

CASE NO.:
Appeal (crl.) 1082 of 2005

PETITIONER:
Sheel Kr. Roy

RESPONDENT:
Secretary M/O Defence & Ors

DATE OF JUDGMENT: 18/05/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. Sinha, J :

1. Interpretation and application of some provisions of the Army Act 1950 (hereinafter referred to as "The Act") and Army Rules, 1954 (hereinafter referred to as "The Rules") arises for consideration in this appeal, which arises out of the judgment and order of a Division Bench of the Delhi High Court dated 4.3.2005 passed in Writ Petition (Civil) No.3442 of 1998, dismissing the writ petition filed by the appellant herein.

2. Appellant joined the Army Service on or about 18.8.1981. He is a holder of B.Sc. (Biology) degree. He has received trade training in the Army as a Technician Electronic System. He passed the 54th Entrance Examination from Army Cadets College from Dehra Doon in the year 1986. He secured first position in the South Command and third position on an all India basis. In ordinary course, he would have become a Commissioned Officer upon obtaining training from Army Cadet College, Dehra Doon but prior thereto he was posted to Ladakh. While posted at Leh, owing to high altitude of the place, he developed psychiatric problems. For want of necessary care, he became a psychiatry patient. He had to undergo treatments in the Army Hospitals situated at Chandigarh, Allahabad, Jabalpur and Ambala.

3. In the Medical Board proceedings held on 22.4.1987, the appellant was put in medical category 'CEE' wherein it was opined :

"This 27 yrs. Old serving soldier with more than 5 yrs. of service is a case of Neurosis-onset of illness in early Jan. 1987 while serving in high altitude area.

Illness was characterised with acute onset of attacks of chest pain, giddiness, vomiting and tingling sensation all over the body, physical.

Present Condition.

Examination and relevant laboratory parameters were within normal limits. He was evaluated psychiatrically at CH (WC) in Chandigarh in Feb. 87.

Psychologically he was tense anxious and worried. He showed preoccupation on somatic symptoms, craved for sympathy. Exaggerated his symptoms and expressed his inability to withstand extreme cold climate and other environmental constraints, of high altitude area. He had sleep and appetite disturbances with normal insight and judgment.

He has been managed with psychotherapy and anxiolytics for which response is favourable it presents a symptomatic. He is cheerful and has no overt signs of anxiety. On motivation for

further service is FM SF-10 dated 10 Apr. 87 is unsatisfactory. He needs to be observed in low medical category.

Recommended to be placed in medical category CEE temporary psychological for 6/12 yrs.

To be reviewed thereafter with fresh AFMSF-10 by his O.C. Unit."

[Emphasis supplied]

4. The medical re-categorization which was to take place on or about 21.10.1987 was delayed. He continued to be on medical leave and was categorized to be in CEE category for six months. Thereafter he went on leave as a part of annual leave, but he allegedly over stayed for about 96 days. Some punishment was imposed on him by an order dated 5.12.89. He prior to joining his present posting, was posted in another unit on 20.1.1990. He was allegedly found fit to join his duties. He was again summarily tried and awarded three days' pay fine despite the fact that his medical re-categorization had not been done timely. He was admitted to Medical Hospital, Ambala from 13.5.1990 to 7.6.1990 for medical recategorisation. He was granted casual leave for the period of 7.6.1990 to 18.6.1990 to visit his family, but he allegedly overstayed his leave again for 20 days, even though there is nothing to show as to whether he had been declared fit for joining his duties or not. There is also nothing on record to show that any action was taken against him in respect thereof but admittedly he was admitted to Medical Hospital, Ambala for medical re-categorization. He was transferred to Command Hospital (Western Command) on 16.7.1990.

5. For his purported absence for the period from 16.7.1990 to 22.7.1991, a chargesheet was submitted which reads as under :
"The accused No.14243462A Sigmn(TES) Sheel Kumar Roy of
2 Corps Air Sp. Sig Unit is charged with :-

Army Act
Section 39(a) ABSENTING HIMSELF WITHOUT
LEAVE

In that he, at Ambala Cantt, absented himself without leave from M11, Ambala Cantt. At 1000h. on 16th July 1990 and remained so till surrendered voluntarily at Depot regt. (Corps of Signals) Jabalpur at 0700h on 22 Jul. 91.

Station : Ambala Cantt
Dated : 3 Sep. 91.

Sd/-
(Amarjit Singh)

Col.

Commanding Officer
2 Corps Air Sp. Sig Unit"

6. We would deal with this aspect of the matter a little later, but we may notice that it is borne out from the record that he had again been sent to Command Hospital (Western Command) for medical re-categorization. Having been found fit, he was allegedly discharged from the Hospital on 12.8.1991 upon upgrading to Medical Category 'AYE'. He was summarily tried for another misconduct and was awarded 7 days Rigorous Imprisonment and 7 days Pay fine.

