Attachment of Pay-officers, JCOs, WOs and OR. It says:

532. Attachment of Pay-Officers, JCOs, WOs and OR. The "pay of all persons subject to Army Act, 1950 is immune from attachment. The legal position of persons belonging to the Armed Forces in the matter of arrest for debt, attachment of their pay and allowances and priority in the disposal of litigation involving them, has been explained to the State Governments for communication to the courts within their jurisdiction, by the Ministry of Home Affairs vide their letter No. 50/51-JUDICIAL, dated 7th January, 1954, reproduced in Appendix "R" (to these regulations).

THE general law of the land is that if any person fails to comply with the attachment order issued u/s 125(1) Cr P, the Magistrate is empowered, under clause (3) of that Section to issue a warrant for levying the amount due in the same manner as for levying fines. u/s 421(1) Cr. P, the fine can be recovered by issuing a warrant for levy of the amount by attachment and sale of any moveable property belonging to the offender. However, as the salary not yet drawn is not movable property, within the meaning of Section 421(1) Cr P, it cannot be attached in execution of a warrant issued under that Section.

The cda as the officer receiving the court order will at once take steps in the name, and on behalf of the person subject to the Army Act, to have the attachment order set aside, by applying to the solicitor to the local government or other officer he is entitled to consult on legal matters for such legal assistance as he may require, in the event of

(I) an order for attachment of his pay and allowances being issued by direction of

any civil or revenue court or of any revenue officer in execution of any decree or order enforceable against him, or

(II) an order for attachment of his pay and allowances being issued by a Criminal Court u/s 421 Cr Pc for enforcement of a maintenance order made u/s 125 Cr PC.

IN the event of the court upholding the attachment, an application for a revision of the court's order shall be made."

(20) The first paragraph of the Regulation is similar to what is contained in Section 28 of the Act. The notification dated 7.1.1954 published in Appendix "R" to the Regulations deals with the attachment procedure and grant of leave to officers to defend the Court cases. The second para of the Regulation deals with attachment order u/s 125(1) Cr Pc by a Magistrate and after referring to Section 125(3), it provides for collection of the amount by following the same procedure as for collection of "fines" u/s 421(1) Cr PC. It is not necessary for us in the present case to decide whether Section 25 bars any such action by the criminal court and whether it requires the Criminal Court to approach the Central Government for making the deduction, The para 2 gives another reason for immunity from attachment and it says that the salary "not yet drawn is not movable property" within the meaning of Section 421(1) Cr Pc and it cannot be attached in execution of a warrant issued under the Section. It is not necessary for us to decide whether, as a matter of law, such a statement is correct. The third paragraph requires the Controller of defense Accounts to take steps to have the attachment vacated, if granted by a Civil or Criminal Court or even to fill a revision if the attachment is made absolute.

(21) Reference was also made to Section 5 Cr Pc which saves the effect of special laws. It will be noticed that Regulation 532 formulates the procedure for purposes of making Section 28 effective. If, as stated earlier, Section 28 does not control Section 90(i), then there can obviously be no question of Regulation 532 controlling the said provision. We Therefore hold on Point 3 against the petitioner. Point 4

(22) That a show cause notice was issued to the petitioner before passing the impugned order is not disputed. Though the copies of the notice and the reply of the petitioner were not filed by the petitioner, the respondents placed copies of the same before us. The Under Secretary to the Government of India issued letter dated 28th August, 1992 together with a copy of the petition of the petitioner's wife dated 8.7.92. The notice asked the petitioner to show cause why 27.50% of his pay and allowances should not be deducted towards maintenance of his wife and child. Petitioner sent an elaborate reply dated 3.10.92 also stating that the wife has other independent income and that she was having business, that she organized an exhibition in December, 1991 in Park Hotel that she has bank accounts, that she spent a lot of money (Rs. 10,000) for the exhibition, that her matrimonial conduct was unbecoming, she filed a complaint against him in the Criminal Court and complained to his superiors, that

she refused to stay gracefully with her husband but gave criminal complaints to the Police, that he had filed a divorce petition against her in the District Court in 1992, and that she had filed an application u/s 24 of the Hindu Marriage Act, 1955 and that the application u/s 90 must be stayed because of Section 10 of CPC. It was stated that the wife filed a Civil suit for injunction-restraining the petitioner from meeting the son. Thereafter, the Government called for information from the wife in regard to the business, Bank account etc. and passed the impugned order.

