

Form No. 4
{See rule 11(1)}
ORDER SHEET
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW
Court No.1
O.A. No. 205 of 2014

Kumar Man Singh

By Legal Practitioner for the Applicant

Applicant

Versus

Union of India & Others

By Legal Practitioner for Respondents

Respondents

Notes of the Registry	Orders of the Tribunal
	<p><u>27.08.2018</u> <u>Hon'ble Mr. Justice S.V.S. Rathore, Member (J)</u> <u>Hon'ble Air Marshal BBP Sinha, Member (A)</u></p> <p style="text-align: center;">Present: Shri Raghvendra Kumar Singh, Ld. Counsel for the applicant and Shri A.N. Tripathi, Ld. Counsel for the respondents.</p> <p style="text-align: center;"><u>ORDER (Oral)</u></p> <p>1. By means of this Original Application filed under Section 14 of the Armed Forces Tribunal Act, 2007, the applicant has made prayer for the following relief :-</p> <p style="padding-left: 40px;"><i>“(a) To quash the order/communication dated 05.06.2008 as contained in Annexure No. 1.</i></p> <p style="padding-left: 40px;"><i>(b) That this Hon'ble Tribunal may be pleased to direct the respondents to reconsider and reinstate the applicant in the job without any further delay with all consequential benefits applicable to the applicant.</i></p> <p style="padding-left: 40px;"><i>(c) That this Hon'ble Tribunal may be pleased to direct the respondents concerned to pay the regular salary to the applicant as is applicable considering his poor condition and problems otherwise the applicant shall suffer irreparable loss and injury.</i></p> <p style="padding-left: 40px;"><i>(d) That this Hon'ble Court/Tribunal may issue any other appropriate order or direction which the Hon'ble Tribunal may deem just and necessary in the circumstances of the case may also be passed; and</i></p> <p style="padding-left: 40px;"><i>(e) To allow the application with costs.</i></p> <p style="padding-left: 40px;"><i>(f) To quash the discharge order dated 30 May 2008 as contained in the Annexure No. 15.</i></p> <p>2. In brief the facts necessary for the purpose of the instant O.A., may be summarised as under.</p> <p>3. The applicant was enrolled in Indian Air Force on 31.12.1998 as</p>

C.P.L.W.S. During service period, he was posted at different stations. While he was posted in District Kanpur and had completed 9½ years of service, there was no complaint against him but on 20.11.2007 the applicant received a show cause notice alledging therein that there was a complaint made by Smt. Sushila Devi wherein she has alledged that she was married with the applicant in June, 1994 as per Hindu rites and rituals, even then the applicant has got married twice.

4. On the basis of this complaint, an inquiry was held. In reply to show cause notice, the applicant submitted his reply annexing the documents necessary to prove that the applicant was innocent.

5. The case of the applicant is that the complaint was totally incorrect and misleading. The applicant has admitted that he was married with Sushila Devi in 1994 but vide Panchnama dated 21.01.1997, as per traditions and customs prevailing in the area and society, the applicant's marriage was dissolved. After such dissolution, he has contracted second marriage. A Court of Inquiry was held wherein the factum of plural marriage was established.

6. His defence was not accepted by the competent authority and before the order on the said show cause notice could be passed on 23.05.2008, the applicant absented himself w.e.f. 03.04.2008 and thereafter vide order dated 05.06.2008, the applicant was discharged in-absentia. The discharge order reads as under :-

*“ 4 Base Repair Depot
Air Force Station
Kanpur – 08*

4BRD/712/PF-786225/NE/P3

05 Jun 08

*Col Kumar Man Singh
Vill – Mujouna
PO – Haripur
PS – Allouli
DIST – Khagaria
Bihar
Pin 848203*

DISCHARGE : AIRMEN

1. It is intimated that you have absented yourself from Air Force with effect from 0700 h on 05 May 08.

2. Your discharge order has been received by this depot. You will be discharged from service with effect from 17 Jun 08 (F/N) 'IN-ABSENTIA' under the provision of AF Rules 1969, Chapter-III, Rule 15(2)(g)(ii), if you don't report to the unit before specified date.

