

**ARMED FORCES TRIBUNAL, CHANDIGARH REGIONAL BENCH AT
CHANDIMANDIR**

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**TA 57 of 2010
(Arising out of CWP No.6686 of 1995)**

Jawahar Lal Dutt (deceased) through LRs	...	Petitioner
Vs		
Union of India and others	...	Respondent(s)

For the Petitioner (s) :	Mr. Arun Singla, Advocate
For the Respondent(s) :	Mr. S. K. Sharma, Sr.PC

**Coram: Justice Prakash Krishna, Judicial Member.
Lt Gen (Retd) NS Brar, Administrative Member.**

**ORDER
07.02.2014**

This Writ Petition filed in the Hon'ble Punjab and Haryana High Court challenging the punishment awarded by Summary Court Martial (SCM) is taken up on transfer to this Tribunal as an appeal against SCM under Section 15 of the Armed Forces Tribunal Act, 2007.

The Writ Petition was filed on 24.05.1995 and the petitioner died on 09.09.2006 during the pendency of the Writ Petition. Legal heirs of the petitioner were impleaded and allowed to be taken on record on 18.01.2012 and thereafter the Writ Petition came to be transferred to this Tribunal on 13.03.2012.

The facts alleged are that the petitioner was serving in the Army and was tried by a SCM on 06.12.1989 and was awarded the sentence of dismissal from service. Thereafter the petitioner made a number of representations to the Army Authorities, however, nothing came of it and this Writ Petition came to be filed seeking directions for quashing the SCM proceedings for being without jurisdiction and the sentence being disproportionate, excessive, arbitrary, discriminatory and violative of various statutory provisions and seeking reinstatement of the petitioner into service with all consequential benefits.

The charge against the petitioner (Annexure P3) was that he had overstayed leave granted to him by three days and was consequently tried by SCM and dismissed from service.

It is alleged that the petitioner while in service was awarded some minor punishments on various dates and was issued show cause notice for discharge from service. The discharge was found to be illegal and he was allowed to rejoin service which was not liked by his Commanding Officer. He was granted leave from 16.09.1991 to 14.11.1991 and was to rejoin on 15.11.1991. He could not rejoin due

to domestic compulsions and rejoined on 18.11.1991. He was consequently tried by SCM and dismissed from service. The trial by SCM and the punishment awarded is said to be disproportionate, excessive, arbitrary, discriminatory and violative of various statutory provisions. Repeated representations by the petitioner and his wife were turned down. Hence this writ petition seeking re instatement in service with all consequential benefits.

In the written statement filed by the respondents, it is stated that the petitioner was a habitual offender and had been tried summarily and awarded various punishments six times prior to the SCM and, therefore, the sentence awarded was appropriate and according to the Rules. It is then stated that the SCM was conducted as per rules and procedure and the petitioner had pleaded guilty at the trial.

At the commencement of hearing of the arguments, learned counsel for the petitioner stated that he does not challenge the proceedings, findings and plea of guilty by the petitioner in the SCM. However, he prays for review of the punishment awarded.

To begin with, it would be appropriate to reproduce the charge which was levied against the petitioner. The charge sheet (Annexure P-3) reads as follows :-

“The accused No. 14453069P Nk (Clk) Jawahar Lal Dutt of 2 Field Regiment (SP) is charged with :-

AA Sec 39(b) WITHOUT SUFFICIENT CAUSE
OVERSTAYING LEAVE GRANTED TO HIM,

in that he,

at Jhansi on 15 Nov 91 having been granted leave of absence from 16 Sep 91 to 14 Nov 91, to proceed to home, failed without sufficient cause, to rejoin at 0600h, on 15 Nov 91, on the expiry of the said leave.

