

(1991) 11 DEL CK 0043

In the Delhi High Court

Case No : Letters Patent No. 11 of 1988 and Civil Miscellaneous Petition No's. 157 and 158 of 1988

Union of India and Another

APPELLANT

Vs

K.K. Taneja

RESPONDENT

Date of Decision : 14-11-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Limitation Act, 1963 — Section 5

Citation : (1991) 43 DLT 227

Hon'ble Judges : M.K. Chawla, J;Arun Kumar, J

Bench : Division Bench

Advocate : Vipin Sanghi and A.S. Chadha, for the Appellant;

Judgement

M.K. Chawla, J.

(1) The present Letters Patent Appeal by the Union of India is directed against the Judgment dated 2.11.87 of the Learned Single Judge, quashing the order of dismissal from service of Major K.K. Taneja, the respondent herein, by the General Court Martial and confirmed by the Competent authority under the Army Act.

(2) Along with this appeal, the appellants filed an application (CM158/81) u/s 5 of the Limitation Act, for condensation of delay of 19 days in filing the appeal. The appellants also moved another (CM 157/88) under Order 41 Rule 27 read with Section 151 CPC for permission to place on record the relevant Gazette notification/warrant by way of additional evidence .

(3) Before dealing with this appeal and the applications, it is relevant to keep in mind a few salient features of the respondents, case as disclosed in his petition (CWP 1253/78). The respondent herein was appointed as a regular commissioned officer in the Indian Army in December, 1965. There after in the year 1967, he was promoted to the rank of Lieutenant and in April 1969 to the

rank of acting Captain. In the year 1974, the respondent was working as acting Major. While working in that capacity, he was charged for an offences 69 of the Army Act, 1950 (hereinafter referred to as the Act) on the allegation that on 7/05/1976, at about 2300 hrs, he used criminal force on Mrs Yasl Pal Kaur, with the intention to outrage her modesty in a military special train ,which was moving from Gwalior to Delhi. After completing the formalities of investigation, a charge sheet was framed against the respondent and a General Court Martial was convened to enquire into that charge. The respondent pleaded not guilty to the charge. The General Court Martial on evidence found the respondent guilty of the charge and announced the sentence subject to confirmation as follows :-

"(A)to forfeit 5 years of service for the purpose of promotion; and (b) to be severely reprimanded."

(4) This order of sentence was sent to Major General Bhardwaj ,General-Officer Commanding, 19 Infantry Division for confirmation. The said officer by his order dated 17.11.76 directed the General Court Martial to reassemble again for the purpose of reconsidering the sentence awarded by it in the light of the observations made in the said order. Incompliance of this direction, the General Court Martial reassembled on 18thNovember, 1976 and revised the sentence as under :-

"(A)the court having attentively considered the observation of the confirming authority and the whole of the proceedings do now revoke the sentence and now sentencing the accused IC-16741F,Ex-Capt. Taneja Kuldip Kumar 21, Rajput attached 2nd Battalion, Jammu & Kashmir Rifles to be dismissed from service."

(5) This order of sentence was again sent to the Competent Authority for confirmation. The Chief of Army Staff confirmed in the sentence vide Order dated 28.1.77. The respondent's petition u/s 164 of the Act was considered and rejected by the Central Government on 27/04/1977.

(6) The respondent herein challenged the Court Martial proceedings on various grounds in his petition (CWP 1253/78) but during i he course of the hearing of his petition, great emphasis was laid on the ground that after the sentence was passed by the Court Martial on 8.3.76, forfeiting 5 years service of the respondent herein for the purpose of promotion and a severe reprimand, the order of sentence was sent for confirmation to Major General Bhardwaj, who was not the competent authority to either consider the revision petition or confirm the sentence passed by the General Court Martial. The subsequent revised sentence passed by the General Court Martial on the basis of the observations made by Major General Bhardwaj and its confirmation by the Competent Authority was thus illegal. In support of this submission, reliance was placed on para 471of the Regulations of the Army Act, 1962, which lays down the powers of the officers who are competent to confirm the proceedings and the sentence passed by the General Court Martial.