7. It is further interesting to note that a Court of Enquiry was held in terms of Army Rule 22 of the Rules on 3.9.1991 in regard to the alleged overstay from 16.07.1990. In its opinion the Court of Enquiry observed :
"1. No.14243462 S/Man S.K. Roy of 2 Corps Air Sup.
Signal Unit had absconded on 16 July 90 at 1000 h from M.H. Ambala Cantt while still on their strength.

2. No.14243462 S/Man S.K. Roy has been received by this hospital on the authority of 2 Corps Air Sup. Sig. Unit vide their letter No.213/PC/SKR/03/X of 29 Jul 91 and admitted to this hosp. On 30 Jul 91 (FN).

3. Absence period of above patient to be regularized administratively as per existing orders by MH Ambala Cantt/2 Corps Air Sup Sig Unit.

4. o.13964654 L/NK/NA M.S. Pillai ex-MH Ambala Cantt now posted to 151 Base Hosp. Has given false statement after having duly cautioned that he had brought 3 patients where as No.14243462 S/Man S.K. Roy was absconding from MH Ambala Cantt. Disciplinary action against the individual is recommended."

[Emphasis supplied]

8. We may also put on record that, as far back as 17.5.1990, his behaviour having been found unsatisfactory, an opinion was formed that 'his mental outlook and personal habits and his behaviour in the unit being unsatisfactory' as it was recommended not to retain him in service.

9. It is really a matter of grave concern that, despite the recommendations of the Court of Enquiry, he while undergoing punishment of 7 days' Rigorous Imprisonment by the order dated 30.8.1991, the charge-sheet in question being dated 3.9.1991 was issued to the appellant by the Commanding Officer of his unit. He was tried in a Summary Court Martial proceeding held on 7.9.1991 only for an hour i.e. from 13.45 to 14.45 hrs. It is not again in dispute that the Commanding Officer himself was the Prosecutor and also the Judge. He was held guilty and sentenced to undergo six months' rigorous imprisonment and was also the punishment of dismissal from service. On Appeal, the Chief of Staff, however, by order dated 5.10.1991 remitted three months' Rigorous Imprisonment maintaining the sentence of dismissal. He made representations before the higher authorities.

10. The Writ Petition filed by the appellant, as noticed hereinbefore, has been dismissed by the High Court. We may, however, before proceeding with matter notice that the records of the Court of Enquiry were not placed before the High Court.

11. Ms. Lily Thomas, learned counsel appearing on behalf of the appellant inter alia would submit :

(i) Appellant having been suffering from mental illness and having been undergoing rigorous imprisonment for seven days on a different charge, service of the charge on him during that period as also holding of a Court Martial wherein the Commanding Officer played both the role of a prosecutor as also a Judge amount to denial of his human right as also Article 21 of the Constitution of India. No legal assistance was also provided to him and furthermore no time having been granted for preparation of his case as he was in custody, the proceeding should be treated to be an eye-wash.

(ii) Imposition of two punishments, viz., rigorous imprisonment as also dismissal from service is violative of Section 39 read with Section 71 of the Act.

(iii) Appellant having been found to be not fit for being retained in service in a medical proceedings held on 17.5.1990, quick successive convictions one for making a complaint to the Adjutant General directly and another for violation of Section 39 of the Act must be held to be wholly illegal. Charge against the appellant in regard to his alleged unauthorized absence was based on incorrect facts as from the movement order filed by the respondents

themselves, it would appear that he had been admitted in Medical Hospital, Ambala on 11.7.1990.

(iv) Recommendations of the Court of Enquiry although noticed by the Commanding Officer himself in the Summary Court Martial Proceedings having not been taken into consideration, the said authority must be held to have misdirected itself in law. Had the recommendations been taken into consideration, the Commanding Officer would have regularized his leave and in any event he having been found to be admitted in a Medical Hospital or in a Hospital as a patient, the findings of unauthorized absence is perverse.

12. Mr. Vikas Singh, learned Additional Solicitor General, appearing on behalf of the respondents, on the other hand, would submit that:

(i) the appellant having been found fit for joining his services, no illegality has been committed by the Commanding Officer in awarding a punishment of six months' Rigorous Imprisonment as also dismissal from service.

(ii) Although the appellant had pleaded guilty before the Commanding Officer, he had proceeded in terms of Section 116 of the Act on the premise as if the delinquent officer had not pleaded guilty and, thus, the Summary Court Martial proceedings must be held to have been conducted in accordance with law, particularly when he had again pleaded guilty before the Commanding Officer in the said proceedings.

(iii) The contentions raised before us having not been raised before the High Court, this Court should not entertain the same.

13. The fact that the appellant was suffering from mental illness for a long time is not in dispute. We have noticed hereinbefore that he was recommended to be placed in Medical Category CEE for six to twelve years. His medical re-categorization, however, had not been done periodically.

14. From the records produced by the respondents, it is evident that the appellant had remained in one or the other Army Medical Hospitals from 8.7.1990.

