

**IN THE PUNJAB AND HARYANA HIGH COURT AT
CHANDIGARH**

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**CWP-18496-2020 (O&M).
Date of Decision: 21.02.2023.**

Smt. Monika Sharma

.. Petitioner

Versus

Union of India and others

... Respondents

CORAM: HON'BLE MR. JUSTICE VINOD S. BHARDWAJ.

Present: Mr. Vikas P. Singh, Advocate,
for the petitioner.

Mr. Gaurav Pathak, Advocate, for respondents No.1 to 5.

Mr. Navdeep Singh, Advocate, for respondent No.6.

VINOD S. BHARDWAJ, J. (ORAL)

The present writ petition raises a challenge to the order dated 08.09.2020 (Annexure P-24) whereby the maintenance awarded in favour of the petitioner has been discontinued by the respondent-Authorities.

Briefly summarized, the facts of the present case are that marriage of the petitioner was solemnized with respondent No.6 on 18.04.2006 and a girl child namely Rishita was born out of this wedlock. However, the marriage fell apart and the petitioner as well as respondent No.6 started living separately. The petitioner was granted maintenance allowance under Section 90 (i) of the Army Act 1950 read with AO 2/2001. An affidavit in terms of the above Army order was also submitted by the petitioner on 19.08.2009. Vide letter dated 30.11.2009, the petitioner was

granted maintenance allowance @ 22% of the salary of respondent No.6 for herself and 5.5% of the salary towards maintenance of the minor daughter Rishita. Respondent No.6 challenged the above order by filing OA 60 of 2010 before the Armed Forces Tribunal (AFT) Principal Bench. The same was disposed of vide order dated 08.11.2010 observing that as the proceedings under Section 13 (1) of the Hindu Marriage Act are pending before the Civil Court, the Army Authorities shall finalize the issue of maintenance on the basis of outcome of the Civil Court order. The petitioner claims to be getting maintenance since then under the said arrangement. However, respondent No.6 again submitted an application for review of the order of maintenance in the year 2016 which was rejected vide order dated 13.10.2016 (Annexure P-6) by observing that FAO No.6042 of 2012 was pending before the High Court and there was nothing to show any change of financial position or status of the wife-petitioner herein.

Aggrieved thereof, OA 208 of 2017 was filed by respondent No. 6 before the Armed Forces Tribunal, Principal Bench, New Delhi, and reliance was also placed on the advisory issued by the Ministry.

The above said petition was disposed of vide order dated 19.09.2019 by issuing directions to the respondents to investigate the matter afresh for alteration/amendment of the maintenance amount already granted to the petitioner on the strength of documents that had been filed before the the Armed Forces Tribunal (hereinafter to be referred as AFT).

It is further submitted that the petitioner meanwhile had also preferred a complaint to the SSP, Women Grievance, Gurugram, against respondent No.6 under Section 494 of the Indian Penal Code, 1860 for marrying another woman during the lifetime of his first wife.

The matter remained pending before the Authorities on one pretext or the other, however, the final order was passed on 08.09.2020 whereby the respondents ordered to discontinue the maintenance allowance granted by the Headquarters (Southern Command) vide letter No.D2408112/281/DV dated 13.11.2009 with immediate effect. The maintenance allowance of Rishita, daughter of petitioner and respondent No.6 however, continued at 5.5% of the salary of respondent No.6 as per the earlier order dated 30.11.2009. The same was passed without prejudice to the rights of the petitioner to avail the avenues of reconciliation procedure/process of proceedings available in the ongoing cases including divorce case pending before the Punjab and Haryana High Court.

Aggrieved thereof the present petition has been filed.

Written statement on behalf of respondents No.1 to 5 has been filed. It has been stated that respondent No.6 filed O.M.1157 of 2019 before AFT, New Delhi, regarding reduction of maintenance and also moved an application to the Army as well. The same was disposed of vide order dated 19.09.2019 and the order had been passed in compliance thereof. It is also averred that an Experts Committee Advisory was issued in supersession of all previous orders. The wife should avail her remedies before Civil Court.

A separate written statement on behalf of respondent No.6 was also filed. It is averred that there is no illegality in the order or the decision making process. The recommendation of the Committee of Experts was accepted by the Ministry and it was noticed that such issues should only be dealt with by the Civil Court. The Army Act was promulgated prior to Hindu Marriage Act and it being a special Statute, Army Authorities should not decide on the matters of maintenance. She may thus take recourse to Civil Court for availing her remedies. It was also alleged that the petitioner concealed her income and assets from the Authorities. His efforts for amicable settlement were futile. Certain pleas on merit as regards her income were also raised.

