
(2014) 03 SC CK 0019
In the Supreme Court Of India
Case No : C.A. Nos. 7397-7398 of 2013

Union of India (UOI)	Vs	APPELLANT
A.D. Nargolkar and Another		RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:

Armed Forces Tribunals Act, 2007 — Section 30
Army Act, 1950 — Section 134, 191
Constitution of India, 1950 — Article 226
Defence Service Regulations, 1980 — Regulation 67, 88

Citation : (2014) 3 SCALE 545 : (2014) 3 SCT 630

Hon'ble Judges : Jasti Chelameswar, J; Balbir Singh Chauhan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Aggrieved by judgment in writ petitions 13360 and 13367 of 2009 dated 9.7.2012 of the Delhi High Court, the Respondents therein (Union of India and Ors.) preferred these appeals.. The Respondents herein preferred the above mentioned writ petitions aggrieved by a judgment of the Armed Forces Tribunal in O.A. Nos. 50 and 53 of 2009 dated 30th September, 2009.

2. The brief factual background of these appeals is that the Respondent joined Indian Army in 1979 as an officer. Eventually, he came to be promoted to the rank of Colonel in the year 1999. He was on study leave during 2006-2007 upto 31st May, 2007. In January 2007, a selection board was convened for considering the cases of eligible officers for promotion to the rank of Brigadier. By letter dated 22nd March, 2007, the Respondent and other officers were empanelled in the select list for appointment to the post of Brigadier. It appears, the empanelment was also approved by the Government. The actual promotion was to be made in due course subject inter alia to a condition of "continued satisfactory performance". By proceeding dated 26th May, 2007, the Respondent was posted as Brigadier at Ferozepur. The Respondent requested for a "field posting" therefore the posting of Ferozepur was cancelled.

3. On 20th July 2007, a complaint came to be lodged by an ex-army officer named Sh. Dhoom Singh Pundir. The substance of the complaint is that the Respondent "stole the affection" (in the jargon of Indian Army it means 'an extra marital affair') of the complainant's daughter and was also blackmailing the complainant. On the basis of the complaint, it appears, a discreet inquiry was conducted by the Military Intelligence.

4. In the meanwhile, talks were initiated between the Respondent and the complainant allegedly under the guidance of DG Artillery Lt. Gen. A.S. Bajwa which eventually led to the tendering of a conditional apology by the Respondent on 22nd September, 2007. Consequently, the complainant agreed in writing not to pursue his earlier complaint dated 20.7.2007 and also another complaint given to the Civil Police on 4.8.2007.

5. The Appellants called for the comments of the Respondent herein regarding the complaint against him. The Respondent replied stating that the misunderstanding between him and the complainant had been sorted out and the complainant had withdrawn his complaint.

6. However, by order dated 17th September, 2007, a Court of Inquiry (hereinafter referred to as "CoI") was convened to investigate the complaint against the Respondent. Though the complainant declined to participate in the inquiry, the Appellants insisted on proceeding with the CoI and issued summons to the complainant, his wife and daughter.

7. The Appellants also, by proceeding dated 6th November, 2007, purported to take judicial notice u/s 134 of the Army Act of the complaint and decided to proceed with the inquiry. The Court of Inquiry eventually submitted its report in the first week of January, 2008.

8. The Respondent approached the Bombay High Court in writ petition No. 942/2008 praying inter alia that the CoI proceedings be quashed. According to the Respondent, he came to know of the discreet inquiry conducted by the Military Intelligence which led to the convening of the CoI only through the counter filed in the abovementioned writ petition. The said writ petition was disposed of without interfering with the Court of Inquiry but with certain directions, the details of which are not necessary for the purpose of this order.

9. During the pendency of the said writ petition, a show cause notice dated 7th March, 2008 came to be issued to the Respondent on the basis of the Court of Inquiry proceedings calling for the Respondent's explanation as to why he should not be awarded 'censure' for the misconduct alleged against him. The show cause notice, was accompanied by a copy of the CoI and certain other documents but the findings and opinion of the CoI were not supplied to the Respondent.

10. On 14.4.2008, the Respondent gave a detailed reply to the show cause notice. One of the objections raised by the Respondent was that he had not been

supplied with the copy of the Inquiry Report conducted by the military intelligence which was conducted behind his back which formed the basis of the CoI.

11. On 5th June, 2008, the censure order of severe displeasure (recordable) was awarded to the Respondent. Thereafter on 18.07.2008, the Respondent's empanelment to the post of Brigadier was cancelled on the ground of "drop in performance".

12. In the interregnum, the Respondent filed WP 5674 of 2008 in the Bombay High court praying that the Appellants herein be directed to supply copies of the findings and opinion of the CoI. By order dated 1st August, 2008, the court directed the supply of the copies of the documents prayed for, which were eventually supplied on 13th August, 2008 (some 70 days after the penalty was imposed).

