

Jagdish Chand Sharma Vs. Union of India (Uoi) and ors.

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Court : Himachal Pradesh

Decided On : Aug-28-1984

Reported in : 1985CriLJ696

Judge : P.D. Desai, C.J. and; H.S. Thakur, J.

Appellant : Jagdish Chand Sharma

Respondent : Union of India (Uoi) and ors.

Judgement :

P.D. Desai, C.J.

1. The petitioner, who was at the material time working as Lower Division Clerk, was put up for trial on May 7, 1976, before the General Court Martial (hereinafter referred to as 'the GCM') along with one Des Raj Pathak, who was at the relevant time Commanding Officer-II, for an offence punishable Under Section 69 of the Army Act, 1950 (hereinafter referred to as 'the Act'). The GCM found the petitioner as well as Des Raj Pathak guilty of the offence with which they were charged. The petitioner was sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 5,000/-, So far as Des Raj Pathak is concerned, he was sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs. 8,000/-. The sentence was announced on June 13, 1976. On October 7, 1976, the 3rd respondent (Chief Engineer, Project Deepak, Shimla) confirmed the proceedings of the GCM. While confirming the proceedings, the 3rd respondent remitted the unexpired period of sentence of rigorous imprisonment. The petitioner accordingly served the sentence of imprisonment from June 13, 1976 to October 8, 1976.

2. On October 21, 1976, the 3rd respondent passed an order in exercise of the power conferred by Rule 19(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter referred to as 'the Rules') removing the petitioner from service with immediate effect on the ground that the conduct of the petitioner, which led to his conviction, was such as to render his further retention in public service undesirable. The petitioner preferred an appeal against the said order on July 19, 1977. The appeal was considered and rejected and the decision was conveyed to the petitioner under a communication dt. May 3, 1978. Meanwhile, the petitioner had instituted a writ petition (C.W.P.No. 38 of 1978) in this Court, challenging the order of removal passed by the 3rd respondent. Three submissions were urged at the hearing of the said petition on behalf of the petitioner ; first that in view of the extant instructions the order of removal could not have been passed without affording to the petitioner an opportunity of being heard, secondly, that the petitioner was discriminated against since Des Raj Pathak, was also convicted and sentenced along with the petitioner, was not proceeded against departmentally and, thirdly, that the order of removal was not a speaking order. All the three submissions were rejected by the decision rendered by this Court on August 21, 1978.

3. It appears that Des Raj Pathak submitted a petition Under Section 164(2) of the Act (hereinafter referred to as the post- confirmation petition) on February 3, 1978 praying for annulment of the GCM proceedings and for

the consequential relief of setting aside of the order of conviction and sentence passed against him. The post-confirmation petition was accepted by the Government of India by an order dated October 23,1982. The material portion of the said order reads as under :

Whereas on the aforesaid memorandum,he had submitted a post-confirmation petition D/- 3-2-1978 requesting for annulment of the GCM proceedings and whereas the Central Government has considered the aforesaid post-confirmation petition of Sh. D.R. Pathak and has come to the conclusion that in the absence of any convincing evidence to uphold such conviction, the finding and sentence be set aside and order accordingly.

Having set aside the conviction and sentence, the order proceeded to give the following further directions in exercise of the powers conferred on the Central Govt.

(a) As Sh. Pathak has already undergone over five months of rigorous imprisonment, recovery from his pay be made for a sum of only Rs. 2,000/- (Rupees two thousand only).

(b) Sh. Pathak will not be entitled to any salary for the period of imprisonment and his absence be treated as (Dies-Non).

(c) Sh. Pathak will continue in service till superannuation. The above directions were given because it was found that Des Raj Pathak was guilty of non-performance of the prescribed duty which had resulted in an enormous loss to the Government and which amounted to a serious lapse on his part which had been duly proved.

4. It would thus appear that when the petitioner's previous writ petition (C.W.P. No. 38 of 1978) was pending and even when it was decided on August 21, 1978, a post- confirmation petition submitted by Des Raj Pathak Under Section 164(2) of the Act was pending consideration before the Government of India and that presumably in view of the pendency of such petition, the departmental proceedings, if any, initiated against him did not make any substantial progress and that, ultimately, in view of the orders passed on the post confirmation petition setting aside the conviction and sentence his services were not terminated but certain other penalty was imposed upon him departmentally under the self-same orders.