Station: c/o 56 APO
Date: 2 Dec 91

Sd/-DG Wakankar
Lt Col
Commanding Officer
2 Field Regiment (SP)”

The petitioner, according to the respondents, could not give any satisfactory reason for 03 days overstaying beyond the sanctioned leave. Some explanation was given by the petitioner that he could not rejoin the duty immediately after the leave period on account of sudden illness of his wife. The said averment, according to the respondents, is not correct as the petitioner has taken different stands in this regard at different point of time. Be that as it may, we proceed on the footing that the petitioner overstayed by 03 days. The question is for such an offence, what punishment should have been awarded to the petitioner. Section 39 of the Army Act 1950 deals with this aspect, and for the sake of convenience, the aforesaid Section is reproduced below:-

“39. Absence without leave. – Any person subject to this Act who commits any of the following offences, that is to say, -

- (a) Absents himself without leave; or
- (b) Without sufficient cause overstays leave granted to him; or

- (c) Being on leave of absence and having received information from proper authority that any corps, or portion of a corps, or any department, to which he belongs, has been ordered on active service, fails, without sufficient cause, to rejoin without delay; or
- (d) Without sufficient cause fails to appear at the time fixed at the parade or place appointed for exercise or duty; or
- (e) When on parade, or on the line of march, without sufficient cause or without leave from his superior officer, quits the parade or line of march; or
- (f) When in camp or garrison or elsewhere, is found beyond any limits fixed, or in any place prohibited, by any general, local or other order, without a pass or written leave from his superior officer; or
- (g) Without leave from his superior officer or without due cause, absents himself from any school when duly ordered to attend there,

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as is in this Act mentioned.”

For the sake of convenience, the sentence awarded by the SCM vide Annexure P-4, is reproduced below :-

“Taking all these matters into consideration, I now sentence the accused No. 14453096P Naik (Clk GD) Jawahar Lal Dutt of the 2 Field Regiment SP to be dismissed from service wef 06 December 1991.

Signed at Jhansi, the sixth day of December, 1991.

Sd/- Lt Col
The Court
IC-27879W Lt Col DG Wakankar
Commanding the 2 Fd Regt SP
holding the trial.

The trial closed at 1510 hours

Sd/- Lt Col
The Court

Promulgated and extract taken at 1515 hours on sixth day of December 1991.

Sd/- Saurabh Kumar
Major
OIC Document”

When the petitioner carried the matter in appeal, the appeal was dismissed by the respondents by taking into consideration the matters which were extraneous to the SCM proceedings. This is apparent from the order dated 24.2.95 (Annexure P-15). The Record Officer while disposing of the appeal of the petitioner was swayed away that overstaying leave is one offence and the petitioner had earlier earned four red-ink entries in the year 1991. We are of the considered view that the said fact was not germane to justify the impugned order passed by the SCM. The petitioner was not charged for red-ink entries awarded to him earlier. The other aspect of the

case is that according to the petitioner, he challenged the recording of red-ink entries before the High Court by filing writ petition being Writ Petition No. 6041 of 1986. During the pendency of the afore-stated writ petition, the departmental appeal filed by the petitioner was accepted by the Army and the competent authority passed the order of reinstatement of the petitioner into service under the provisions of Army Rule 11(2), vide Annexure P-1. Directorate General of Artillery (Arty 3), Army HQs, in its order dated 16.11.87 filed as Annexure P-1, has recorded that two red-ink entries were subsequently amended as black ink entries as per details mentioned therein. In Para 5 of the order, it has been recorded that the petitioner has earned only two red ink entries. For the sake of convenience, Paragraphs 5 and 6 of the said order are reproduced below :-

“5. Since the individual has earned only two red ink entries, petitions of the individual are considered to be justified and it has been decided by the DG Arty that the individual should be reinstated under Rule 11(2) of Army Rules 1954.

6. In view of the above, instructions have been issued to HQ Southern Command Artillery and 76 Medium Regiment to reconsider the case of No. 14453069 Ex Gnr(Clk) Jawahar Lal Dutt for reinstatement into service forthwith in terms of Rule 11(2) of Army Rules 1954, vide our signal No. 341599/Arty-3 dated 16 Nov 87.”

