
(1997) 12 AHC CK 0100
In the Allahabad High Court
Case No : Second Appeal No. 317 of 1996

Union of India (UOI)

APPELLANT

Vs

Subedar Deena Nath Tiwari

RESPONDENT

Date of Decision : 09-12-1997

Acts Referred:

Army Act, 1950 — Section 192
Criminal Procedure Code, 1973 (CrPC) — Section 125
Defence Service Army Regulations, 1987 — Section 333(C)

Citation : (1997) AWC 632 : (1998) 2 DMC 731 : (1998) 3 RCR(Criminal) 242

Hon'ble Judges : R.A. Sharma, J;D.K. Seth, J

Bench : Division Bench

Advocate : Shishir Kumar, for the Appellant; Ashok Khare, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—Two appeals being Special Appeal No. 317 of 1996 by Union of India and Special Appeal No. 376 of 1996 by Subedar Deena Nath Tiwari have been preferred respectively against the same judgment dated 1.3.1996 passed in Writ Petition No. 9726 of 1989. While the Union of India challenged the whole order dated 1.3.1996, Subedar Deena Nath Tiwari challenged only that part of the order, by which the salary for the period from termination till reinstatement was directed to be considered by the Authorities after the proceeding u/s 125 of the Code of Criminal Procedure is finally decided.

2. Both these appeals were heard together. Mr. Shishir Kumar appeared on behalf of Union of India, appellant in Special Appeal No. 317 of 1996 and respondent in Special Appeal No. 376 of 1996. Mr. Ashok Khare represented Subedar Deena Nath Tiwari, appellant in Special Appeal No. 376 of 1996 and respondent in Special Appeal No. 317 of 1996. Both the learned Counsel addressed the Court on every point involved in the appeal.

3. Mr. Shishir Kumar contended that the finding of res judicata as held in the order dated 1.3.1996 cannot be sustained, inasmuch as, according to him, there

were no two proceedings, on the basis whereof the principle of res judicata could at all be made applicable. The order, on which reliance was placed for holding res judicata was not an order terminating the proceeding and neither the same was passed by an officer competent to decide the issue. Secondly, he contended that the order that has been impugned being an administrative order, the principle of res judicata is not at all attracted. The second assault launched by Mr. Shishir Kumar was that there was no question of directing the matter to be decided after the proceeding u/s 125, Criminal Procedure Code is concluded. Inasmuch as the expression "Civil Court" used in the relevant provisions does not include a proceeding pending before a Criminal Court. Therefore, it was not incumbent upon the respondents to await the decision of Criminal Court in the proceedings u/s 125, Criminal Procedure Code treating the same to be sub-judice in terms of Regulation 333(C)(c) of the Army Regulation.

4. Mr. Ashok Khare, learned Counsel for Subedar Deena Nath Tiwari, on the other hand, contended that by the order of the Army Officer, the case was closed after enquiry on the basis of first complaint. On the basis of second complaint, the impugned order was passed and therefore there were two orders. Even though res judicata may not apply, but the principle would be applicable even in the cases involving the present one where termination of service have been affected on the finding that petitioner Mr. Deena Nath Tiwari is guilty of plural marriage and thus the decision having been in the nature of a quasi-judicial decision. According to him, if on enquiry the complaint appears to be frivolous and the Authority decides not to proceed with the same and thereby recommend to the higher Authority, it automatically comes to an end and the second order having been passed on the basis of second complaint made after the first order is passed, definitely is the second proceedings, in which the order was passed by the higher Authority, does not alter the situation and amalgamate the two proceedings or render the first proceedings insignificant and nonest. He then contended that the expression "Civil Court" occurring in Army Regulation has been used in contra-distinction to the Military Court and has not made any distinction between a Civil and Criminal Court other than Military Court. Therefore, pendency of the proceedings u/s 125 in a Criminal Court, is also to be treated as sub-judice because of its pendency in a Civil Court namely a Court other than Military Court.

5. His third contention was that since by virtue of the order appealed against, reinstatement was directed and there being no order for termination, Subedar Deena Nath Tiwari is entitled to the salary for the whole period until service is terminated.

6. Mr. Shishir Kumar in reply contended that Subedar Nath Tiwari having not worked during the said period and his service remained terminated, Mr. Tiwari cannot be paid salary for the said period.

