

CASE NO.:
Appeal (civil) 5799 of 2000

PETITIONER:
Pradeep Singh

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 19/04/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Jammu and Kashmir High Court dismissing the Letters Patent Appeal filed by the appellant.

Background facts in a nutshell are as follows:

Absence for a period of 2= months was treated as misconduct and Summary Court Martial was convened in terms of Section 116 of the Army Act, 1950 (hereinafter referred to as the 'Act'). He was charged under Section 39A of the Act by order dated 7.8.1989 for having remained absent from duty without leave. He was tried and punished by a Summary Court Martial vide order dated 16.8.1989. The order of dismissal passed by the Court Martial was challenged in the writ petition primarily on the following grounds:

- (i) that officiating Commanding Officer was not competent to convene the Summary Court Martial and therefore, the proceedings and the sentence awarded by the Summary Court Martial is illegal being without jurisdiction;
- (ii) that the petitioner was neither provided any legal assistance nor allowed to cross-examine the witnesses, and therefore, the right of hearing has been denied to him;
- (iii) that the petitioner having been punished by removal of the rank could not be tried and punished on the same ground.

The respondents took the stand that all the submissions are without foundation. The High Court noticed that the appellant was posted somewhere in Leh and was deputed for Commando course in December, 1988 which he joined in January, 1989. He completed the course on 7.2.1989, but instead of reporting at the Transit Camp after completion of the course, he went home on the assumption that he had already applied for annual leave which must have been sanctioned by his Commanding Officer. He finally reported at 259-Transit Camp on 21.4.1989 and reached his unit on 19.5.1989. His grievance was that immediately after he reached the unit, his rank of Naik was withdrawn. Later he

was directed to appear before the Summary Court Martial on 11.8.1989, which concluded the hearing and awarded the punishment of dismissal. The High Court found that the stand that Officiating Commanding Officer was not competent to convene Summary Court Martial was without substance in view of the definition of "Commandant Officer" as given in Section 3(v) of the Act. So far as the denial of legal assistance is concerned, it was noted that the appellant admitted that Major D.P. Naikavde was named as his friend to advise him during the course of trial. His plea that he did not see the said officer during the court martial was found to be without substance. It was noted that in case he was not assisting him, he could have made a grievance before the Summary Court Martial. That has not been done. There was no substance in the plea. The appellant was informed that on completion of the commandant course he did not immediately join the unit and instead joined after 2= months. He assumed leave may have been granted without any foundation. As he was holding acting rank of Naik, he forfeited the right to hold the same because of his absence from duty without leave as per army Headquarter letter No.94930/AG/PSC (C) dated 21.11.1988. Appellant was not holding the substantive rank of Naik, the same was withdrawn, because of absence without leave. It was in essence withdrawal of a concession given. The plea relating to dual jeopardy was, therefore, without any substance. Accordingly, writ petition was dismissed. Before the Division Bench the stand taken before the learned Single Judge was reiterated. The Division Bench found that in view of the factual scenario as noted by the learned Single Judge, the writ petition had been rightly dismissed. It, however, observed that in case some persons similarly situated were treated with leniency, it was open to the appellant to make a representation which shall be duly considered by the respondents. With the aforesaid observation the Letters Patent Appeal was dismissed.

The learned counsel for the appellant highlighted the same aspects which were urged before the learned Single Judge and the Division Bench. According to him, the withdrawal of the rank was a punishment and the High Court was, therefore, not justified in its view. Learned counsel for the respondent on the other hand supported the orders. With reference to Section 80 of the Act, learned counsel for the appellant submitted that removal of stripes amounted to punishment and, therefore, further action was not permissible. In this context, the rules relating to acting ranks need to be noted. The same is contained in Army Instructions Nos. 84 and 88. Rule 84 relates to promotion for Junior Commissioned Officers and other Ranks. According to the instructions, there are two kinds of promotion, i.e. one acting and other substantive. So far as the acting rank is concerned, they are dealt with in Part I. The same so far relevant reads as under:

"PART I .- ACTING RANKS

2. The following are the general provisions governing the above promotions:-

(a) Acting promotion will be made to fill vacancies in authorized establishment, whether temporary or permanent. Acting rank will remain unpaid until an unbroken period of 28 days has been served in that rank when acting rank will be converted into paid acting rank; pay

will be admissible with retrospective effect from the date of the grant of such acting rank.