Learned counsel for the parties are *ad idem* that the petitioner not being a military personnel is not entitled to invoke the jurisdiction of the AFT and that no other alternative remedy against the aforesaid order is provided under the Army Act of 1950 to the wife who is not an Army personnel. The order having been passed under a Statutory Act and powers of Civil Court being barred, the present petition can thus be entertained.

Learned counsel for the petitioner argued that the impugned order has been passed in violation of principles of natural justice and that no opportunity of hearing was granted to the petitioner. It is also submitted that the Authority was not competent to pass the order. AS per A.O. 2/2001, the Competent Authority is either Chief of Army Staff or the G.O.C. whereas the order has been passed by an officer of the rank of Colonel. The documents regarding assets and properties of the petitioner have thus not been taken into consideration at all. It is also argued that AFT had only

empowered the respondent-Authorities to investigate and not to pass any fresh order.

Besides, the respondent Authorities ought to have asked the respondent No.6 to seek remedy of Civil Court, if so aggrieved and there was no occasion to review the order after more than a decade.

Learned counsel for the respondents has vehemently submitted that the initial order dated 30.11.2009 had been passed by the Authorities in exercise of its powers under Section 90 (i) of the Army Act, 1950. It is submitted that during the pre-independence era Army Act, 1881 was applicable and that Section 145 of the Army Act 1881, prohibited attachment of salary and other rights of any serving army personnel. Since any such attachment orders, even pursuant to the orders passed by a competent Court or Authority could not be passed, hence, the Army Authorities were obligated to implement the above said order on administrative side by attachment of the salaries. It is contended that post independence, the Army Act 1950 was notified by the Parliament wherein the two provisions i.e. Section 28 and Section 90 had been incorporated in place of Section 145 of the erstwhile Army Act, 1881. The relevant provisions of Army Act, 1950, read as under:-

28. Immunity from attachment. *Neither the arms, clothes, equipment, accoutrements or necessities of any person subject to this Act, nor any animal used by him for the discharge of his duty, shall be seized, nor shall the pay and allowances of any such person or any part thereof be attached, by direction of any civil or revenue court or any revenue officer in satisfaction of any decree or order enforceable against him.*

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90. Deductions from pay and allowances of officers. *The following penal deductions may be made from the pay and allowances of an officer, that is to say,-*

(a) all pay and allowances due to an officer for every day he absents himself without leave, unless a satisfactory explanation has been given to his commanding officer and has been approved by the Central Government;

(b) all pay and allowances for every day while he is in custody or under suspension from duty on a charge for an offence for which he is afterwards convicted by a criminal court or a court- martial or by an officer exercising authority under section 83 or section 84;

(c) any sum required to make good the pay of any person subject to this Act which he has unlawfully retained or unlawfully refused to pay;

(d) any sum required to make good such compensation for any expenses, loss, damage or destruction occasioned by the commission of an offence as may be determined by the court- martial by whom he is convicted of such offence, or by an officer exercising authority under section 83 or section 84

(e) all pay and allowances ordered by a court- martial to be forfeited or stopped;

(f) any sum required to pay a fine awarded by a criminal court or a court- martial exercising jurisdiction under section 69;

(g) any sum required to make good any loss, damage, or destruction of public or regimental property which, after due investigation, appears to the Central Government to have been occasioned by the wrongful act or negligence on the part of the officer;

(h) all pay and allowances forfeited by order of the Central Government if the officer is found by a court of inquiry constituted by the Chief of the Army Staff in this behalf, to have deserted to the enemy, or while in enemy hands, to have served with, or under the orders of, the enemy, or in any manner to have aided the enemy, or to have allowed himself to be taken prisoner by the enemy through want of due precaution or through disobedience of orders or willful neglect of duty, or having been taken prisoner by the enemy, to have failed to rejoin his service when it was possible to do so;

(i) any sum required by order of the Central Government or any prescribed officers to be paid for the maintenance of his wife or his legitimate or illegitimate child or towards the cost of any relief given by the said Government to the said wife or child.”