5. On September 24, 1983 the petitioner made a representation to the 3rd respondent setting out all the material facts which had led to his conviction and sentence by the GCM and his consequential removal from service. Paras. 6 and 12 of the representation are material for the present purposes and they are set out in extenso hereinbelow :

6. That on the other hand Sh. Des Raj Pathak, who had been convicted and sentenced like me, had been served with a Memorandum to show cause as to why penalty dismissal should not be imposed on him. I also came to know later that some departmental proceedings were started against Sh. Pathak. It is further learnt that a post-Confirmation petition had been submitted by Sh. Des Raj Pathak on 3-2-1978 to the Central Government requesting for annulment of the General Court Martial proceedings and Central Government by its order Dt. 23-10-1982 set aside the conviction and sentence of Sh. Des Raj Pathak. It was, however, found that Sh. Des Raj Pathak had failed to perform the prescribed duties (Supervisory responsibilities of Canteen Stores) and which was severe lapse on his part and, therefore, the Central Governme.it in exercise of the powers conferred on it under Sub-section (2) of Section 164 of the Army Act, 1950 passed the following order :

(a) As Sh. Pathak has already undergone over five months' rigorous imprisonment recovery from his pay be made for a sum of Rs. 2,000/- (Rupees Two thousand) only.

(b) Sh. Pathak will not be entitled to any salary for the period of imprisonment and his absence be treated as (dies non).

(c) Sh. Pathak will continue in service till superannuation.

It is, thus, clear that the conviction and sentence of Sh. Pathak were set aside, on the ground that there was no convincing evidence to uphold the conviction and sentence. As a consequence Sh. Pathak has been reinstated and all his emoluments have been paid except to a limited extent as mentioned above in this para.

xx 12. That it may be submitted that I had been convicted and sentenced on the same very evidence which was found to be not convincing in the case of Sh. Pathak Co-II. I and Mr. Pathak had been jointly tried. There was joint charge-sheet against us, even charges were more on Mr. Pathak. The conviction had been recorded against both of us on the same evidence. Under the rules common disciplinary proceedings should have been taken against me and Sh. Pathak. There seems to be no reason why the order of conviction and sentence passed against me by the General Court Martial and confirmed by the Chief Engineer should not be set aside particularly when in the same set of circumstances it has been so done in the case of Sh. Pathak. It may also be submitted that Mr. Pathak did not file any appeal against his order of conviction and sentence and similarly I also did not file any appeal. It was only on the basis of post-confirmation representation, consequent upon the opportunity given by way of show cause notice to Sh. Pathak, that Mr. Pathak has been acquitted. I respectfully submit that the same treatment should be meted out to me and I should also be acquitted and my order of dismissal aforementioned should also be set aside. In this connection the following observations made by the Hon'ble Supreme Court of India in : 1983CriLJ1105 (Ramji Surjya v. State of Maharashtra) may kindly be perused :

13. Having reached the above conclusion, we feel that ends of justice require that we should suo motu recall the order dismissing the appeal of Bhikji Surjya Padvi accused No. 4 (appellant No. 2) in this appeal and acquit him also. We accordingly review the order dated August 18, 1980 of this Court dismissing his appeal and restore his appeal to the file. It may be mentioned here that the learned Counsel for the State fairly conceded that if the appeal of accused No. 2 is to be allowed, accused No. 4 should also be released.

14. In the result we allow this appeal, set aside the conviction of accused Nos. 2 and 4 (appellants Nos. 1 and 2) Ramji Surjya Padvi and Bhikji Surjya Padvi Under Section 302/34 of the Penal Code and the sentences of imprisonment for life imposed on them by the High Court and restore the judgment of acquittal passed by the trial court. Accused No. 2 and accused No. 4, the appellants herein shall be released forthwith.

The above observations were made by the Hon'ble Supreme Court of India on the following facts :

Ramji accused No. 2 and Bhikji accused No. 4 along with two other accused Nos. 1 and 3 were tried jointly for an offence Under Section 302/34 IPC. All the four of them were acquitted by the Sessions Judge on appeal by the State to High Court of Bombay, accused Nos. 2 and 4 were convicted under the above section and sentenced to life imprisonment. Accused Nos. 1 and 2 had died in the meantime. Both accused Nos. 2 and 4 filed an appeal in the Supreme Court of India against the judgment of the High Court of Bombay, convicting them under Section 302 I. P. C. read with Section 34. The appeal of accused No. 4 Bhikji was dismissed in limine on 18th Aug. 1980, whereas the appeal of Ramji accused No. 2 was admitted. When the appeal of Ramji came for regular hearing, his appeal was accepted and he was acquitted. The Hon'ble Supreme Court suo motu reviewed its order of 18th August, whereby they had dismissed the appeal of accused No. 4 Bhikji in limine and acquitted him also. This case is on all fours with my case and therefore I should be acquitted when Sh. Pathak has been acquitted on his post-confirmation representation.

The ultimate prayer which the petitioner made in the said representation is to be found in para 15 and it is in the following terms:

15....