(b) The rank of Nb Ris/Nb Sub is a substantive rank. No acting promotion to that rank will, therefore, be made. A senior NCO may, however, be authorized to perform the duties of a Nb Ris/Nb Sub where necessary.

(c) Every Commanding Officer of a Unit or Officer-in-charge Records, where acting promotions are centrally controlled on Corps roster basis, is empowered to make acting promotions, provided that the individuals concerned are in possession of all the qualifications prescribed for the higher rank. The authority competent to sanction acting promotion is also empowered to order reversion from such acting rank. Acting and paid acting promotions or reversions will be published in Part II orders which will be the authority for issue of pay and allowances of the appropriate rank.

(d) Acting rank will be granted from the day the vacancy occurs provided that the individual has assumed the duties of the higher rank from that day and reversion will take place with effect from the day the individual ceases to perform the duties of the appointment for which acting rank is granted or the vacancy ceases to exist except as provided otherwise.

(e) On casual, annual or accumulated annual leave

(i) On casual leave
An individual will retain paid acting rank or paid lance appointment during the period of casual leave and no acting promotion will be permissible in his place. Acting rank will, however, be relinquished from the date of overstayal of casual leave except when the period of casual leave and its overstayal is regularized against annual leave entitlement for the year in which casual leave is taken and as Special Leave vide Rule 6 (d) (ii) of Leave Rules for the Service, Vol. I- Army Cases of overstayal of casual leave owing to sickness will be dealt with as in clause g (ii) below.

(ii) On annual or accumulated annual leave

An individual will retain paid acting rank or paid lance

appointment during the period of annual or accumulated annual leave and no acting promotion will be permissible in his place. Acting rank will, however, be relinquished from the date of expiry of such leave unless the overstayal is due to natural calamities and the period of overstayal is regularized as Special Leave vide Rule 6(d) (ii) of Leave Rules for the Services, Vol. I.- Army.

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Part II deals with Substantive Ranks.

The withdrawal of ranks of Naik was on account of his unauthorized absence and was not, therefore, punishment in that sense. Section 80 on which strong reliance has been placed reads as under:

"80. Sitting in closed court ¶ (1) A court-martial shall, where it is so directed by these rules, and may in any other case on any deliberation amongst the members, sit in closed court.

(2) No person shall be present in closed court except the members of the court, the judge-advocate (if any) and any officers under instruction.

(3) For the purpose of giving effect to the foregoing provisions of the rule, the court-martial may either retire or cause the place where they place where they sit to be cleared of all other persons not entitled to be present.

(4) Except as hereinbefore mentioned all proceedings, including the view of any place, shall be in open court and in the presence of the accused subject to sub-rule (5).

(5) The court shall have the power to exclude from the court any witness who has yet to give evidence or any other person, other than the accused, who interferes with its proceedings."

A bare reading of the provisions along with the Army Instructions make it clear that Section 80 has no application to the facts of the present case.

So far as legality of the Court Martial is concerned, the learned Single Judge has found that the appellant was not holding substantive rank of Naik. The rank which was temporarily given was liable to be withdrawn in case of absence from duty and somebody else had to hold that post. This situation arises when a person who was acting as Naik is not available.

The next ground of challenge relates to legality of proceedings before the Court Martial.

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, 1973 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 be significant degree, a specialized 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 the 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 non-jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that 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 it is within its powers to award punishment.

Above position was highlighted in Union of India and Ors. v. IC \026 14827, Major A. Hussain (AIR 1998 SC 577).

The inevitable result is that the appeal is without merit, deserves dismissal which we direct. However, liberty as given to the appellant by the Division Bench, having not been assailed by the respondents, remains unaltered.