

CASE NO.:
Appeal (civil) 7052-7053 of 2001

PETITIONER:
UNION OF INDIA AND ORS.

RESPONDENT:
R.K. SHARMA

DATE OF JUDGMENT: 09/10/2001

BENCH:
K.T. THOMAS & S.N. VARIAVA

JUDGMENT:
JUDGMENT

2001 Supp(3) SCR 664

The Judgment of the Court was delivered by S.N. VARIAVA, J. Leave granted. Heard parties.

These Appeals are against an Order dated 16th March, 2001 by which two Appeals, one filed by the Appellant (herein) and the other filed by the Respondent (herein), were dismissed.

Briefly stated the facts are as follows :

The Respondent was, at the relevant time, serving as Deputy Commandant of Assam Rifles. On 28th November, 1986 he was served with a charge-sheet. Thereafter a General Court Martial was held and the Respondent was found guilty of four of the charges. The penalty of dismissal from service was imposed on the Respondent. The Central Government dismissed the Appeal filed by the Respondent. The Respondent then filed a Writ Petition in the High Court. By an Order dated 14th October, 1999, a Single Judge of the High Court held that the Court Martial had been properly conducted and that there was no breach of principles of natural justice. It was further held that the four charges had been established in the General Court Martial and that the Respondent was liable for punishment. It was however held that having regard to the nature and degree of the offences established the extreme and severe punishment of dismissal from service was violative of the provisions of Section 72 of the Army Act, 1950. The order of dismissal was set aside and the matter was sent back to the General Court Martial, for awarding any lesser punishment than dismissal from service. It was directed that the Respondent would not receive any salary and allowances for the period when he was out of service.

Both the Appellant and the Respondent filed Appeals. The Appellate Court refused to grant any stay to the Appellants herein. The Appellants, therefore, approached this Court. This Court by an Order dated 7th August, 2000 granted an interim stay. This was then confirmed by an Order dated 16th October, 2000. By the Order dated 16th October, 2000 the High Court was requested to dispose of the Appeals expeditiously.

The Division Bench has, in the impugned Order, relied upon the authority of this Court in the case of Bhagat Ram v. State of H.P. reported in AIR 1983 SC 454, for proposition that the penalty must be commensurate with the gravity of mis-conduct and that any penalty disproportionate to the gravity of mis-conduct would be violative of Article 14 of the Constitution. To be noted that this case was not under the Army Act, but in respect of a civil servant.

The Division Bench also relied upon the following observations in the case of Ranjit Thakur v. Union of India reported in [1987] 4 SCC 611 :

"Judicial review generally speaking, is not directed against a decision, but is directed against the "decision making process". The question of 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 recognized grounds of judicial review."

Based on the above authorities the Division Bench has held that the sentence awarded was too harsh considering the nature of the allegation and the charge established. The Division Bench has also directed that if the original General Court Martial was not available, as two of its members have retired, then another General Court Martial could be constituted with available members for purpose of imposing a lesser punishment. Being aggrieved by this Order the Appellants have filed this Appeal.

In order to consider the correctness of the impugned Order it is necessary to see the charges which have been held proved. The four charges read as follows :

First Charge
Army Act
Section 63

AN ACT PREJUDICIAL TO
GOOD ORDER AND MILITARY
DISCIPLINE

In that he, at field, on 31 Oct. 84 while being the Officer Commanding 'A' Coy, 11 Assam Rifles on receipt of signal No. 0 2140 dated 31 Oct. 84 from Tac HQ 11 Assam Rifles directing Coy Cdrs to visit fwd posts immediately to check alterness and report all OK did not himself visit the fwd post but improperly detailed JC-111310 Sub GS Panthi, the Senior JCO of the Coy for the task.

Second Charge
Army Act
Section 45

BEING AN OFFICER
BEHAVING IN A MANNER
UNBECOMING HIS POSITION

AND THE CHARACTER EXPECTED
OF HIM.

In that he, at field, between the period 14 Oct. 84 to 30 Nov. 84 drew ration for personal consumption of Rs. 930.37 (Rupees Nine hundred thirty and paise thirty seven) only from the Quartermaster 'A' Coy but did not pay for the same.

Third Charge
Army Act
Section 57(a)

IN A TOUR DIARY
MADE BY HIM KNOWINGLY
MAKING A FALSE STATEMENT

In that he, At field, on 17 Dec. 84 while being the Officer Commanding 'A' Coy in his Tour Diary stated that he left Manigong on 20 Oct. 84 for Tadadege well knowing the said statement to be false.