In the circumstances mentioned above, it is prayed that this representation of mine may kindly be considered within a month from its receipt, failing which I will be compelled to move the Hon'ble High Court of Himachal Pradesh for getting redress.

6. It requires to be stated at this stage that the petitioner had meanwhile preferred a writ petition (C.W.P. No. 253 of 1983) on August 22, 1983 in this Court seeking the relief, inter alia, that the order of removal passed against him be quashed and set aside and that the Central Government be directed to review the case in light of the order passed in the case of Des Raj Pathak and that reinstatement be ordered. When the petition reached preliminary hearing on September 26, 1983, the learned Counsel for the petitioner stated to the Court that the petitioner had made a post-confirmation representation to the third respondent, with a copy to the Central Government, wherein it had been prayed that the order of conviction and sentence passed by the GCM be reviewed in light of the orders passed in the case of Des Raj Pathak and that in view of the said representation, the petition may be permitted to be withdrawn with permission to file a fresh petition. In light of the statement made as above, the writ petition was dismissed as withdrawn with liberty reserved to the petitioner, in express terms, to file a fresh petition if the law so permits.

7. The petitioner's representation was rejected by the third respondent by an order made on December 13, 1983. The order referred to the representation made by the petitioner as an application 'for reconsideration of orders of his dismissal from service' and rejected the same on three grounds. First, that 'the penalty of dismissal was imposed upon him under CCS (CC & A) Rules which do not provide for any post-confirmation petition' secondly, that 'the said penalty of dismissal was Imposed upon him under Rule 19 of CCS (CC & A) Rules and Shri Jagdish Chand Sharma was at liberty to prefer appeal against the said punishment of dismissal.... under para 25 of the said rules within a period of 45 days from the date of receipt of the said order' but no such appeal was preferred within the prescribed time limit and, thirdly, that Civil Writ Petition No. 38 of 1978 filed by the petitioner against the said order of removal was dismissed by this Court without any direction to alter the penalty.

8. The petitioner has instituted the present petition challenging the aforesaid order Dt. December 13, 1983 rejecting his representation Dt. September 24, 1983.

9. Now, it is apparent that the third respondent has failed to comprehend the true nature of the remedy invoked and the reliefs sought by the petitioner in the course of his representation, The representation, if properly appreciated and correctly read, contains a twofold prayer ; first, that in light of the decision taken in the case of Des Raj Pathak, the proceedings of the GCM in the case of the petitioner should be reviewed and the conviction and sentence passed against the petitioner and confirmed by the 3rd respondent should be set aside and, secondly, that, consequentially, the order of removal from service passed against the petitioner, which was founded on the petitioner's conviction by the GCM, should also be quashed and set aside and the petitioner should be reinstated in service. Thus the representation was primarily in the nature of a post-confirmation petition Under Section 164(2) of the Act and the challenge to the order of removal was consequential in nature. The 3rd respondent, however, has apparently treated the representation as having been directed solely against the order of removal passed against the petitioner and altogether failed to consider order do not leave any scope for doubt or debate on this score. In our opinion, therefore, there is a total non-application of mind and failure to exercise the jurisdiction on the part of the '3rd respondent who has failed to consider the representation of the petitioner in all its material aspects and rejected the same without taking into consideration the two distinct prayers made by the petitioner. Even if the 3rd respondent was not the competent authority to deal with and decide the post-confirmation petition, it was his duty to have returned it to the petitioner for presentation before the competent authority or, better still to have forwarded the same himself to the competent authority. Be it stated that if the order of conviction and sentence passed by the GCM and confirmed by the 3rd respondent is quashed and set aside by the competent authority, the order of removal too will require to be reviewed because it is founded on the misconduct of the petitioner which Moulded in his conviction and if the conviction goes, the removal cannot stand unless in the course of a departmental inquiry the misconduct is proved and penalty is imposed in accordance with law.

10. Two submissions were made on behalf of the respondents to oppose the petition. First, that the petitioner should have presented the post-confirmation petition soon after the order of conviction and sentence was

confirmed by the 3rd respondent and that such a belated attempt on his part to invoke the remedy cannot be permitted in law and, secondly, that, in any case, a post-confirmation petition presented after the order of removal is passed is not maintainable.

