

(2008) 03 MAD CK 0050

In the Madras High Court

Case No : Writ Petition No. 36674 of 2003 and W.P.M.P. No's. 44548 and 44549 of 2003

Md. Abbas Mohideen

APPELLANT

Vs

Government of India and Others

RESPONDENT

Date of Decision : 05-03-2008

Acts Referred:

Coast Guard (Discipline) Rules, 1983 — Rule 26, 63, 64, 65
Coast Guard Act, 1978 — Section 119, 16, 42, 51, 51(1)
Constitution of India, 1950 — Article 226, 311(2)

Citation : (2008) 2 LLJ 587

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : G. Rajagopalan, SC for S. Thiruvengataswamy, for the Appellant; P. Wilson, ASG for Respondents 1-4 and K. Kannan, SC.G.S.C for Respondents 5-8, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—I have heard the arguments of Mr. G. Rajagopalan, learned Senior Counsel leading Mr. S. Thiruvengataswamy, learned

Counsel appearing for the petitioner, Mr. P. Wilson, learned Assistant Solicitor General of India representing the respondents 1 to 4 and Mr. K.

Kanna, learned Senior Central Government Standing Counsel for the respondents 5 to 8 and have perused the records.

2. The petitioner in this petition challenges the order dated 29.10.2003 passed by the second respondent wherein and by which he was given the

sentence of dismissal from the Coast Guard.

3. The petitioner joined the Coast Guard as an Assistant Commandant (Technical) which is Class I Group A Cadre, on 06.8.1989. On completion

of his training and probation, he was posted to work in several Ships in the Western Command. Thereafter, he joined the Eastern Command on

Board C.G.S. Jija Bai stationed near the Paradeep Port on 12.8.1993. According to the petitioner, the fifth respondent was the Commanding

Officer on 24.5.1994 on the said ship. On 18.10.1994, it is stated that two Thailand trawlers were found in the international waters and the fifth

respondent, without any authority, apprehended the trawlers and brought them to the Indian waters. He also boarded the said trawlers and using

the crew of the ship Jija Bai under his instructions, the Thai trawlers were looted. Thereafter, it was taken to Paradeep Port on 19.10.1994.

4. The petitioner objected to such a blatant action on the part of his superior as it would amount to an act of piracy. Because of his objection, his

problem started and apprehending that he may not sign the incomplete seizure memo, which was to be handed over to the local Police, he was sent

to Chennai on 22.10.1994 to participate in the Eastern Region games and he was granted leave even though he had never applied for the same.

5. During November 1994, the entries in his Annual Confidential Report were sent to him for the period November 1993 to October 1994 by the

fifth respondent. During that period, the ship also had some technical problems, which was duly attended to by the petitioner.

6. The petitioner's marriage was fixed on 04.4.1995 and he had applied for leave for 26 days on 27.3.1995. During his leave period, the named

respondents court martialled the petitioner and even cancelled the leave for his marriage. He reported to the ship on 17.4.1995 at the instance of

the fifth respondent, who was his Commanding Officer. On 18.5.1995, a request was made to constitute a Board of Enquiry. The fifth respondent

made all kinds of accusations against the petitioner and the report given by him was not furnished to him. The petitioner instituted certain

proceedings before the Orissa High Court. During these proceedings, on 31.10.1995, the Departmental promotion Committee [DPC for short]

was convened to consider the issue of promotion to the post of Deputy Commandant and in the normal course, the petitioner's name should have

been included in the panel. But in the list that was displayed, his name was omitted and the petitioner had made representation against the non-

inclusion of his name.

7. The petitioner was given a charge-sheet dated 15.02.1996 containing four charges which are as follows:

a. Failure to discharge duties properly and was fully responsible for non-preservation of star board D.A after ingress of sea water leading to

deterioration of material state of starboard D.A thereby committed an offence u/s 16 of Coast Guard Act, 1978.

b. Knowingly concealed the vital information of sea water ingress in star board D.A from his Commanding Officer, administrative authority and

repair agency thereby committed an offence u/s 16 of Coast Guard Act, 1978.

c. Grossly derelicted his duty by allowing the damage to get compounded on port D.A in overheated condition over a long period without proper

fault diagnosis thereby committed an offence u/s 16 of Coast Guard Act, 1978.

d. Showed total irresponsible and careless attitude in fault diagnosis and repair of defects affecting the ship's operational efficiency and delay in

repair process thereby committed an offence u/s 16 of Coast Guard Act, 1978.