13. The Respondent unsuccessfully pursued some statutory complaint against the order of penalty (the details of which are not necessary) and finally approached the Armed Forces Tribunal by filing the two OAs which eventually culminated in the judgment under appeal. The OAs were dismissed in limine even without notice to the Appellants. Aggrieved by the same the Respondents herein approached the High Court by two writ petitions which were allowed by the judgment under appeal.

14. The learned ASG submitted that (1) in view of a clear provision of an appeal against the decision of the tribunal (under Section 30 of the Armed Forces Tribunal Act), the High Court ought not to have entertained the writ petitions; (2) even on merits, the High Court erred in coming to the conclusion that the "findings of the CoI are perverse and without any evidence and cannot be sustained".

15. On the other hand, the Respondent, who is appearing in person, submitted that the High Court has rightly concluded that the Respondent was censured by the Appellants without there being any legally tenable material justifying such a course of action.

16. At the outset, we must state that the instant appeals were listed alongwith other connected appeals wherein a common question of law regarding the maintainability of a petition under Article 226 of the Constitution of India against the decision of the Armed Forces Tribunal arises. Subsequently, on a request made by the Respondent, who is appearing in-person, we separated the matter from the bunch and made it clear that we will not examine the question of maintainability of writ petition against the decision of the Armed Forces Tribunal in these appeals and the question would be considered separately.

17. Thus, we are left with the only question - whether the penalty of 'censure' imposed on the Respondent is sustainable in law.

18. A CoI was convened by the proceeding dated 17.9.2007 to investigate into

the complaint dated 26th August, 2007 against the Respondent made by Mr. D.S. Pundir. Initially, the complainant declined to participate in the proceedings of the CoI. He was summoned to give evidence before the CoI on the ground that notwithstanding his not pressing his complaint, judicial notice of the complaint u/s 1341 of the Army Act was taken². The complainant appeared though he did not make any clear statement before the CoI regarding any culpable conduct of the Respondent. He did state that the complaint which led to the convening of the CoI was lodged by him and stated that he was not pressing the same in view of the subsequent developments. Eventually, the CoI submitted its report to the convening authority. Thereafter, on 7th March, 2008, a show cause notice was issued to the Respondent, the relevant portion of which reads as under:

1. A Court of Inquiry was ordered by General Officer Commanding 41 Artillery Division to investigate into the complaint dated 27 July 2007 submitted by Shri DS 1 134. Judicial notice - A court-martial may take judicial notice of any matter within the general military knowledge of the members.

2. It may be noticed from the language of Section 134 the provision authorises only a court-martial to take judicial notice of certain matter and a court of inquiry is not a court martial. Pundir against you to the Chief of the Army Staff, making serious allegations against your conduct. 2. The proceedings of the Court of Inquiry were placed before the General Officer Commanding-in-Chief, Southern Command, who after due perusal finds you prima facie blameworthy for a conduct not expected of an officer with your service, and seniority, as enumerated hereunder:

(a) Misuse of official position as Colonel Administration, Headquarters 11 Infantry Division to enter into an improper relationship with Mrs. Neelam Bhati, wife of IC-41278X Colonel v. Bhati an officer posted in the same station.

(b) For harassment and mental torture of Shri DS Pundir, his daughter Mrs. Neelam Bhati and her husband IC-42178X Colonel v. Bhati through unwarranted communications by telephone calls and SMS messages with an intent to blackmail and extort.

(c) For entering into settlement agreement dated 22 September 2007 with Shri DS Pundir after convening of the Court of Inquiry with the sole aim to undermine and circumvent the due process of law.

3. The General Officer Commanding-in-Chief, Southern Command is of the opinion that his censure in an appropriate form is warranted for the aforesaid commissions and misconduct on your part. On his directions and on his behalf, you are hereby afforded an opportunity to explain your ibid conduct and show cause as to why the proposed Censure of the General Officer Commanding-in-Chief, Southern Command, in an appropriate form be not awarded to you.

4. Your reply to this Show Cause Notice must be submitted through your immediate superior officer in command within a period of 20 days from the date

of receipt of the notice, failing which it shall be presumed that you have nothing to urge in reply and an ex parte decision will be taken.

5. A copy of the Court of Inquiry proceedings including all exhibits, less findings and opinion are enclosed herewith for preparation of your reply.

6. Receipt of the Show Cause Notice will be acknowledged by you.

19. On receipt of the response to the said show cause notice by the Respondent herein, an order of censure came to be passed in the following terms:

1. I have perused the replies dated 14 May, 2008, 15 May 2008, 15 May 2008, 19 May 2008 and 23 May 2008 and other relevant records and material forwarded by IC 38032M Colonel AD Nargolkar of Headquarters 41 Artillery Division to the Show Cause Notice dated 07 March 2008 issued by Headquarters Southern Command along with the recommendations of Commanders in the chain.

2. I have duly considered the aforesaid replies to the Show Cause Notice in the light of Court of Inquiry proceedings. I find that the facts and circumstances brought out by the officer in his aforesaid replies do not absolve him of the acts of commission/omission averred in the Show Cause Notice. I find that the said replies are without any merit or substance and I am not satisfied with the said replies. I, therefore, find IC 38032M Colonel AD Nargolkar blameworthy of the following lapses on his part:

(a) Misuse of official position as Colonel Administration, Headquarters 11 Infantry Division to enter into an improper relationship with Mrs. Neelam Bhati, wife of IC-41278X Colonel v. Bhati an officer posted in the same station.