He submits that the Ministry of Defence had constituted a Committee of Experts to review the service including Potential Disputes Minimizing Institution Mechanism relating to redressal of grievances in the year 2015. A report was thereafter submitted and after noticing all aspects, the said Committee of Experts made its recommendations wherein it was observed that even though the defence personnel have the bounden duty to maintain their families. The exercise of looking into the aspects as to whether there has been an actual abdication of responsibility and duty or the truthfulness of the allegations from both side cannot be conducted by the defence Services. Hence, for the purpose of maintenance, it was made clear that recourse to Civil Courts or competent Authorities is the correct procedure where evidence can be weighed for reaching the conclusion after assessing the veracity of the statements to conclude an appropriate maintenance in a particular case. It was further recommended that grant of

maintenance by Military Authorities should be an exception rather the rule. However, the powers of the Competent Military Authority must definitely be invoked for giving effect to orders of Civil Court/Statutory Authorities in case where they may have granted maintenance but the individual concerned is not releasing the amount to the wife/family or which such powers are apparently primarily meant.

It is argued that as the Military Authorities have already taken a policy decision not to exercise the jurisdiction under Section 90 (i) of the Army Act, 1950, except in exceptional circumstances, and that ordinarily a person is required to take recourse to a competent Civil forum for seeking determination of maintenance/compensation. All pending/operating orders were to enure for a period of three years to be extended by another two years i.e. upto a maximum of five years. The aforesaid time was granted to enable the beneficiaries of the orders already passed by the Competent Military Authorities to take recourse to the remedies available to them under the civil laws/appropriate matrimonial laws. It is also argued that the new policy supersedes all earlier orders.

Controverting the aforesaid submissions advanced by the learned counsel for the respondents, learned counsel for the petitioner submits that power to grant maintenance under Section 90 (i) of the Army Act, 1950 was conferred by a Statute. A policy cannot override a statutory power exercised. Any such policy decision can only be applicable prospectively and only with respect to the cases that are brought before the Competent Authority after the adaptation of the policy. Accordingly, any order already passed in due exercise of powers vested in a Competent

Authority cannot be superseded by a policy decision to review such order. It is further contended by the counsel for the petitioner that she had filed an application for grant of maintenance before the District Judge, Gurugram who vide order dated 30.11.2011 had directed that the petitioner would be entitled to a sum of Rs.20,000/- per month as maintenance *pendente lite* from the date of the application i.e. 29.09.2009 along with Rs.5000/- as litigation expenses. The aforesaid judgment of the District Judge, Gurugram was challenged by respondent No.6 vide Civil Revision No.7727 of 2011. The above said Civil Revision was decided vide order dated 23.12.2014. The operative part of the aforesaid judgment reads thus:-

“Counsel for the respondent-wife is not in a position to deny the said factum of payment of maintenance under the Army rules and regulations.

A perusal of the letter dated 30.11.2009 (Annexure P4) would also go on to show that in exercise of the powers under Section 90(i) of the Army Act, 1950 read with Army Rule 193, the GOC-in-C Southern Command had accorded sanction for 27.5% per month from the pay and allowances of the petitioner husband, which is to subsist till the marriage ends or the death of the wife and in the case of her daughter, till she gets married or till her death. The amount is being remitted by cheque to the address given and to the bank account of the wife. It is also not disputed that now, in view of the enhancement of salary of the petitioner, a sum of Rs.22,737/- is being paid to the respondent-wife, as per the statement of accounts of the petitioner for February, 2014. Thus, the respondentwife is already being paid the maintenance and she had only asked for civil litigation charges and the Court below was not correct in

holding that a sum of Rs.20,000/- would be payable as maintenance pendente lite since neither there was any such prayer made. It is also a matter of fact that the petition filed under Section 13 also stands dismissed and the matter has come in appeal before this Court in FAO No.6042 of 2012 titled Maj. Gaurav Bhardwaj Vs. Smt. Monika Sharma but no application for maintenance has been filed in view of the above deduction at source.

In such circumstances, the order dated 30.11.2011 (Annexure P1) is modified to the extent that the wife will only be entitled for the amount of 27.5% which is her share and her daughter's share, as per the Army rules, referred above. A sum of Rs.5000/- has also been handed over to the counsel for the respondent wife as litigation expenses.”

(Emphasis supplied)

By making a reference to the aforesaid order passed, counsel for the petitioner contends that the order dated 30.11.2011 passed by the District Judge, Gurugram was modified by the High Court and the petitioner was held entitled for the amount of 27.5% which is her share and her daughter's share as per Army Rules. An amount of Rs.5000/- had also been handed over as litigation expenses.