8. On 15.02.1996, Record of Evidence [ROE for short] was started and it was completed during the end of February 1996. After the ROE was

completed, the procedure to be followed is provided under Rule 26 of the Coast Guard (Discipline) Rules, 1983 [for short, "C.G. Rules"] and it

reads as follows:

Rule 26: Disposal of case by Commanding Officer after Record or Abstract of evidence.--(1) Where an officer has been detailed to prepare the

record of evidence or to make an abstract thereof he shall forward the same to the Commanding Officer.

(2) The Commanding Officer may, after going through the record or abstract of evidence:

(a) dismiss the charge, or

(b) rehear the charge and award one of the summary punishments, or

(c) apply to the Convening Authority to convene a Coast Guard Court for the trial of the accused.

Mr. S.K. Singh, the sixth respondent was the Commanding Officer, who forwarded the ROE to the Coast Guard Headquarters and it is the stand

of the petitioner that he had held that there was no case against the petitioner and recommended dropping of the charges.

9. Thereafter, once again, another charge sheet was issued to the petitioner framing two charges and they are as follows:

(i) In that he while on board Coast Guard ship Jija Bai as Engineer Officer during the month of April and May 1995 was negligent in ensuring

maintenance and timely defect rectification of the ship's machinery which adversely affected the ship's operational availability.

(ii) In that he during place, months and while performing duties mentioned in the first charge failed to immediately report the defect occurring in the

said ship's machinery to his Commanding Officer, thus contravening para 30(a) (iii) of Coast Guard Ship Jija Bai's Captain Standing Orders said

to attract Section 42 of Coast Guard Act which was issued by Vice Admiral P.J. Jacob the 7th respondent herein.

10. Since the petitioner felt that the charges have been framed at the instance of the fifth respondent by the seventh respondent, who was is close

family friend, he filed another writ petition before the Orissa High Court in O.J.C. No. 10043 of 1996 and the First Division Bench of the Orissa

High Court stayed the proceedings by an order dated 23.9.1996. Thereafter, he filed O.J.C. No. 6959 of 1997 before the Orissa High Court on

the issue relating to his promotion and the same was disposed on 06.4.1998 with a direction to the petitioner to make a representation to the

Coast Guard Headquarters and till the disposal of the representation, it was directed that the trial should not be proceeded with. On 23.4.1998, he

made a representation to the Coast Guard Court [CGC for short] and accordingly, the CGC was dissolved on 27.4.1998 without assigning any

reason by the convening authority.

11. According to the petitioner, the reconvening of the CGC was violative of Section 66 of the Coast Guard Act, 1978. The said Section reads as

follows:

66 (1) If a Coast Guard Court after the commencement of a trial is reduced below the minimum number of officers required by this Act, it shall be

dissolved.

(2) If on account of the illness of the Law Officer or of the accused before the finding, it is impossible to continue the trial, a Coast Guard Court

shall be dissolved.

(3) The convening authority of a Coast Guard Court may dissolve the same if it

considers that the exigencies of the service or necessities of discipline render it impossible or inexpedient to continue the said Coast Guard Court.

(4) Where a Coast Guard Court is dissolved under this section, the accused may be tried again.

12. Therefore, it was contended by the petitioner that since the dissolution was made not according to any one of the three contingencies provided

therein and the matter was also not adjourned by giving any reason, Section 61(4) is not attracted and, therefore, the reconvening of the CGC to

go into the very same charges is improper.

13. However, once again, on 03.11.1998, the very same charges were revived for ROE with the endorsement that it should be tried by the CGC.

It was also submitted that even though the subsequent charges are taken as new charges, such an endorsement goes contrary to Rule 26 of the

C.G. Rules extracted above. ROE was done from 03.11.1998 to 22.7.1999. In the meanwhile, the second writ petition filed before the Orissa

High Court regarding his promotion came to be disposed of on 19.7.1999 directing the second respondent to open the sealed cover containing his

promotion.

14. On 22.7.1999, the CGC was once again reconstituted which forced him to file another writ petition before the Orissa High Court in O.J.C.

No. 12775 of 1999. But the Division Bench which heard the matter, allowed the proceedings to continue but, however, directed the CGC not to

pass any final orders without the leave of the Court. The proceedings before the CGC started on 11.10.1999, was completed on 23.10.1999

without considering the objections raised by the petitioner relating to limitation. The petitioner was also not allowed to bring any defence witness on

his side.