Fourth Charge
Army Act
Section 57(a)

IN A TOUR DIARY
MADE BY HIM KNOWINGLY
MAKING A FALSE STATEMENT

In that he, at field, on 07.01.85, while being the Officer Commanding 'A' Coy in his Tour Diary stated that he left Manigong on 26 Nov 84 for Shiet well knowing the said statement to be false."

At this stage the Sections of the Army Act, 1950, on which these charges

are framed, may be looked at. The first charge is based on Section 63. Section 63 provides for violation of good order and discipline. Under Section 63 if such a charge is found proved, then on conviction by Court Martial, the person found guilty could be sentenced to suffer imprisonment for a term which may extend to seven years or to some other lesser punishment. The second charge is under Section 45. It is in respect of unbecoming conduct. The punishment is dismissal or such lesser punishment as is mentioned in the Act. The third and fourth charges are under Section 57. They relate to falsifying official documents and making false declarations. On conviction the punishment could be for a term which may extend to 14 years or any other lesser punishment.

Section 72 of the Army Act, 1950, reads as follows :

"72. Alternative punishments awardable by court-martial.-Subject to the provisions of this Act, a court-martial may, on convicting a person subject to this Act of any of the offences specified in Secs. 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable, or in lieu thereof, any one of the punishments lower in the scale set out in Sec. 71, regard being had to the nature and degree of the offence."

Under Section 71 various punishments are prescribed according to scale. One of them, at item (e) is dismissal from service. Above this at items (a) to (d) are : (a) death; (b) transportation for life or for any period not less than seven years; (c) imprisonment, either rigorous or simple, for any period not exceeding fourteen years; (d) cashiering, in the case of officers. Various other punishments with which we are not concerned, are prescribed after item (e). Thus it is to be seen that dismissal from service is a lesser punishment than imprisonment for either 7 years or 14 years as contemplated under Sections 57 and 63 of the Army Act, 1950.

The law on the subject is aptly set out in the case of Union of India v. Major A. Hussain reported in [1998] 1 SCC 537. This was a case where a Major had been court-martialed and dismissed from service. The High Court quashed the Court Martial and the sentence on the ground that the delinquent had been denied a reasonable opportunity to defend himself. This Court, after considering various Army Orders, Rules and Provisions of the Army Act, concluded that the Court Martial had been properly held. It was then held as follows :

"23. Though court-martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of

proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court-martial has jurisdiction over the subject-matter and has followed the prescribed procedure and is within its powers to award punishment."

As stated above, both the single Judge as well as the Division Bench have held that the four charges set out have been proved and that the Respondent was guilty of those charges. Having so held it was not open to the Court to have interfered in the sentence. The awarding of sentence is within the powers of the Court Martial. These are not matters in which Court should interfere.

In our view, the observation in Ranjit Thakur's case (supra) extracted above, have been misunderstood. In that case the facts were such that they disclosed a bias on the part of the Commanding Officer. In that case the Appellant Ranjit Thakur had fallen out of favour of the Commanding Officer because he had complained against the Commanding Officer. For making such a complaint the Commanding Officer had sentenced him to 28 days rigorous imprisonment. While he was serving the sentence he was served with another charge-sheet which reads as follows.

"Accused 1429055-M Signalmán Ranjit Thakur of 4 Corps Operating Signal Regiment is charged with -

Army Act
Section 41(2)

Disobeying a lawful command given by
his superior officer

In that he

At 15.30 hrs on May 29, 1985 when ordered by JC 106251-P Sub Ram Singh, the orderly Officer of the same Regiment to eat his food, did not do so."

On such a ridiculous charge rigorous imprisonment of one year was imposed. He was then dismissed from service, with the added disqualification of being declared unfit for any future civil employment. It was on such gross facts that this Court made the observations quoted above and held that the punishment was so strikingly disproportionate that it called for interference. The above observations are not to be taken to mean that a Court can, while exercising powers under Article 226 or 227 and/or under Article 32, interfere with the punishment because it considers the punishment to be disproportionate. It is only in extreme cases, which on their face show perversity or irrationality that there can be judicial review. Merely on compassionate grounds a Court should not interfere.

We find that the lower Court erred in coming to the conclusion that the punishment of dismissal was violative of provisions of Section 72 of the Army Act, 1950. Section 72 merely provides that the Court Martial may, on convicting a person, award either the punishment which is provided for the offence or any of the lesser punishment set out in the scale in Section 71. Section 72 does not set out that in all cases, a lesser punishment must be awarded. In other words, merely because a lower punishment is not granted, it would not mean that the punishment was violative of Section 72. In any case, in this case, under Section 63 there could have been a punishment of imprisonment for a term which may extend to 7 years. Under Section 57 there could have been a punishment for imprisonment for a term which may extend to 14 years. The charges under Sections 57 and 63 had been held to be proved. The General Court Martial could have imposed a punishment of imprisonment. The General Court Martial has chosen to give a lower punishment of dismissal from service. The Court below should not have interfered on the erroneous assumption that provisions of Section 72 of the Army Act, 1950 had been violated.