*Sd/- x x x xx
(Hardik Modi)
Wg Cdr
Flt Cdr HRM Flight*

7. His discharge order was passed and the same was communicated to the applicant. It transpires from the aforesaid discharge order that separate discharge order was received by the Depot, since the applicant was not present, therefore, he was discharged in-absentia.

8. Feeling aggrieved, the applicant has filed this Original Application. Admittedly in this case, the applicant has not preferred any statutory appeal and has not availed alternative remedy and has filed this Original Application.

9. In the counter affidavit, a copy of the order passed by Air Martial, Air Officer-in-charge Personnel has been filed wherein after considering defence of the applicant, the order of the discharge was passed on the ground '**HIS SERVICES NO LONGER REQUIRED UNSUITABLE FOR RETENTION IN THE IAF.**' It has also been observed by the competent authority that the applicant at the time of filing of enrolment form, has not mentioned as 'divorcee' and declared his status as unmarried. Thus, the applicant has been dismissed for solemnising plural marriage with Ms Arti Kumari.

10. The submission of learned counsel for the applicant is that the applicant belongs to Kurmi/Dhanuk community of Bihar, where, as per their customs and traditions, a marriage can be dissolved by Village Panchayat. Learned counsel for the applicant has drawn our attention towards Section 29 (2) of Hindu Marriage Act, 1955, which reads as under :-

“(2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.”

11. Law is settled on the point of custom which is recognised in sub-section (2). The party relying on custom, must prove the existence of custom and that it is ancient, certain, reasonable and is not opposed to public policy. He must further prove that the divorce has in fact taken place in conformity with that custom. In the absence of proper pleadings no defence regarding dissolution of marriage by custom can be entertained. It is not only sufficient to plead the existence of custom but it has to be proved that the parties were entitled for a customary divorce. Where the custom or divorce by deed could not be proved, the husband had no right to contract a second marriages.

12. In the facts of the instant case, the applicant has only pleaded that there was custom in the society of the applicant to dissolve the marriage by the Village Panchayat. However, there is nothing on record to establish that any such custom or tradition actually exists.

13. Section 13 of the Indian Evidence Act, 1872 is relevant in this context, which reads as under :-

“13. Facts relevant when right or custom is in question. – Where the question is as to the existence of any right or custom, the following facts are relevant :-

(a) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;

(b) Particular instances in which the right or custom was claimed, recognized, or exercised or in which its exercise was disputed, asserted or departed from.”

14. Thus, the applicant was required under law to prove the existence of the marriage, which is not proved. Apart from it, decision of the Court regarding existence of such tradition or custom in the society of the applicant is virtually a decision on the civil right of the applicant.

15. Learned counsel for the respondents has argued that whether the applicant has divorced his wife or not, is a question of fact and the issue of divorce can only be decided by a competent Civil Court as only service matters can be taken up by this Tribunal. The relief claimed by the applicant cannot be granted unless decision of civil rights is given, which cannot be decided by this Tribunal. He has drawn our attention towards Para 578 of Air Force Regulations 2003, which deals with plural marriage. Para 578 reads as under :-

“578. Plural Marriage by persons in whose case it is prohibited by law.

(a) Hindus, Buddhists, Jains and Sikhs and also other persons who are governed by Hindu Law are forbidden under the Hindu Marriage Act, 1955 to contract another marriage if either of the party has a living spouse.

(b) Christians, Parsis and Jews are also forbidden under their respective personal laws to contract another marriage if either of the party has a living spouse.

(c) A marriage cannot legally be Performed or registered under the Special Marriage Act, 1954, if either of the party has a living spouse.

(d) Any plural marriage contracted by persons specified in subparas (a), (b) and (c) above or performed or registered under the Special Marriage Act, 1954 is illegal. Such marriage does not bestow on the parties the status of husband and wife nor do the parties acquire any rights against one another. The children from such marriage will be illegitimate. An individual contracting such plural marriage will be liable to punishment under either section 494, I.P.C., i.e., marrying again during life time of husband or wife, or/and section 495, I.P.C. i.e., concealment of former marriage from a person with whom subsequent marriage is contracted.