15. The petitioner filed Contempt Petition No. 110 of 2000 before the Orissa High Court for not opening the sealed cover. But that petition was

disposed of with a direction to the second respondent to open the sealed cover with regard to his promotion within a period of eight weeks from

19.6.2001, i.e., the date of order. But despite the direction, no such action was taken by the respondents. Even the petitioner's writ petition

regarding the second ROE was disposed on 05.3.2003 wherein the Orissa High

Court directed that the objections of the petitioner should be raised before the CGC. On 07.4.2003, an order was issued convening the CGC on 02.5.2003. However, the said order was communicated to him only on 24.4.2003. In the meanwhile, the petitioner filed a Review petition in Rev. P. No. 63 of 2003 before the Orissa High Court against the order disposing of his writ petition and the same was still pending.

16. The petitioner had requested the authorities to provide a defending officer and sought for adjournment for two weeks to enable him to prepare

his defense and when the same was not forthcoming, the petitioner filed a writ petition before this Court in W.P. No. 14388 of 2003. On

18.8.2003, the said writ petition was disposed of by stating that the petitioner should raise his preliminary objections before the CGC and that the

CGC should pass orders on the same. But without considering the request of the petitioner and without dealing with the objections raised by him

and also without furnishing the order passed on his objections, the proceedings went on which necessitated the petitioner to file Contempt Petitions

in Cont. P. No. 918 of 2003 on 02.10.2003.

17. In the meanwhile, he was admitted in the Intensive Care Unit of Malar Hospital as he had suffered Chest Pain on 28.10.2003. On

29.10.2003, the personnel belonging to Coast Guard came to the Hospital and informed the authorities that he was being shifted to the Military

Hospital. But instead of doing so, he was taken to the Coast Guard Headquarters at Fort St. George where the sentence in the ROE was

pronounced at 16 hours dismissing him from service and at 17.30 hours, his Identity Card was taken away from him. All these were done without

serving him a copy of the dismissal order. It was only during the contempt proceedings on 01.12.2003, the order was served on the petitioner.

Even that did not contain the proceedings dated 30.9.2003. Even though the petitioner could have filed a representation to the Central Government

u/s 119 of the Coast Guard Act, in view of the facts and circumstances of the case, the petitioner, without availing other remedies, moved this

Court with the present writ petition.

18. The writ petition was admitted on 16.12.2003 and notice was ordered to the respondents. In W.P.M.P. No. 44547 of 2003, an interim

injunction was granted restraining the respondents from evicting the petitioner

from the quarters allotted to him and the same was also made

absolute on 20.12.2006. In the other two Miscellaneous Petitions, viz., W.P.M.P. Nos. 44548 and 44549 of 2003 seeking for direction for

payment of last drawn salary and also for a direction to suspend the sentence of dismissal, only notice was ordered.

19. Though the fourth respondent had filed a counter affidavit dated 11.02.2004 only for the purpose of vacating the interim order in respect of the

quarters, no other counter affidavit has been filed to controvert the averments made in the affidavit. However, the respondents were rest contented

with filing a notes of submission along with a typed set of papers containing the minutes of the enquiry proceedings.

20. It is the stand of the respondents that the allegation that the charges are vague is not correct. Further, in terms of Rule 64 of the C.G.

(Discipline) Rules, it is informed that if the charges are read over during the proceedings, it is for the petitioner to plea guilty or not. According to

the respondents that the time to object to the charges is only before the enquiry and not before this Court, the same cannot be raised. It is also

stated that the plea of limitation and jurisdiction should have been raised before the authorities and since the statutory rule was not followed, this

Court cannot go into the issue. It is also stated that actually, there was no limitation, it was only because of the stay order obtained by the

petitioner, the matter could not be proceeded and if that is excluded, then there was no delay at all.

21. In this context, it is relevant to refer to Section 51(1) of the Coast Guard Act, which reads as follows:

51.(1) No person unless he is an offender who has avoided apprehension or escaped arrest or committed the offence of desertion or of giving false

entry on enrolment or the offence of mutiny shall be tried or punished in pursuance of this Act for any offence committed by him unless such trial

commences within three years from the commission of such offence.

22. But this Section was amended by Central Act 44 of 2002 and in the place of Section 51(1), the following amendment has been introduced:

51. Period of limitation for trial of offences under the Act.--(1) No person unless he is an offender who has avoided apprehension or escaped

arrest or committed the offence of desertion or of giving false entry on enrolment

or the offence of mutiny shall be tried or punished in pursuance of this Act for any offence committed by him unless such trial commences [within a period of three years from the commission of such offence and such period shall commence,-

(a) on the date of the offence; or

(b) where the commission of offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first

day on which such offence comes to the knowledge of such person or authority; or

(c) where it is not known by whom the offence was committed, on the first day on which the identity of the offender becomes known to the person

aggrieved by the offence or to the authority competent to initiate action, whichever is earlier.