The above factual aspect of the case has not been denied by the respondents in their counter affidavit. In this factual scenario, the Record Officer who disposed of the appeal of the petitioner vide order dated 24.2.95, was not justified in taking into consideration the red-ink entries which was not the subject matter of SCM proceedings. The petitioner had no opportunity of hearing during the SCM proceedings so far as the red-ink entries were concerned.

In the counter-affidavit, the defence set out by the respondents is that the petitioner pleaded guilty before the SCM, to justify the order of dismissal. Even if it is so, plea of guilt cannot justify the passing of the impugned dismissal order. The impugned order has been sought to be supported with the help of two black ink entries and four red ink entries in the record of the petitioner vide Para 3 thereof. It is an acknowledged legal position that validity of an order has to be judged on the reasons mentioned therein. The reasons cannot be supplemented by way of affidavit or otherwise. Reference can be made to a well known judgment of the Apex Court, **AIR 1978 SC, 851, Mohinder Singh Gill Vs Chief Election Commissioner**.

Now the question arises, what we should do in the facts and circumstances of the case. It has been laid down that unless the sentence awarded in disciplinary proceedings, is shockingly disproportionate and the court shall not interfere in the matter and the matter should be restored back to the disciplinary authority generally. It is in the discretion of the disciplinary authority to award appropriate punishment and court should not take responsibility on its shoulders to award a sentence. In **Ranjit Thakur v. Union of India and others, AIR 1987 SC 2386**, the Apex Court has observed as follows :-

“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 the 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. In the present case, the punishment is so stringently disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.”

The above quoted case arose out of Court Martial proceedings and related to an Army personnel. The Apex Court interfered with the punishment imposed by a Court Martial on the ground that it was strikingly disproportionate to the gravity of the offence [**Union of India and others versus Bodupalli Gopaldaswami**, (2011) 13 SCC 553] on the following reasoning :-

“Judicial review generally speaking, is not directed against a decision, but is directed against the decision making process. The 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 be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In **Union of India vs. R.K. Sharma – 2001 (9) SCC 492**, this Court explained the observations in **Ranjit Thakur**. It clarified that in **Ranjit Thakur**, the charge was ridiculous, the punishment was harsh and disproportionate and it was on such gross facts that this Court had held that the punishment was so strikingly disproportionate that it called for interference; and the said observations in **Ranjit Thakur** are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and merely on compassionate grounds, courts should not interfere.”

In the case of **S.R. Tiwari vs. Union of India and another, (2013) 6 SCC 602**, the Apex Court interfered in the matter on the ground that the charges proved of misconduct seems to be of an administrative nature rather than a misconduct of a serious nature and interfered with the quantum of sentence. Similarly, the Apex Court in **Civil Appeal No 4465 of 2005 – Union of India vs. Ex Gnr Ajit Singh** decided on **2.4.2013**, reduced the sentence on the facts of that case.

Having considered all aspects of the matter, the punishment of dismissal from service awarded for the offence of overstaying leave by three days, in our view, is quite clearly disproportionate and harsh. The petitioner was guilty of overstaying leave by three days and the punishment should have been proportionate and appropriate for the offence. We, accordingly, consider it appropriate to set aside the sentence of dismissal and convert it to ‘Severe Reprimand’. Consequently the petitioner will be deemed to be in service till completion of qualifying service for pension and discharged thereafter. He shall not be entitled to any pay and allowances from the date of his dismissal by the SCM, and deemed date to be in service, till the date of discharge. He shall however be entitled to service pension from that date upto his death and his widow shall be entitled to family pension thereafter as per Rules. He shall be entitled to arrears of the pension to be paid to the widow and the widow shall be entitled to the arrears of family pension as also the

current and future family pension as and when it becomes due, in accordance with law.

Necessary action to be taken and the dues paid within a period of four months from the date of receipt of certified copy of this order by the respondents.

The petition is allowed in part with the above directions.

[Justice Prakash Krishna]

[Lt Gen (Retd) NS Brar]

07.02.2014
RS

Whether the judgment for reference is to be put on internet? Yes/No