(23) We have perused the petition filed by the wife against the petitioner which also contains lot of facts and allegations against the petitioner.

(24) In as much as civil cases are pending (perhaps criminal cases also), we do not propose to discuss the merits of the allegations made by each pending against the other. We do not want to cause prejudice to either of the parties. From the above, we are, however, satisfied that principles of natural justice were followed.

(25) With regard to the quantum fixed by the Government, it is now slated across the Bar by the petitioner that out of Rs. 3800 salary, Rs. 1600 was deducted as maintenance and after other deductions, he is getting only Rs. 1750 into his hands. But it is admitted that petitioner is contributing Rs. 3500 towards Provident fund. That means that the total amount of pay and allowance is Rs. 7300, and the deduction towards maintenance is Rs. 1600 p.m.

(26) Learned counsel for the respondent placed before us and has also referred us to Army Order 26188 (December, 1988) which, under the heading "Maintenance" refers to Section 90(i) and Section 91(i). Among other matters of detail, it states in para 2 that all persons subject to the Army Act are bound to maintain their wives and children and this obligation need not always be conditional to a harmonious marital life. All powers to grant maintenance allowance under the Army Act are independent of the provisions of Section 125 Cr PC. Para 3 of the Army Order states that:

"EACH application for grant of maintenance allowance will be examined on its merit and final decision regarding grant of maintenance allowance will be taken independent of the Court decree, if any"

(27) Para 5 states that, in making a recommendation for the grant of maintenance allowance, legitimate commitments of the concerned individual own income of the applicant will be taken into account. The quantum, if sanctioned, is not to be more than (i) 33% of pay and allowances in respect of any illegitimate children. "Pay and allowances" include all sums payable (other than in lieu of lodging, rations, clothing and traveling allowances). It is also stated that application can be made for enhancement of maintenance also. Para 6 says that total maintenance shall not exceed 33% of pay and allowances. How the amount is to be divided between the claimants is also mentioned. In exceptional cases, there could be some deviation. Paras 7 to 11 deal with procedure for application,

calling for information from the concerned officers and for preliminary verification whether the applicant is the legally wedded wife, whether she is being neglected and whether she is unable to maintain herself and dependant children. Para 9 provides for verification through Zilla Sainik Board and for submission of a report to the superior authorities. Para 12 says that, having established a prima facie case, the prescribed officer under Sections 90(i) and 91(i) (read with Army Rule 193) will issue show cause notice to the concerned Army personnel and the Commanding officer will also send his recommendations to the superior officers. Final decision is to be taken "after considering all aspects of the case including reply of the individuals to the show cause notice if any". Para 14 deals with procedure for effecting the penal deductions. It also permits provision for stoppage of maintenance (see also Regulation 533) in case of attainment of majority of the child or marriage of a girl or in the case it is to be stopped on dissolution of marriage.

(28) In the present case, we have already stated that show cause notice was issued, reply of petitioner was received and on that basis further information regarding the Bank Account/business of the wife was called for and a final decision was taken for deduction as stated above. We are of the view that there is no error committed by the authorities in imposing a deduction of Rs. 1600 p.m. out of Rs. 7300.00 , for the maintenance of the wife and son.

(29) Petitioner argued his case extremely well. We thank the counsel for the authorities and also for the wife/son and Mr. Ojha, amicus Curiae, for placing all the relevant provisions of Army orders etc. before us.

(30) The writ petition is dismissed but there shall be no costs.