(7) According to the respondent his sentence could only have been confirmed

either by the General Officer Commanding-in-Chief (here in after referred to as GOC-in-Chief). Major General Bhardwaj who at the relevant time was the General Officer Commanding 19 Infantry Division, was not the officer of the rank of GOC-in-C and, Therefore, could not have acted as the confirming authority. .

(8) While dealing with this submission, the learned Single Judge noted that even though it was submitted by the learned counsel for the Union of India that the Central Government had in fact issued a notification empowering an officer of the rank of GOC-in-C 19 Infantry Division to perform the functions u/s 154 of the Act but he failed to produce any such notification in court. In view of these circumstances, the learned Judge concluded :-

" THUS, the sentence passed in the present case by the court-martial on 8.10.1976 had to be confirmed by GOC-in-C, Command before it became valid. It is not disputed that Major General Bhardwaj who passed the revisional order dated 17.11.1976 and pursuant to which the court martial met again and revised the sentence, at the relevant time was only a General Officer, Commanding 19 Infantry Division and not a GOC-IN-C. A chart filed by the petitioner indicating the hierarchy of the officers indicates that a Goc Commanding a Division is two ranks below the GOC-IN-C. This chart is also not disputed by the learned counsel for the respondents. It is, Therefore, clear that the order passed by Major General Bhardwaj on 17.11.76 was without jurisdiction. Since the order dated 17.11.76 was passed by an officer not competent to do so, the subsequent revision of the sentence by the court martial in pursuance of the directions given by Major General Bhardwaj was also irregular and invalid. In my opinion, confirmation of the revised sentence dated 28.2.1977 by the Chief of Army Staff or by a Competent authority to do so, the subsequent revision of the sentence by the court-martial in pursuance of the directions given by Major General Bhardwaj was also irregular and invalid. In my opinion, confirmation of the revised sentence dated 28.2.1977 by the Chief of Army Staffer by a competent authority to do so under Para 471 of the Regulations cannot validate the revised sentence. Therefore, since the whole procedure followed in the case after passing of the first sentence by the court martial was invalid and against the provisions of the Act, this petition deserves to be allowed on that ground alone."

(9) The writ petition was allowed and the Rule was made absolute. The proceedings and sentence of the General Court Martial were set aside and the petitioner was held entitled to all other consequential reliefs. It is against this order that the present Lpa has been preferred.

(10) Before dealing with this appeal on merits, we propose to dispose of the two above said applications filed Along with the appeal.

(11) In the first application (C.M. 157/88) under order 41 rules 27 seeking permission to lead additional evidence, the case of the appellant is that during the course of hearing of argument, it was submitted that the central government had in fact issued a warrant (A-3) for confirming the findings and sentences of

general court martial under the Army Act, in favor of the officer commanding the 19 Infantry Division and to perform the functions u/s 154 of the Act, but the said warrant was not available on the court record. Thereafter, a vigorous search for the said warrant was made which could not be traced in spite of best efforts of the appellants. However, in the meantime, the learned Single Judge allowed the civil writ petition on this ground alone. In the application, it is submitted that this very warrant has now been traced out by the appellants in their records lying in the records of the Infantry Division at Jammu & Kashmir, after a great deal of effort. As the entire case of the respondent has been allowed due to the non-production of the said warrant, the appellant be now allowed to lead evidence by placing the said warrant on record .

(12) The respondent has opposed the application by alleging that the appellant should have produced the said warrant at the time of the filing for the counter-affidavit or in any event before the decision of the writ petition. They have been negligent in not producing the said document and at this late stage ,cannot be allowed to file the same in the appeal. The application merits dismissal .