7. Both the learned Counsel have referred to certain decisions which we propose to deal with at the appropriate stage.

8. Admittedly, the decision to terminate service is an administrative order by reason of express provision contained in Regulation 333(C)(c) of the Army Regulation. Inasmuch as the said provision proscribes that "when it is found, on receipt of a complaint from any source whatsoever, that any such person has gone through a ceremony of plural marriage, no disciplinary action by way of trial by Court Martial or summary disposal will be taken against him, but administrative action to terminate his service will be initiated and the case reported to higher Authorities in the manner laid down in sub-para (B)(g)" of Regulation 333. Therefore, the action taken against Mr. Deena Nath Tiwari under said Regulation 333(C)(c) is nothing but an administrative action, by which his service was terminated. In the present facts and circumstances of the case, whether principle of res judicata is attracted or not, is not necessary to be gone into because of the view we have taken as hereinafter.

9. Similarly, the question raised by Mr. Shishir Kumar about the competence of order of the authority, who had passed the first order, need not be gone into in the present case because of the view we have taken in respect of other points raised by the parties with regard to the word "Civil Court". Therefore, we refrain from dealing with the said question of competence.

10. Admittedly, in the present case administrative action has been taken against Mr. Deena Nath Tiwari to terminate his service under Regulation 333(C)(c) of the Army Regulation. The facts being more or less admitted, it is not necessary to refer to the facts at the present moment for our present purpose by reason of the view we have taken in the present case.

11. Regulation 333 (C)(c) prescribes that administrative action for terminating service against a person contracting plural marriage can be taken subject to the restrictions imposed in later part of the said clause of regulation which provides:

"In cases where cognizance has been taken by Civil Court of competent jurisdiction, the matter should be treated as sub-judice and decision of the Court awaited before taking any action."

12. Thus, it appears that subsequent part of the said clause provides for awaiting the decision of the Civil Court treating the matter to be sub-judice. If it is held that by reason of the pendency of the proceedings u/s 125, Criminal Procedure Code the matter could be treated as sub-judice and pending before Civil Court as it could be interpreted in contra-distinction to the Military Court, then its decision is to be awaited. Learned Single Judge had proceeded to hold that the proceeding is a proceeding which is to be awaited before taking action under Regulation 333(C)(c).

13. Mr. Shishir Kumar contended that the expression "Civil Court" used in the provision does not include Criminal Court. Mr. Khare, however, opposed the same and in course of his arguments, he has drawn our attention to various provisions of the Army Act, Army Rules and Regulations in support of his contention.

14. The expression "Civil Court" had not been defined either in the Army Act or the Rules or Regulations framed there under. Therefore, we are left with the choice to gather the meaning from the context it has been used in various provisions of the Act, Rules or Regulations as the case may be.

15. The expression "Civil Court" has been used in Defence Service Regulations in Chapter 7 (since been described as Section 7) containing Regulations 416 to 530. This chapter deals with "charges by Civil Court". Use of expression civil power in "charges by civil power" means "power" other than "military power". Regulation 416 therefore provides that "summons issued by a Civil Court in respect of an offence" should be reported at once to the Company Commander so that arrangement can be made for attendance of the delinquent "before the Magistrate". It is significant to note that the "Civil Court" has been used in respect of an "offence" and "attendance before the Magistrate", which presupposes that the expression "Civil Court" connotes a Court other than Military Court. Similarly, Regulation 417 deals with cases "when a JCO, WO or OR is charged with an offence before a "Civil Court". Regulation 418 is captioned by the heading "Rules Regarding Adjustment of Jurisdiction of Civil and Military Courts Over Military Personnel Accused to Civil Offence" clearly indicates that distinction between Civil and Military Court is only being made and the offences other than those under the Army Act are to be treated as civil offences. Regulation 419 provides that "(a) all civil offences except those specified in the Army Act Section 70 can be tried either by Court-Martial or by a Civil Court, (b) offences under Army Act, Sections 40(a), 47, 53(a) and (b) and 64(b) as well as most offences u/s 52 can also be tried by a Court-Martial or a Civil Court.... If the offender is in military/civil custody, the OC Unit/ Magistrate will take steps to request the appropriate Military Authority to decide the Court before which proceedings shall be instituted." Thus, this provision also used the expression "Civil Court" in contra-distinction to a Military Court.