(e) An application from an individual to contract such plural marriage will not be entertained, nor can ex-post-facto sanction be given to such plural marriage.

(f) When it is found that any person in whose case it is prohibited by law has contracted plural marriage, no disciplinary actions by way of his trial by court martial or under Section 82 or 86 of the Air Force Act, will be taken but only administrative action to terminate his service under Section 19 or 20 of the Air Force Act will be taken.

(g) When a case of plural marriage has been brought before a criminal or civil court, the commanding officer will not initiate, administrative action till after the matter has been finally disposed of by the court. When a person is charged for contracting plural marriage before a criminal court, he will not be claimed for trial by court-martial. Such person will inform his commanding officer immediately a complaint is made against him in a court of law, and the commanding officer will then report the case to Air Headquarters (Directorate of Personal Services) through normal channel.

(h) When a person has been convicted under section 494 or 495 of the Indian Penal Code, or his plural marriage has been dissolved, he will inform his commanding officer of his conviction and punishment or of the dissolution of plural marriage, and the commanding officer will then report the matter to Air Headquarters (Directorate of Personal Services) through normal channel. Thereafter the commanding officer will initiate administrative action to terminate his service under section 19 or 20 of the Air Force Act.

(j) The failure on the part of a person to notify his officer of the filing of a suit or a complaint against him in at court for contracting plural marriage or of his conviction under section 494 or/ and section 495 of the Indian Penal code or of the dissolution of his plural marriage will render him liable to be proceeded against under section 42(e) of the Air Force Act.

(k) All cases where administrative action is required to be taken will be initiated by the commanding officer and submitted through channel to Air Headquarters (Directorate of Personal Services).

(emphasis added)

16. On the strength of the aforesaid Regulations, it is argued on behalf of the respondents that in the facts of this case until and unless a specific finding is given that a divorce by Panchanama was a valid divorce, no relief can be granted to the applicant. Since this point can be decided only by a Civil Court of competent jurisdiction, therefore, the applicant be directed to seek dissolution by Civil Court of competent jurisdiction of such divorce by Panchanama, only then this O.A. shall be maintainable before this Tribunal.

17. Learned counsel for the applicant in his reply has submitted that this Original Application may be dismissed with liberty to the applicant to get a declaration from the competent Civil Court regarding dissolution of his first marriage with Sushila Devi by Village Panchayat.

18. In view of the above facts, situation and keeping in view the controversy involved in this case, it is clear that the applicant cannot get the relief claimed until and unless it is decided that the applicant's dissolution of marriage by the Village Panchayat was a valid divorce. It is pertinent to mention here that the complainant Sushila Devi in her complaint and the applicant also in his O.A. have specifically stated that they were married according to Hindu Rites and Rituals. Once they were married with Hindu Rites and Rituals, then the marriage ought to have been dissolved according to Hindu Law. The complainant Sushila Devi has denied dissolution of her marriage. Thus the applicant cannot get relief claimed until and unless dissolution of marriage with Sushila Devi by Village Panchayat is held to be valid as legal divorce. This point can only be decided by a Civil Court of competent jurisdiction and not by this Tribunal. This Tribunal has jurisdiction to try only service matters of the personnel subject of Army Act, Navy Act & Air Force Act. Therefore, in view of these facts, situation and keeping in view the submission of both learned counsel for the parties, we hereby **dismiss** this O.A. with liberty to the applicant to move the competent Civil Court for declaration of dissolution of his marriage by Village Panchayat. The applicant shall be at liberty to approach this Tribunal after getting such declaration from the competent Civil Court.

19. In view of the aforesaid facts situation and submission of the applicant, we hereby **dismiss** this Original Application at this stage with liberty to the applicant to get a declaration from the competent Civil Court that dissolution of his marriage with Sushila Devi by Village Panchayat is a valid divorce.

20. It is hereby made clear that the applicant after getting such declaration from the competent Civil Court, may again approach this Tribunal for the relief claimed in this Original Application.

(Air Marshal BBP Sinha)
Member (A)

(Justice S.V.S. Rathore)
Member (J)

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