

(1997) 07 GAU CK 0018
In the Gauhati High Court
Case No : Writ Appeal No. 196/95

Union of India (UOI) and Another

APPELLANT

Vs

Corporal Sharma A.K.

RESPONDENT

Date of Decision : 31-07-1997

Acts Referred:

Air Force Act, 1950 — Section 150, 161, 161(1), 161(2)
Air Force Rules, 1969 — Rule 24, 59
Constitution of India, 1950 — Article 226
Penal Code, 1860 (IPC) — Section 109, 325

Citation : (1998) CriLJ 1791

Hon'ble Judges : M. Ramakrishna, C.J.; P.C. Phukan, J

Bench : Division Bench

Advocate : R.P. Kakti, C.G.S.C, for the Appellant; T.C. Khetri and S. Roy, for the Respondent

Judgement

M. Ramakrishna, C.J.—Appellants Nos. 1 and 2 were the respondents in Civil Rule No. 335/89, which was heard and disposed of by the learned single Judge of this Court on 20th March, 1995, by his order allowing the writ petition holding that, the proceeding of the District Court Martial culminating in the finding of guilt and sentence passed thereupon and the confirmation thereof by the authority shall stand quashed. Being aggrieved by the order of the learned single Judge, the Union of India and the Air Officer Commanding-in-Chief, Eastern Air Command, Indian Air Force, have come up with this appeal challenging the correctness and legality of the order under appeal on the grounds taken in the appeal.

2. We have heard the learned counsel for the appellants, the Central Govt. Standing Counsel, and the learned counsel for the respondent.

3. The brief facts necessary for the purposes of disposal of this appeal are as follows :

Mr. A. K. Sharma, Corporal, bearing No. 668504, who was serving in the Indian

Air Force, was charge sheeted for certain offence said to have been committed by him on 31st of August, 1988, while he was so serving. It is stated that there was a small incident resulting in a quarrel and criminal force having been used by Corporal A. K. Sharma, the writ petitioner, as a result of which both the petitioner and Corporal Vijay Kumar were taken into custody by the Military Police. On 2-9-88, the petitioner was marched before the Commanding Officer and he was charged with the offence of use of criminal force to the victim, Corporal K.K. Gupta, by beating him (K.K. Gupta) with a stick thereby causing grievous injury to him. Thereafter on 12-9-88, a new charge was framed by the Commanding Officer without hearing the petitioner in regard to the altered charge and thereupon directed the petitioner to face the trial and record his evidence. It is stated that before the new charge was framed no opportunity was given to the writ petitioner to be heard, much less to record his statement by way of evidence.

4. It is in admission that an offence u/s 109 IPC and an offence u/s 325 IPC were framed by virtue of the new charge against the petitioner. Both the writ petitioner and Corporal Vijay Kumar were produced separately before the Commanding Officer. Each one of them was charged separately. It is stated that there was no compliance of Rule 24 of the Air Force Rules, 1969, before refraining the charge and making a very serious allegation under Sections 109 and 325 IPC.

5. On 26th October, 1988, the District Court Martial was convened and the charge sheet was served upon the petitioner. On 27th October, 1988, an order convening a separate Court Martial against Corporal Vijay Kumar was passed. It is stated that by virtue of the action taken by each one of them in collaboration with each other, causing grievous hurt to Corporal K. K. Gupta, and based upon these charges, they were put on trial. On 28th October, 1988, the District Court Martial proceedings started and the defence counsel sought for adjournment until 1-11-88 for raising special plea under Rule 59 of the Air Force Rules, 1969. On 1-11-88, the writ petitioner filed a petition before the District Court Martial (DCM in short) raising a plea to the general jurisdiction of the Court under Rule 59 of the Rules of 1969. He produced defence witnesses in support of his plea and he was heard by the Commanding Officer. The charge-sheet was marked as exhibit and annexed as Annexure-A in the writ petition.