(b) For harassment and mental torture of Shri DS Pundir, his daughter Mrs. Neelam Bhati and her husband IC-42178X Colonel v. Bhati through unwarranted communications by telephone calls and SMS messages with an intent to blackmail and extort.

(c) Entering into settlement agreement dated 22 September 2007 with Shri DS Pundir with the sole aim of undermining and circumventing due process of law being fully aware that a Court of Inquiry has been convened.

3. For the aforesaid lapses, I direct that my "Severe Displeasure" (Recordable) be conveyed to IC 38032M Colonel AD Nargolkar of Headquarters 41 Artillery Division.

As a consequence of order of censure, the Respondent's empanelment as a Brigadier stood cancelled.

20. The Armed Forces Tribunal dismissed the OA of the Respondent in limine without notice to the Appellants herein who were Respondents before the Tribunal.

21. The Tribunal proceeded on the basis that the CoI is similar to aa

departmental enquiry.³

22. On the other hand, the only reference to a Court of Inquiry in the Army Act, 1950 is to be found u/s 191(2)(d).⁴Section 191 deals with the rule making power of the Central Government. The Section authorises the Central Government to make rules for the purpose of carrying into effect the provisions of the Army Act. Sub-Section (2)(d) authorises the Central Government to make rules regarding the assembly and procedure of, courts of inquiry. Chapter VI of the rules framed under the Army Act deals with the courts of inquiry. Rule 177 stipulates that "a court of inquiry is an assembly of officers.....directed to collect evidence and, if so required, to report with regard to any matter which may be referred to them.

23. Rule 182 provides that the proceedings of a CoI or any statement given at a CoI shall not be admissible in evidence against the person subject to the Act. However, the issue of effect or applicability of the aforesaid provision has neither been agitated nor been considered by the High Court or the Tribunal.

24. Defence Service Regulations, 1980 provide guidance for determining the entitlement of the officer empanelled for promotion. Regulation 88 provides for giving local rank which ipso facto does not confer any right of substantive appointment on the promotional part. Regulation 67 deals with substantive promotion by selection. This Regulation stipulates that promotion is to be made in public interest, however, the promotion shall be from the date the substantive vacancy occurs in the cadre. The officer on his substantive appointment shall be given only seniority from the date of conferring the local rank without affecting his pay and pension etc. For appointing an officer in substantive capacity, a fresh order is to be passed. It would not occur automatically. The competent/statutory authority has to play a positive role.

25. In the instant case, the Respondent never got the benefit even of the local rank as he did not join on such posting. Whether for such an eventuality the Appellants are to be blamed or the Respondent, the Court/Tribunal below did not give any finding on it. The facts pleaded before us reveal that Respondent on being posted in local rank could not join at Ferozepur as he was on study leave. Though, the Respondent applied for extension of the study leave, however, he later withdrew his application for extension. Thus, his posting even in local rank could not be given effect to. Respondent was attached to Pune and an attempt was made to post him in local rank at Aurangabad. In the meanwhile, the impugned order was passed. The High Court or the Tribunal did not examine the case from this angle at all though took note of the aforesaid facts.

26. In view of the above, we set aside the judgment of the Delhi High Court dated 9.7.2012, passed in Writ Petition Nos. 13360 and 13367 of 2009 as well the judgment and order of the Principal Bench of the Tribunal dated 30.9.2009 in O.A. No. 50 of 2009 and remand the case to A.F.T. (Bombay Bench) for de novo hearing. The parties shall be at liberty to raise all issues before the Tribunal. As

the matter has been pending before this Court for a long time, we request the learned Tribunal to hear and dispose of the O.A. on priority basis.

The appeals stand disposed off. No order as to costs.

1134. Judicial notice - A court-martial may take judicial notice of any matter within the general military knowledge of the members.

2 It may be noticed from the language of Sec. 134 the provision authorises only a court-martial to take judicial notice of certain matter and a court of inquiry is not a court martial

3 So far as the question of proving the documents in the Court of Inquiry against the Petitioner is concerned, suffice it to say that in a departmental inquiry the preponderance of probabilities is sufficient and we do not require the standard of strict proof as is done in a criminal case. After going through the finding of the Court of Inquiry and evidence specially of Mr. Pundir, we can appreciate the predicament of the father and husband. Having regard to the facts and circumstances of the case, we are satisfied that the approach of the authorities was justified. - Para 5 of the judgment of the Armed Forces Tribunal.

4191. Power to make rules.- (1) The Central Government may make rules for the purpose of carrying into effect the provisions of this Act. (2) Without prejudice to the generality of the power conferred by Sub-Section(1), the rules made thereunder may provide for-

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(d) the assembly and procedure of courts of inquiry, the recording of summaries of evidence and the administration of oaths or affirmations by such courts."