It is thus contended that the order regarding grant of maintenance originally passed in the exercise of the powers under Section 90 (i) of the Army Act, 1950, thus is supplanted in the order dated 23.12.2014 passed by this Court in Civil Revision No.7727 of 2011. Their entitlement to the aforesaid amount of 27.5% having been thus directed in above order, the entitlement of the petitioner and her minor daughter to the aforesaid maintenance thus flows from the said order passed by the High

Court under Article 227 of the Constitution of India. He thus submits that the Army Authorities thereafter could not have revisited the grant of compensation to the petitioner and the appropriate remedy available to the petitioner was to raise a challenge to the aforesaid order dated 23.12.2014 or to seek a clarification of the same, if so advised.

Learned counsel for the respondent No.6, however, controverted by submissions that the said order would not be applicable against the right of respondent No.6 since the scope of above said Civil Revision was restricted to the extent of litigation expenses that were being claimed by the petitioner and that the order dated 23.12.2014 cannot be read as awarding of any maintenance allowance to the petitioner. He further submits that what had been noticed by the High Court in its order dated 23.12.2014 was only the fact that an order under Section 90 (i) of the Army Act, 1950 was passed on 29.11.2009 (Annexure P-3) and that once the foundation of the aforesaid maintenance order ceases to exist, the order dated 23.12.2014 has to be interpreted in the same manner. He further contends that the impugned order passed by the Army Authorities does not in any manner preclude the petitioner from taking recourse to the alternative remedies available to her and that she would be entitled to seek determination of compensation as per the procedure of law. He further submits that the Authorities have rightly taken into consideration the fact that the petitioner had misrepresented about the immovable property i.e. a plot having been transferred in her favor at Dehradun. Further, it was noticed by the Authorities that the bank account of the petitioner reflected a much higher credit value which was beyond the amount given by

respondent No.6 towards maintenance allowance. It is also noticed by the Competent Authority that the petitioner had not raised a dispute qua her employment with the SR Public Century School, Bahadurgarh, and that the petitioner was also drawing salary during this entire period. The above said material concealment having been noticed and not being a subject matter of dispute, the order in question does not suffer from any vice, illegality, impropriety or non-appreciation of evidence available on record.

I have heard the learned counsel for the respective parties and have gone through the documents on record.

An essential question that arises for consideration is as to whether the compensation awarded to the petitioner vide order dated 30.11.2009 is supplanted in the order dated 23.12.2014 passed by this Court in Civil Revision No.7727 of 2011 and/or as to whether the above said order merely noticed the order dated 30.11.2009 about the compensation/maintenance awarded to the petitioner and did not rule on the aforesaid aspect. In case this Court upholds that the aforesaid order amounts to awarding of compensation/maintenance to the petitioner and her daughter to the extent as awarded by the Military Authorities prior in point of time, the subsequent alteration of the said order by the Competent Authority under Section 90 (i) of the Army Act 1950, would have no further bearing since the right would then flow from the order passed by this Court on 23.12.2014.

In order to appreciate the same, it is necessary to refer to Section 90 (i) of the Army Act, 1950 which is undisputedly applicable in

the present case. The plain reading of the aforesaid provision clearly shows that a power is conferred with the Army Authorities to pass an order of maintenance to the wife and children of the serving Army personnel. Accordingly, the Authorities were within their jurisdiction to assess maintenance to be awarded. The Army Authorities may take any policy decision, however, the said policy decision would not vitiate an order which is otherwise passed in consonance with the provisions of Section 90 (i) of the Army Act, 1950 unless such order is set aside as per law.

The order of 30.11.2019 directed deduction of 27.5% salary of the respondent No.6 and the above deduction was to continue till the subsistence of the marriage with the officer or till her death. None of the above two eventualities have occurred.

The challenge raised through O.A. 60/2010 only resulted in affirmation of the order, till finalization of the matter by Civil Court. Review application against the said order of AFT was also dismissed vide order dated 13.10.2016. The order had thus become final. Counsel for the respondent No.6 or the Union of India has failed to refer to any provision of the Army Act or the Rules framed thereunder as per which, an order passed by the Competent Authority which had been affirmed by the AFT could be reviewed by the Departmental Authority.

It is well settled provision in law that power of substantive review has to be conferred on the Authority by the Statute. If no such authority is conferred, such jurisdiction cannot be exercised.