11. The first submission deserves to be rejected outright on the short ground that Section 164(2) while conferring a right to present a post-confirmation petition on a person who considers himself aggrieved by a finding or sentence of any Court Martial which has been confirmed and corresponding duty on the competent authority to consider such petition, does not prescribe any period of limitation. The law imposes no time limit for the exercise of such right and the performance of such duty. No provision prescribing a period of limitation has been brought to our notice and we do not propose to read any such limitation in a beneficent provision of this nature which is intended to provide an effective remedy against a finding or sentence of any Court Martial to an aggrieved person. In a case like the present, where the conviction and sentence imposed upon a co-accused put up for trial before the Same GCM along with the petitioner on the same charge and on the same evidence is quashed and set aside on the ground of lack of convincing evidence in exercise of the said power and the petitioner having come to know of the same presented a petition invoking the same jurisdiction within a reasonable time from the date of his knowledge of such order, it would be a travesty of justice if his petition were not to be entertained on such a highly technical ground. Even if the power were discretionary in nature, its exercise could have been Compelled in such circumstances. It is settled law that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and, with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised. In other words, if the conditions laid down for the exercise of discretion are satisfied, the authority has no discretion to refuse to exercise the discretion. The authority is under a statutory duty to exercise the discretion. If there is omission to exercise discretion, inter alia, on account of the failure on the part of the authority to genuinely address itself to the matter before it or due to misconception of the scope of its power under the statute, mandamus can issue directing such authority to re-hear and determine the matter afresh according to law. See *Julius v. Lord Bishop of Oxford*, (1880) 5 AC 214, approved in *L Hirday Narain v. Income-Tax Officer, Bareilly* : [1970]78ITR26(SC) . It is equally well settled that where a statute conferring a discretion on a public authority to exercise or not to exercise a power did not expressly limit or define the extent of his discretion, the discretion might nevertheless be limited to the extent that it must not be so used, whether by reason of misconstruction of the statute or for other reason, as to frustrate the objects of the statute which conferred it. Under such circumstances, though the public authority might have full and unfettered discretion, it is bound to exercise it lawfully, namely not to misdirect itself in law, nor to take into account irrelevant matters, nor to omit relevant matters from consideration. If the discretion is not exercised lawfully, the Court would not be prevented, in proper cases, from reaching a conclusion that a prerogative writ should issue. See : *Padfield v. Minister of Agriculture* 1968 1 All ER 694. The first submission must, therefore, be rejected.

12. The second submission is equally unsound. As earlier pointed out, the order of removal rests on the Order of conviction and sentence passed by the GCM and confirmed by the 3rd respondent. The order of conviction and sentence being thus the foundation, if the foundation is displaced, the order of removal cannot stand. The order of removal cannot, therefore, bar the entertainment of the post-confirmation petition. Besides, the order of removal is passed pursuant to the power conferred by the Rules and it pertains to the disciplinary jurisdiction exercisable against an employee for his proved misconduct. The order of conviction and sentence passed in exercise of the powers conferred by Section 69 of the Act relates to the criminal jurisdiction and empowers the imposition of punishment on a person found guilty of the commission of an offence. The source of power and the nature of penalty are different in each case and so is the remedy of the party aggrieved by the penalty imposed in exercise of each power. A person may be convicted and visited with punishment and he may not yet be dismissed or removed from service or vice versa. By no stretch of imagination, therefore, the removal under the Rules can be allowed to be projected into the statutory right and corresponding duty conferred by Section 164(2) of the Act. May be, on merits, the competent authority

may find that so far as the petitioner is concerned, there is evidence to sustain his conviction and sentence and consequentially his removal. But that is a matter which can be decided only after the post-confirmation petition is entertained and determined on merits. The second submission must also, therefore, be rejected.

13. For the foregoing reasons, the impugned order dt. December 13, 1983, Annexure-PJ, is quashed and set aside. The competent authority is directed to treat the representation dt. September 24, 1983, Annexure PH, made by the petitioner as a post-confirmation petition Under Section 164(2) of the Act, in the first instance, and to dispose it of accordingly on merits in light of the observations made in the course of this judgment and in accordance With law after affording to the petitioner an opportunity of being heard in person, if he so desires. The 3rd respondent will forward the representation to the competent authority, if he is not such authority, for disposal accordingly and it will be decided by a speaking order by the competent authority within a period of eight weeks from today. In case the post-confirmation petition is allowed, the competent authority will proceed to consider the consequential relief sought by the petitioner, namely, setting aside of the order of removal in light of the observations made hereinabove and in accordance with law and pass appropriate orders thereon either simultaneously or within two weeks thereafter. It is clarified that under such circumstances, the decision of this Court rendered on August 21,1978, in Civil Writ petition No. 38 of 1978, would be no bar to the grant of appropriate relief in regard to the order of removal, because with the setting aside of the order of conviction and sentence, there would be material alteration of circumstances, It is further clarified, however, that the question of reconsideration of the order of removal will arise only if the order of conviction and sentence is set aside in exercise of the power conferred by Section 164(2).

14. Rule made absolute accordingly. The petitioner will be entitled to the costs of the petition quantified at Rs. 350/-, which are to be deposited in the Registry within 8 weeks. Mr. Kedar Ishwar states that the costs when recovered will be paid to the High Court Legal Aid and Assistance Fund.

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