16. Regulation 420 provides that, (a) AJCO, WO or OR or an enrolled non-combatant, released on bail and awaiting trial by the civil power will, during the period he remains on bail perform, all military duties without prejudice to his trial by the civil power when required to surrender for the same, (b).... As soon as to CO of the arrested person receives information about the arrest by the civil police...." Then Regulation 421 provides "Defence of Soldiers Charged With Criminal Offences - The following are the rules for the defence of soldiers charged with criminal offences and prosecuted by Government in Civil Courts: (a) When soldiers are to be tried by a Civil Court upon any criminal charge ... (d) When Counsel is provided for the defence of a soldier at the first trial in a Civil Court..." Regulation 422 deals with delay in civil proceedings to the extent that "OC unit will report to higher Authority whenever the trial of a JCO, WO or OR in a Civil Court is inordinately delayed."

17. Thus, it appears that the expression "Civil Court" in the Army Rules have been used in contra-distinction to a Military Court. The said Regulation has not

made any difference in-between a Civil Court and Criminal Court while referring to Civil Courts in contra-distinction to a Military Court.

18. Since as it clearly appears from the various provisions as quoted above, that a "Civil Court" with reference to the said regulation is a Court established under the ordinary law other than the Courts established by the Army Act or in common parlance Military Court. Therefore, pendency of the proceedings u/s 125 is a proceeding, of which cognizance has been taken by a Civil Court of competent jurisdiction. As such by reason of pendency of the said proceedings, the matter is to be treated as sub-judice. As soon as these two questions are satisfied, in view of the provisions contained in Regulation 333(C)(c) it is incumbent upon the Military authorities to await the decision of the Court before taking any action. In the present case, action had been taken despite pendency of the said proceedings before the Civil Court namely a Court other than the Military Court. Thus, the said administrative action could not have been taken until the said proceeding is concluded.

19. Therefore, we do not find any infirmity in the order of learned Single Judge that the petitioner Sri Deena Nath Tiwari should be reinstated and the Military Authority should await the decision in the proceeding u/s 125, Criminal Procedure Code.

20. The question of payment of salary for the period between termination and reinstatement is to be governed by the law declared by the Apex Court in various matters where the question relating to payment of arrears of salary consequent upon termination order having been found invalid, was dealt with. The Apex Court in various cases held that whenever order of termination is found invalid and the person is reinstated, he is entitled to the salary provided that he was not gainfully employed elsewhere in the meantime. Therefore, such payment is subject to the condition that if the petitioner is not gainfully employed elsewhere, he would be eligible and entitled to arrears of payment between the period of termination and reinstatement. In the cases of Managing Director, Uttar Pradesh Warehousing Corporation and Another Vs. Vijay Narayan Vajpayee, ; Piara Lai v. State of Punjab 1990 Supp SCC 754 ; Tarlochan Singh Vs. Punjab State Warehousing Corporation and others, ; State of U.P. v. Atal Behari Shastri 1993 Supp (2) SCC 2079 ; Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others, ; Paluru Ramkrishnaiah and Others Vs. Union of India (UOI) and Another, ; Chairman, Governing Council Anjuman Arts, Commerce and Science and Others Vs. Sayyed Mohammad Shafi, it has been so held, by reason where- of the principle is now well settled.

21. Therefore, that part of the order, by which payment of salary for the period between termination and reinstatement has been withheld and have been made subject to ultimate decision of the Authorities concerned after the proceedings u/s 125 is over, does not appear to be a sound conclusion that can be supported in law. Therefore, we are unable to agree with that part of the decision of the impugned order appealed against.

22. Thus, judgment and order dated 1.3.1996 appealed against, stands affirmed with this modification that salary of the writ petitioner shall be paid to him for the period during which his service was terminated and he was reinstated. However, this will be subject to such decision by the Competent Authority of the military organisation with regard to payment of such salary during when a person is not in regular active service. This payment will however not entitle the writ petitioner to claim any benefit notional or otherwise of promotion which are dependent on certain conditions being fulfilled, which however could not be materialised in view of the fact that the petitioner was not in regular service during the said period. Such matters, therefore, shall be dealt with by the Authority concerned in accordance with law.

23. With the above observations and modification, the order appealed against referred to above, stands affirmed.

24. In the result, Special Appeal No. 317 of 1996 is dismissed and Special Appeal No. 376 of 1996 is allowed to the above extent. There will be no order as to Costs.