(13) We find substance in the submission of the learned counsel for the respondent. It is not disputed that in para no. 9 and 10 as well as in ground A and B of the petition (CWP 1253/78) filed on 30.10.78, the respondent had specifically raised the ground that by virtue of section 153 of the Army Act, read with para 471 of the Army Orders of 1968, the findings and sentence awarded by the General Court Martial against the respondent was "required to be confirmed by the competent authority, which in his case was the Central Government or the concerned GOC-in-C and the findings having been sent to Maj. General Bhardwaj, the General Officer Commanding, 19 Infantry Division for the purpose of considering the sentence, was illegal. The appellant in their counter controverted the averments and submitted that the order dated 17.11.76 directing the General Court Martial to re-assemble in open court for the purpose of reconsidering the sentence awarded by it was within jurisdiction, valid, legal and proper. Being the confirming authority, the said Goc was entitled u/s 160(1) of the Act to direct the revision.

(14) At this stage, we may note that when the petition came up for admission on 7.12.78, the Bench observed thus :-

"THE revisional order of 7.11.76 was passed by Major General A.P. Bhardwaj recites that "he is the confirming authority. Mr. Bhargava says that the revisional authority is not the General Officer Commanding but the GOC-in-C and in this connection, he refers to para 471 of the Army Orders of 1968. Since there is no indication why no subsequent amendment in the Army Orders, 1968 is there, and also there is no averment as to what is that precise difference between the General Officer Commanding and the GOC-in-C. We would like to be satisfied on this point. Mr. Bhargava wants time to file an additional affidavit .Let him do so and the case be listed on 13.12.78."

(15) The required affidavit was filed and after going through the same, a notice was issued to the respondents to show cause why Rule Nisi be not issued on 20.12.78. After the respondent filed their counter, the Rule was issued on 21.2.79.

(16) From the narration of fact referred to above, it is evident that the appellants were fully made aware of the grounds on which the respondent's dismissal from service was being challenged. Not only was this ground incorporated in the petition itself, but it was also highlighted at the time Rule Nisi was issued to the appellant in the month of February, 1979. Before a party is allowed to adduce an additional oral or documentary evidence, he has to satisfy the provisions of Rule 27 (I) (aa) of Order 41 of the Code. This provision reads asunder :-

"THE party seeking to produce additional evidence, establishes that not withstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed "

(17) In this case, the appellant has failed to show due diligence in procuring this document. Rather their conduct borders on negligence. For more than 12 years, the appellants for reasons best known to them did not care to bring on record the notification/warrant (A-3) which they now propose to produce by way of evidence. Admittedly, this warrant had been issued by the Secretary, Ministry of defense on 4 653. It was nor at all difficult for the appellants to have annexed this very document along with their courier as it was readily available either with Ministry of defense or from the Headquarters of 19 Infantry Division located in the State of Jammu & Kashmir. It could also have been produced before the start of the arguments in the writ petition. This has not been done.

(18) Learned counsel for the appellant in support of his submission, relied upon a Judgment reported as K. Venkataramiah Vs. A. Seetharama Reddy and Others, . During the course of the Judgment, the court on this aspect, held as under :-

"UNDERR. 27. (1), the appellant court has power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause where even though the court finds that it is able to pronounce judgment on that state of record as it is, and so it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgments in a more satisfactory manner. Such a case will be one for allowing additional evidence for anyothers substantial cause under R. 27(1) (b) of the Code."

Reliance was also placed on the observations of this court in case reported as Union of India Vs. Angrup Thakur, , holding :-

"HELD,that a document which purports to operate as a delegation of the executive functions of the Union to the Government of a State stands ona

somewhat different footing from the evidence normally to be led by the parties in the form of private documents and the statements of witnesses. Where a respondent does not claim to lead any evidence in rebuttal nor does he attempt to question the relevancy of the notification, the court would be defeating the cause of justice, if it declines to look at the notification issued by the Government."

(19) It is well settled that the court is not bound under the circumstances mentioned in the Rule to allow additional evidence and the parties are not entitled as of right to the admission of such evidence. The matter is entirely in the discretion of the court, but this discretion has to be exercised judicially.