6. During the course of trial, one of the defences taken by the petitioner was that, by virtue of the law as declared by the Supreme Court in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others, it was stated that the Judge as framed against the writ petitioner is contrary to law. Again, the witnesses who have been produced and whose evidence having been recorded in support of such charge cannot be sustained in law. Later, the defence counsel gave a written address to the DCM containing the submissions as to the plea of bar of general jurisdiction raised under Rule 59 of the Air Force Rules. Thereafter the prosecution has supplied with a reply to the defence counsel and the Judge

Advocate then referred to the three charge-sheets and the copies of the same had been served upon the petitioner as per Annexures A, B and F, i.e., exhibits J, K and B2. The Judge Advocate also discussed the judgment of the High Court given in Civil Rule No. 372/82 and also the Apex Court decision in Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others,

7. Ultimately, the argument advanced was that the present charge framed against the petitioner which was served on him in course of the trial having been dropped, the charges which have been re-framed to those under Sections 109 and 325 IPC cannot be sustained. However, ignoring this argument, the DCM proceeded with the trial and recorded a finding based upon the said witnesses examined by the prosecution in its support. It is stated that by virtue of the provisions of Section 161 of the Indian Air Force Act, 1950, hereinafter referred to as "the Act, 1950", an appeal by way of representation was submitted by the petitioner before the confirming authority prior to the sentence and the order of the Court Martial came to be confirmed by the competent authority. It is stated that as there was confirmation of the finding, order and the sentence passed by the Court Martial, before the disposal of the appeal/representation pending before the Central Govt. the sentence of punishment imposed was given effect to. The petitioner then approached this Court with a petition under Article 226 of the Constitution of India challenging the action and the punishment having been imposed by the Court Martial as also confirmed by the competent authority under the Act, 1950.

8. Although the learned single Judge has passed a detailed order resulting in the quashing of the order of the competent authority including that of the Court Martial, the learned single Judge had no occasion to discuss a pertinent question, viz., that if by virtue of the provisions u/s 161 of the Act, 1950, a right of appeal be present and in exercise of which an appeal is presented before the Central Govt. immediately after passing of the order by the Court Martial and before the order has been confirmed by the competent authority, will it be competent for the writ petitioner to rush to the High Court invoking provisions under Article 226 of the Constitution of India before the statutory appeal is disposed of ?

9. During the course of argument advanced before us, the learned Central Govt. Standing Counsel brought it to our notice that during the pendency of the representation before the appellate authority as on that date, the writ petition was filed and disposed of. Therefore, we are to find out this aspect of the matter. The learned counsel for the appellants, during the hearing of the appeal has urged three points :

Firstly, regard being had to the order of the Court Martial and the punishment having been imposed by it which was given effect to immediately after its confirmation, since the petitioner was convicted, the petitioner could not have the right to have the appeal disposed of.

Secondly, as the requirement of the provisions of Section 161 of the Act, 1950,

which confers the right to appeal by way of representation to the Central Govt. by the aggrieved person, the language abundantly makes it clear that the disposal of the appeal need not be awaited for giving effect to the order.

Thirdly, as there was no alternative remedy available to the petitioner, he had to approach this Court invoking the provisions of Article 226 of the Constitution.

10. Let us now examine both the significance and the consequences of these submissions, taking into consideration the requirements of law. At the outset, it is seen that Section 161 of the Act, 1950, deals with the "Remedy against order, finding or sentence of Court-Martial. This is the head-line of Section 161. With a view to appreciate the contentions urged by the learned counsel for the respondent/petitioner (respondent in the appeal), we extract the provisions of Section 161 of the Act, 1950.

161. (1) Any person subject to this Act who considers himself aggrieved by any order passed by a court-martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such Court martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

Sub-section (2) of Section 161 of the Act, 1950, provides :

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of a court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Air Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Air Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit.

It is needless to say that according to the submissions of the learned counsel for the petitioner/respondent, the competent authority confirmed the order and the sentence, the order of the Court Martial being lesser than that of the Central Govt., and a representation by way of an appeal was filed before the Central Government. Now therefore, we will have to consider wherein (here is an appeal by way of representation before the Central Government by an aggrieved person, and there is delay on the part of the Central Govt., the appellate authority, in considering disposal of the statutory appeal and its consequences.

