
(2006) 01 DEL CK 0084

In the Delhi High Court

Case No : Writ Petition (Civil) No. 5907 of 2003 and CM No's. 10384, 10385 and 11897 of 2003 and 8789 of 2005

Wg. Cdr. B.D. Jena

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-01-2006

Acts Referred:

Air Force Act, 1950 — Section 161(2), 42, 46, 47, 50
Constitution of India, 1950 — Article 14, 16, 21, 226
Penal Code, 1860 (IPC) — Section 120A, 34

Citation : (2006) 01 DEL CK 0084

Hon'ble Judges : Mukul Mudgal, J;H.R. Malhotra, J

Bench : Division Bench

Advocate : H.B. Mishra, for the Appellant; Anil Nag and Amit Gupta, for the Respondent

Judgement

Mukul Mudgal, J.—The petitioner who was serving as Wg. Commander in Indian Air Force was sentenced to six months rigorous imprisonment and cashiered from service and the sentence commenced on 7th August, 2003. The petitioner in this writ petition has prayed for the following reliefs:-

(a) Call for the entire proceedings of the GCM, in question which are pending confirmation by respondents nos. 3 and then 2 because petitioner is Wg Cdr (Selection Post) w.e.f., 16th May 2002 and so confirmed, as his date of commission being 19th June 1982 w.e.f., 19th June 2002;

(b) Issue writ of certiorari and setting aside the charge-sheet No. -I (Annexure P-3), Charge-sheet No-II (Annexure P-4) dated 30th July 2003, Convening Order dated 1st August 2003 (Annexure P-2), Order to pressurise GCM undated but circulated on 5th September 2003 (Annexure P-8), order of finding undated but circulated on 6th September 2003 (Annexure P-9), order of sentence dated 6th September 2003 (Annexure P-10) as being illegal, arbitrary, ultravires, perverse to facts/evidence, wrongful, incompetent, malafide and opposed to principles of

natural justice;

(c) Declare the GCM proceeding void ab-initio;

(d) Issue writ of mandamus or any other appropriate writ/s, order/s, direction/s. Commanding the respondents in general and respondents nos. 1,2,3,6,7 to restore prestige and status to petitioner in order to re-enforce his fundamental rights as envisaged under Articles 16 and 21 read with Article 14 of the Constitution of India;

(e) Pass order/s directing the respondents to restore his belongings and compensate innocent petitioner who has stood subjected to illegal and irregular arrests, custody, denudation of his personal belongings, deprivation of his service duty and forced to reel under avoidable tortures and agony w.e.f 27th January 2003 (midnight);

(f) Issue writ of mandamus or any other order/s, direction/s for referring the entire case to CBI in terms of para 590 of the Regulations for the Air Force 1964 (R) as the case is being claimed as of bribery and corruption;

(g) Pass order/s directing respondents nos. 1 and 2 to take appropriate actions for bringing other concerned respondents to book so as to deter such acts, neglects or/and omissions Constituting various offences u/s 34 and 120A of IPC 1860 and Section 42, 46, 47, 50, 53, 56, 57, 60, 62, 65, 66, 67 and 71 of the Air Force Act, 1950, in future....

2. The respondents have taken a plea that the petitioner had not exhausted an alternate efficacious remedy namely appeal available u/s 161(2) of Air Force Act, 1950 (hereinafter referred to as the Act), which reads as under:-

161. Remedy against order, finding or sentence of court-martial.--(1)

(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.

3. It has also been contended that in the writ petition running into 176 pages, the petitioner has leveled various factual allegations against the individual respondents which involves disputed question of facts and the writ jurisdiction is not a proper forum for adjudication of such allegations.

4. The learned counsel for the petitioner has submitted that mere existence of an alternate statutory remedy is no bar to the exercise of writ jurisdiction by this Court. Such a proposition has not been disputed by the learned counsel for the respondent. It is, however, contended by the learned counsel for the respondent that there is no reason made out by the petitioner why he should avoid the remedy u/s 161(2) of the Act and approach this Court directly.

5. The learned Counsel for the petitioner has stated that this writ petition cannot be dismissed on this preliminary plea as it has already been directed to be listed on after notice stage for final disposal. We are of the view that merely because the petition is directed to be listed for final disposal or even final hearing cannot be a ground to disentitle the respondent to urge a plea relating to alternate remedy being a bar to the discretionary exercise of jurisdiction under Article 226 of the Constitution of India.

6. The petitioner had approached this court prior to confirmation of GCM proceedings pursuant to the liberty granted by this Court on 26th December, 2003. The said GCM proceedings were confirmed on 7th October, 2003 by the Chief of Air Staff pursuant to the permission given by this Court. In our view, while this Court does have jurisdiction to entertain the writ petition even if an alternate remedy exists in suitable cases where well settled grounds for such interference are made out, the present case is not such a case where we are persuaded to permit the petitioner to bye-pass the statutory alternate remedy. It is vehemently contended by Mr. H.B. Mishra, who is appearing as counsel for the petitioner that the gross scale violation of the Act and the rules and the petitioner's right and the conspiracy detailed in the writ petition showed that this Court should permit the direct entertainment of the writ petition as the petitioner has lost faith in the remedy provided u/s 161(2) of the Act, as the result according to him is forgone.

7. In our view, it is not the petitioner's loss of faith but the Court's perception which is the relevant circumstance in entertaining the writ petition directly under Article 226 of the Constitution even though alternate remedy exists, provided the alternate remedy is not viewed by the Court as equally efficacious remedy as the writ jurisdiction. There is also substance in submission of the learned counsel for the respondent that the petitioner has sought to raise disputed questions of fact in the writ petition running into 176 pages. We are thus of the view that even de hors the alternate remedy, the petitioner can not be permitted to raise disputed questions of fact under Article 226 of the Constitution. Accordingly, we are of the view that the writ petition is liable to be dismissed on the ground of existence of alternate remedy. However, in the interest of justice, we are permitting the petitioner to avail of the alternate remedy provided under the Act within six weeks from today. If the representation/appeal u/s 161(2) is made within the period provided in this order, it shall be disposed of by a speaking order in accordance with law not later than six months from the date of receipt of the said representation.

8. The writ petition and all pending applications stand disposed of accordingly.