(20) As observed earlier, in this case the attitude of the appellant has all through been callous, and the court under the circumstances will be justified in refusing permission to file documents by way of additional evidence. This provision cannot be used to fill up lacunae in the case. Now that they have lost the case on this ground, the appellant wants to produce the document. In case *Roop Chand v. Gopi Chand Thalia* 1989 Sc 1416, the Division Bench refused to accede to the request of the respondents for the filing of additional evidence even though it consisted of documents coming from the official custody. While rejecting this prayer, the court observed :-

"ON a consideration of the matter, we think the objections raised by the appellant's counsel for the filing of additional evidence by the respondent in the appeal proceedings before us merits acceptance. It is true that the documents sought to be filed by way of additional evidence are indisputably the audited balance sheets and reports submitted by the club but even so the fact remains that all the documents could have been obtained and filed by the respondent before the Trial Court itself since the judgment had been rendered by the Trial Court only on 22.2.1977. Even if the respondent was not able to file the documents before the Trial Court, he could have filed the documents before the Appellate Court, and sought its permission to file them as additional evidence. Even before the High Court there was no attempt in this behalf. No satisfactory Explanation has been offered by the respondent for having failed to produce the documents before the Courts below or the High Court. In such circumstances, we see no justification to allow C.M.P.No. 906/79 and permit the respondent to file the documents in question as additional evidence in the proceedings. Accordingly, C.M.P.No. 906/79 is dismissed."

(21) The above said judgments fairly and squarely apply to the facts of the present case. As observed earlier, the respondent was dismissed from service as far back as 18.11.76. By this time, he had almost reached the age of superannuation. The appellants have all through been negligent in putting up their defense by way of filing the material documents even though they were aware of the same and were available with them. The Ministry of defense or for that matter the State of Jammu & Kashmir where 19 Infantry Division is located was not a place inaccessible to them for summoning the record. In fact,

they did not make any effort in this behalf and were awakened only after the writ petition was heard and disposed of.

(22) In this view of the matter, we have no hesitation in dismissing the application C.M. 157/88.CM. 158188

(23) Admittedly, there is 19 days delay in filing the present appeal. The reason given in the application is that immediately on the receipt of the copy of the judgment, on 24.11.87. it was forwarded to the litigation sec. of the Ministry of Law on or about 27.11.87. The said copy was forwarded to the Ministry of defense and it reached the Army Headquarters on 17.12.87. On scrutiny, the officers discovered that the whole order was based on the non-production of warrant A-3, and thereafter efforts were made to trace out the said original warrant from the Army Hqrs. as well as from the 19, Infantry Division located in the State of Jammu and Kashmir. On hearing that the original warrant has been found, that the appeal was filed on 11.1.88. It is further stated that due to the non-availability of the warrant, the appeal could not be filed till 11.1.88.

(24) The application is being opposed on the short ground that the reasons for not filing the appeal within time are quite contrary to the record. It is not mentioned in the application as to when the warrant was discovered from the Jammu and Kashmir office or when it was received and by whom at Delhi. The reason for not filing the appeal due to non-availability of the warrant till 11.1.88 is not based on the record. As a matter of fact, this warrant was not available even on 11.1.88 when the appeal was filed. A copy of this warrant was only placed on record through application (CM157/88) on 21.1.88 when the affidavit in support of the said application was sworn in. If at all the appellants were aware of the existence of the warrant A-3, there was no hitch in filing the appeal within limitation.

(25) We are of the opinion that the delay in filing the appeal has not been properly explained. The delay in filing the appeal could not be the cause of non-availability of the warrant. In fact, it had not been received when the appeal was filed. There was thus no reason or justification to delay the filing of the appeal. The Explanation for the delay is obviously false, which disentitles the appellant to any indulgence.

(26) In the result, the appeal is dismissed as having been filed beyond limitation. Even otherwise, after the dismissal of the appellants' application (C.M. 157/88) under Order 41 Rule 27. CPC, there remains no ground to interfere with the Judgment of the learned Single Judge. On this score also the L.P.A merits dismissal and the same is hereby dismissed, leaving the parties to bear their own costs.