11. It is true, as submitted by the learned counsel for the petitioner/respondent that, immediately after conveying of the order of sentence passed by the Court Martial, when for confirmation of the order, it is laid before the competent authority, the authority shall give an order of sentence. There is no doubt about it. But the question herein is how to protect the interest of a citizen who is a serving soldier and whose appeal was pending consideration by the competent authority under the Statute in the event of the order of the Court Martial given effect to before the disposal of the statutory appeal. The Delhi High Court had

occasion to deal with this question in AIR 1968 Del 156 : S.P.N. Sharma Vs. The Union of India, wherein a Division Bench had the occasion to deal with this question.

12. Referring to the intent of the Statute, their Lordships in the Division Bench of the Delhi High Court interpreted the provisions of Section 161 and its significance including the consequences arising out of such intention and had to say the following :

Quite clearly, this provision is confined to cases where a person considers himself aggrieved by an order passed by a court-martial. It is clear beyond doubt that relevant provisions of the statute use three words "order", "finding" and "sentence". Sub-section (1) deals with the word "order" whereas Sub-section (2) with the words "finding" and "sentence". The scheme of the Act appears to us to support Shri Prakash Narain's contention that the word "order", as used in Section 161(1), does not cover findings and sentences within the contemplation of Sections in Chap. XII dealing with "Confirmation and Revision amply justify our view. The submission by Shri Keshav Dayal that there are no orders contemplated by the Act in regard to which Section 161(1) may be held to operate is unacceptable we find various provisions of the Act dealing with orders against which an aggrieved person might well, during the course of trial, take the matter to the confirming authority for redress.

By way of illustration, there are orders contemplated by Section 150 of the Air Force Act. But this apart, the very fact that a finding or sentence is not to be operative before its confirmation, would seem to impose an obligation on the trying Court-Martial to secure confirmation. If a specific right had been conferred on the person concerned to represent to the Confirming Authority against a proposed confirmation, then one would have expected such a right to be clearly conferred against the finding and sentence and not left to be spelled out from the use of the word "order" in Section 161 (1).

Therefore, in view of the observation of the Delhi High Court which we have extracted above, we are clearly of the view that though Sub-section (2) provides for the competent authority to confirm the order, finding or sentence, but still, the Central Govt. which is competent to hear the appeal and dispose of under the Statute, one would expect that either the appeal shall be heard and disposed of before giving effect to the sentence or in the event of the delay in disposing of the appeal under Sub-section (2) in which event the sentence of the Court Martial would not be given effect to. Otherwise, the person filing a representation being aggrieved by not having the appeal disposed of before confirming will be in doldrum inasmuch as either he will not be able to seek redress with regard to disposal of the appeal before it or, in the Court of law. Be that as it may, in the instant case, we are of the view that the writ petitioner would have afforded to have the appeal disposed of instead of approaching this Court under Article 226 of the Constitution. The reason is, in the event of the statutory appeal having been heard and disposed of by the Central Government when the writ petition is

pending before this Court, to that extent, under the provisions of law, the writ petition becomes infructuous; therefore, it does not serve the purpose or the intent of the law. It is high time the Central Govt. applied their mind to these difficulties and inconsistencies with regard to the drafting of Sub-section (2) of Section 161 of the Act, 1950, and take action for removing these bottlenecks.

13. Coming to this appeal, in the instant case, we are of the view that since the learned single Judge dismissed the writ petition quashing the proceedings and the order of the Court Martial without considering as to the outcome of the appeal being disposed of by the Central Govt., it is possible that the writ petitioner would have got the relief in the said statutory appeal. Under these circumstances, we have no alternative but to set aside the order of the learned single Judge. Accordingly, we allow this appeal.

14. The order passed by the learned single Judge in Civil Rule 355/1989 on 20-3-95, is set aside but we are constrained to add these words that in the event of the statutory appeal having been disposed of relating to any grievance of the writ petitioner not having been ventilated, it is open to the petitioner/respondent to approach this Court in which event the writ petitioner/ respondent will be entitled to legal the contentions that he has taken in the writ petition. It is now " brought to our notice that by virtue of the order made by the learned single Judge in the writ petition, the writ petitioner (respondent in the appeal) has been enjoying bail as there was stay order granted in the writ appeal. Therefore, we make it clear that the Statutory appeal presented before the Central Govt. shall be heard and disposed of within a period of 7 (seven) weeks "from today. Till such time as the appeal j>>n"6t disposed of, the bail granted to that petitioner shall continue.