Reliance has been placed by the respondents on the order dated 19.09.2019 passed by AFT to justify the order. A perusal of the said order dated 19.09.2019 shows that the same raised a challenge to the order dated 13.10.2016 whereby review application was dismissed and the principal order was never a subject matter of challenge. Apparently, the respondents preferred a new O.A. 208/2017 only to the order on review for achieving an end which could otherwise have not been attained. An order that had already been affirmed by AFT is being sought to be set aside by another O.A. after a delay of 7 years. In the event of the respondent No.6 challenging the original order, the said fact would have been highlighted immediately and would have raised challenges for the respondent No.6. Interestingly, even the said order only merely directs the respondent Authorities to investigate the matter afresh and does not set aside the impugned maintenance order or direct the Authorities to pass a fresh order of maintenance. In the absence of any such direction, the order passed by Authorities seems to be based on misreading into it by inference what has not been expressly provided. The Authorities could have thus only made the investigation. The respondent No.6 could have thereafter filed an appropriate petition on the strength of the investigation. However, so long as the order of maintenance is set aside or is reviewed as per the procedure of law, such order has to be given effect. No reasons have also been given as to why the proper course has not been followed.

Notwithstanding the same, the question which would next arise is as to whether the order 23.12.2014 can be construed as a direction/order passed by a Civil Court and as affirmed by the High Court. It is thus

necessary to make a reference to the order dated 23.12.2014 that has already been extracted in the preceding part of the present judgment.

It is not in dispute that this Court had noticed that vide decision dated 30.11.2009 in exercise of the powers conferred under Section 90 (i) of the Army Act, 1950 read with Army Rule 193, the GOC in Southern Command had accorded sanction for 27.5% per month from the pay and allowance of the respondent No.6-husband to subsist till the marriage or death in the case of the wife and in the case of the daughter till she gets married or till her death whichever is earlier. It was also noticed that an amount of Rs.22,737/- was being paid to the wife (respondent therein) and she had approached the Court for litigation charges alone and that the Court had committed an error that the sum of Rs.22,737/- should be paid as maintenance *pendente lite*. There was no such prayer made by the petitioner in the said proceedings instituted before the Competent Court. However, before parting with the aforesaid Civil Revision, the Single Judge of this Court modified the order dated 30.11.2011 passed by the District Judge, Gurugam and held that ‘the wife will be entitled for the amount @ 27.5% which is her share and her daughter’s share as per Army Rules referred to above.’

A plain reading of the aforesaid shows that this Court has also held entitlement in favour of the petitioner wife to the extent of 27.5%. The said percentage is, however, based on the order passed by the Competent Authority on 30.11.2009.

The order of maintenance dated 30.11.2011 passed by the District Judge, was thus considered by the High Court and the said order was modified and petitioner was held entitled to 27.5% as her share. The said order dated 23.12.2014 passed by the High Court modified the order of District Judge and apportioned maintenance under its own order. It would have been entirely different in case the High Court would have recorded in its order dated 23.12.2014 that the petitioner would be entitled for an amount as assessed as per Army Rules. Rather the High Court quantifies the percentage of entitlement in its own order. Hence, the order dated 30.11.2009 would thus in essence get modified as per order dated 30.11.2011 passed by the District Judge, Gurugram and finally merge in the order dated 23.12.2014 passed by High Court in C.R. No.7727 of 2011.

Consequently, the entitlement having been affirmed by this Court by supplanting the order dated 30.11.2009 by its order dated 23.12.2014, the respondent Authorities were thus under an obligation to ensure disbursement of the maintenance in terms of the order dated 23.12.2014 passed by this Court.

Further, the respondent-Authorities did not grant any opportunity of hearing to the petitioner before passing of the impugned order dated 08.09.2020 (Annexure P-24).

Hence, considering it from any perspective, the impugned order cannot be held sustainable and is liable to be set aside being based on erroneous interpretation of law and ignoring order of the High Court. The

impugned order however grants liberty to petitioner to seek avenues in pending proceedings.

Since the impugned order itself has been set aside, the liberty granted to petitioner thus needs to be modified for it to be in favour of the party aggrieved.

Hence, the respondent-Authorities shall continue to pay maintenance as originally awarded vide order dated 30.11.2009 and as supplanted vide order dated 23.12.2014 passed in C.R. No.7727 of 2011 by the High Court till such order is modified or set aside as per law. This is without prejudice to the rights of the parties to avail further avenues as per law against the order of maintenance.

The present petition is accordingly disposed of by setting aside impugned order and upholding payment of maintenance @ 27.5% share of salary as apportioned with liberty to the parties to take recourse to the remedies available in accordance with law.

February 21, 2023
raj arora

(VINOD S. BHARDWAJ)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No