Even otherwise, in our view, both the Courts below have erred in coming to the conclusion that the sentence awarded was too harsh considering the nature and degree of the offence established. The first charge, as set out hereinabove, indicates that the Respondent, who was the Commanding Officer of 'A' Company 11 Assam Rifles, had received a signal to visit the forward post, check alertness and report all OK. It is not denied that the signal had been received. It has been proved that the Respondent did not visit the forward post. The Respondent improperly detailed a JCO of the Company to visit the forward post. This was a very serious charge. If a Commanding Officer breaches orders received from the Head Quarters how can discipline be maintained in the Army.

Mr. J.M. Sharma submitted that during that period, i.e. in October 1984, there was an operation, known as operation "Ran Vijay", in progress. He submitted that as a result of the operation the troops were already on high alert. He submitted that 'A' Company had four forward posts. He submitted that just a few days before the receipt of the signal, the Respondent had already visited two of the forward posts viz. Tatadege and Henakar. He submitted that as the troops were already on high alert and as he had just returned back from two of the forward post the Respondent sent the JCO to check alertness in the remaining two forward posts. He further submitted that there was to be a visit, to the 'A' Company, of a VIP and the Respondent was therefore required to remain in Manigong. He submitted that for that reason also the Respondent could not personally visit the forward posts. It was further submitted that in that area, apart them 'A' Company, there were three other Companies, namely 'B', 'C' and 'D' Companies. He submitted that that the Commandants of 'C' Company and 'D' Company had also not visited the forward post after receipt of signal. He submitted that therefore the charge was not that serious and that this was the factor which was taken into consideration by both the Courts below. Mr. Sharma further submitted that even the other charges were not of very serious nature inasmuch as the second charge only related to non payment of a small sum of Rs. 930.37. He submitted that the third and fourth charges only related to making entries in the tour Diary maintained by the Respondent.

We are unable to accept the submissions of Mr. Sharma. It has to be immediately noted that the Company Commandants of 'C' and 'D' Companies had stayed back after getting permission from the Head Quarters. The Respondent did not apply for any permission. The further case that the Respondent was required to stay back because a VIP was to visit the 'A' Company is also of no substance. The VIP was to visit only on 5th November. By that time the JCO, who had been improperly deputed by the Respondent, had already visited the forward posts and come back. Thus the Respondent could also have visited the post and returned well in time to receive the VIP. It is also not possible to accept the case that the Respondent had already visited two of the forward posts a few days earlier. It is to be seen that the third Charge is in respect of making a false entry in the tour diary to show that the Respondent had gone to the forward posts. That charge was proved. This showed that a false entry had been made to show that the Respondent had gone to those posts when in fact he had not gone there. Not only did the Respondent not obey the command from the Headquarter but he falsified records in order to make out a case that he had already gone to two of the forward posts. These are very serious offences. These are offences for which the General Court Martial would have been justified in awarding imprisonment. The General Court Martial took a lenient view by merely dismissing him from service. There was just no justification for interference by the High Court.

Mr. Sharma next submitted that the General Court Martial was not properly convened. When asked whether such a contention was taken up in the Writ Petition. Mr. Sharma placed reliance on the following observations in the Judgment of the Single Judge :

"The petitioner vehemently argued that preliminary hearing when the summary

evidence was recorded, the provisions of rules 22,23 and 24 of the Army Rules, 1954, as well as Army Order 70/84 were not strictly followed. In this context, he pointed out that the Army Order 70/84 prescribed a form which was required to be filled up by the commanding Officer at the time of hearing of a charge against a person subjected to Army Act, 1950, but the said form was not duly filled up by the Commanding Officer." We are unable to accept that the above observation show that in the Writ Petition there was a challenge to constitution of the General Court Martial. The above observations are in respect of a preliminary hearing under rules 22, 23 and 24 of the Army Rules, 1954. This is a hearing which precedes the Court Martial. In any event the High Court has held against the Respondent on this point and no Appeal was filed by him. This point not having been raised in the Writ Petition cannot now be urged before this Court for the first time. We therefore did not permit Mr. Sharma to argue this point.

Under these circumstances, we set aside the Order passed by the learned single Judge as well as the impugned Order. The Writ Petition filed by the Respondent shall stand dismissed. There will be no Order as to costs.