Explanation.-- For the purposes of sub-section, in the computation of the period of time mentioned in this sub-section, any time spent by such

person as a prisoner of war in the enemy territory, or in evading arrest, after the commission of the offence, shall be excluded.

[(1A) Where a proceeding in respect of an offence has been stayed by an injunction or an order of a court, then, in computing the period of

limitation under this section, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which

it was withdrawn shall be excluded.]

23. These amendments received the assent of the President of India on 12.8.2002 and were published in the Gazzette on the same day. It was

directed to come into force the day on which the said amendment was published in the Gazette. Though Section 51(1-A) specifically excludes the

period of injunction or stay obtained before the Court for the purpose of calculating the limitation period, the said defence is not available to the

respondents. The second ROE was convened more than three years after the date of incident i.e., on 27.4.1998 and the first ROE was dissolved

without recording any reasons and only thereafter, on 26.9.1999, the CGC was constituted in respect of the fresh charge sheet dated 10.8.1999

and, therefore, the limitation will apply. The petitioner is well founded in his argument that the period of limitation u/s 51(1) as per the unamended

provision of the C.G. Act alone will apply.

24. It was further contended by the respondents that the petitioner did not raise any ground for any relief in W.P. No. 14388 of 2003 except

raising the same issue as was raised before the CGC and the petitioner's attempt in getting a direction from this Court in W.P. No. 14388 of 2003

on 18.8.2003 was appealed by the respondents in W.A. No. 1401 of 2004 and the Division Bench allowed the Writ Appeal on the ground that

the single Judge ought not to have entertained the writ petition with similar relief. Further, the petitioner had already approached the Orissa High

Court and the direction was set aside imposing cost on him by judgment dated 28.9.2005. It was submitted that the petitioner's objections were

suitably replied and that the petitioner had not availed the alternative remedy provided u/s 119 of the C.G. Act and, therefore, the writ petition

should be rejected.

25. With reference to the argument of the petitioner that reconvening of the ROE in respect of the same allegations is prohibited by Section 66 of

the Coast Guard Act read with Rule 26 of the C.G. Rules, the learned Assistant Solicitor General of India contended by referring to Rules 63 and

65 of the C.G. Rules that the objections regarding jurisdiction and limitation should have been raised before the authorities and not before this

Court. Such a contention cannot be accepted. If there is a statutory violation, the question of raising the same before the authorities may not arise.

Further, the question of limitation is a jurisdictional question and it is an injunction against the authorities from dealing with matters barred by

limitation and the plea of limitation can be raised at any time. Secondly, the statutory proceedings initiated by the respondents being in the nature of

domestic enquiry, the employees are not expected to be aware of all the defence which are available to them. Therefore, it is too late in the day for

the respondents to contend that such issues have to be raised only before the C.G.C. and not before the writ jurisdiction of this Court exercising

power under Article 226 of the Constitution of India.

26. The respondents are clearly aware that their action was hit by Section 51 and, therefore, they have raised the defence of their action being

interdicted by interim orders given by the High Court and, therefore, that period should be excluded while calculating the limitation. The Parliament,

aware of such contingencies, had amended the statute only with effect from

12.8.2002. Therefore, the respondents cannot contend that they can put the interim order obtained by the petitioner against him. On the contrary, they should have taken steps to vacate the interim order on time and inasmuch as the statutory amendment had not been made retrospectively, the respondents cannot rely upon the same.

27. It is also significant to note that the plea of mala fide alleged against the named respondents were not countered by any separate affidavit of parties. This Court is not going into the details of those allegations since the issue could be decided on the jurisdictional issue raised by the petitioner. In the same way, the nature of evidence let in and recorded in the ROE also was not gone into. The petitioner is entitled to succeed both on the question of limitation as well as the statutory bar in convening of second court of enquiry.

28. The jurisdictional issue on the limitation will have to be viewed seriously because in a court of enquiry held by the respondents in terms of the Coast Guards Act, 1978, they can even impose punishment of death and grant Life Imprisonment in terms of Section 53(1) of the Act. Therefore, this Court is constrained to construe the question of limitation and jurisdiction to convene a second ROE in a strict manner.

29. If it is normal disciplinary proceedings in terms of persons holding civil posts and having protection under Article 311(2) of the Constitution of India, this Court might have taken liberal view both on the grounds of limitation and the necessity to have a second enquiry. But whereas in view of the peculiar statutory provision, this Court is bound to uphold the two objections raised by the petitioner.

30. In the light of the above, the writ petition will stand allowed and the impugned order dated 29.10.2003 will stand set aside. In view of the same, the petitioner is entitled to get restored to his service with all consequential benefits as if there was no order of dismissal. However, there will be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.