15. Although he is said to have absented himself on and from 10.7.1990, it now transpires that he had been admitted at the Command Hospital, Ambala Cantt from 11.7.1990. This discrepancy has not been explained. The Court of Enquiry in the aforementioned situation must be presumed to have made recommendations for regularization of his leave upon consideration of the relevant records and particularly the movement orders. It is true that the opinion of the Court of Enquiry is only recommendatory in nature but it is also true that the Commanding Officer in a proceeding for Summary Court Martial was required to take that fact into consideration. It is one thing to say that the recommendations of the Court of Enquiry had not been accepted but then if such recommendations had been made having regard to the materials which were brought on the records by the respondents themselves, we are of the opinion that it was obligatory on his part to assign some reasons in support thereof. It is evident that the premise on which such recommendation has been made by the Court of Enquiry was not taken into consideration in the Summary Court Martial proceeding.

16. In any event, the respondents themselves should have explained in their counter-affidavit as to why the recommendations of the Court of Enquiry were not accepted. Once it is held that for the period of the purported absence in question or a part thereof he had not been absconding but was admitted in Military Hospital, Ambala Cantt, the matter deserved a deeper scrutiny at the hands of the competent authority. The movement orders in respect of the appellant who had been described as a patient clearly shows that he was admitted in Amabala Cantt Hospital on 11.7.1990. The movement order furthermore shows that he was also transferred to Chandigarh Hospital.

17. Fairness and reasonableness in the action of the State whether in a

criminal proceeding or otherwise is the hallmark of Article 14 of the Constitution of India. The doctrine of proportionality is one of the grounds on the basis whereof the power of judicial review could be exercised. It was so held in *Ex.Naik Sardar Singh vs. Union of India* and Ors. 1991(3) SCC 213.

18. We may also notice that in *Ranjit Thakur vs. Union of India* and Ors. reported in 1987(4) SCC 611, this Court held :

"\005The question of the choice and quantum of punishment is within the jurisdiction and discretion of the Court-Martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review\005."

19. We although agree with the learned Additional Solicitor General that it is legally permissible to award more than one punishment in terms of Section 71 of the Act but we may notice that Section 39(a) specifically deals with the misconduct in respect of absence without leave. It is one thing to say that legally it is permissible to impose more than one punishments but then also it is another thing that in exercising the said power all attending situations which fell for consideration by the punishing authority in regard to the quantum thereof would not be taken into consideration. It is clear that the Commanding Officer in the Summary Court Martial proceedings failed to take into consideration the relevant fact and, thus, committed an error apparent on the face of the record. We are also of the opinion that in a case of this nature, imposition of both punishment of rigorous imprisonment for six years as also dismissal from service was wholly arbitrary in nature. It is also vitiated in law as all relevant facts were not taken into consideration.

20. The learned Additional Solicitor General took pains in explaining to us that the appellant's condition had improved and, in fact the medical category was upgraded from CEE to AYE and ultimately he was found fit for joining his duties only on 12.8.1991. The said submission, however, in our opinion, does not stand a moment's scrutiny. What was required to be taken into consideration is the conduct of the appellant for the period 16.7.1990 to 22.7.1991. It is not the case of the respondents that even during the said period, his behaviour or mental condition was such which enabled the authorities to put him on trial or his behaviour even during the said period deserved a harsh punishment, assuming he was guilty of commission of misconduct.

21. On their own showing, the respondents accepted that during his entire service career, the appellant remained a mental patient and had been undergoing his treatment in one hospital or the other. It was, therefore, obligatory on the part of the Commanding Officer to take into consideration the said fact for the purpose of arriving at a finding of his guilt on the charges of misconduct as also for fixing the quantum of punishment. It is in that limited sense, assignment of some reasons in a case of this nature must be held to be necessary. It is now a well settled legal principle which has firmly been accepted throughout the world that a person merely by joining Armed Forces does not cease to be a citizen or be deprived of his human or constitutional right. This aspect of the matter has been considered by a Division Bench of the Delhi High Court in *Nirmal Lakra vs. Union of India* & Ors. reported in 2003(1) SLJ 151.

22. Once it is held that arbitrariness of the Commanding Officer in the matter of holding the appellant and awarding punishment upon him is apparent on the face of the record, the impugned order must be held to be wholly unsustainable.

23. We regard our inability to accept the contentions of the learned

Additional Solicitor General that even in a case of this nature we would shut our eyes to the realities of case and allow gross injustice meted to a citizen of India to be perpetuated on mere technicalities.

24. Moreover, we have noticed hereinbefore that the learned counsel for the appellant stated before us that even the recommendations of the Court of Enquiry had not been produced before the High Court. If that be so, even at that stage, the appellant did not have the advantage of a better assistance from his counsel.

25. The question, however, which arises for consideration is the relief which can be granted to the appellant. He has already undergone the sentence. He has not been working since 1991. He had also remained in Hospital for a long time. Although, thus, it is not possible for us to grant him all the prayers made in his writ petition before the High Court, we are of the opinion that keeping in view the peculiar facts and circumstances of this case, interest of justice would be met if it is directed that he should be deemed to have been discharged from 7.9.1991. He would, thus, be entitled to all benefits arising therefrom. The appeal is allowed in part and to the extent mentioned hereinbefore. However, in the facts and circumstances of this case, there shall be no order as to costs.