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Court : Madhya Pradesh

Decided On : Sep-04-2003

Reported in : 2003(4)MPHT282; 2004(1)MPLJ217

Judge : S.P. Khare, J.

Acts : [Army Act, 1950](#) - Sections 72 and 106; Army Rules, 1954 - Rule 22; [Constitution of India](#) - Articles 32, 226 and 227

Appeal No. : Misc. Petition No. 3912/93

Appellant : ismail Khan

Respondent : General Officer Commanding-in-chief, Western Command and ors.

Advocate for Def. : Indira Nair, Sr. Adv. and ;Anoop Nair, Adv.

Advocate for Pet/Ap. : M.P. Singh, Adv.

Disposition : Petition dismissed

Judgement :

S.P. Khare, J.

1. This is a writ petition under Articles 226 and 227 of the [Constitution of India](#) for quashing order dated 19-11-1991 by which the petitioner has been dismissed from service in a Summary Court Martial proceeding and he has been sentenced to rigorous imprisonment for two months, and for a direction to the respondents to reinstate him in service.

2. It is not in dispute that the petitioner was enrolled in the Army Service on 15-6-1984. He was Driver (Mechanical Transport). He was granted leave from 9-5-1991 to 19-5-1991 on his application for attending the marriage of his brother. The petitioner remained absent and joined his duties on 24-8-1991. He overstayed his leave for 98 days. There was recording of 'summary of evidence' on 27-9-1991 as per Rule 22 of the Army Rules. On 15-11-1991 a charge-sheet was served on the petitioner alongwith summary of evidence. He was informed that he would be tried by the Summary Court Martial on 19-11-1991. On that date he pleaded guilty to the charge. The petitioner was provided with service of a 'friend of accused' on that date. The Summary Court Martial directed dismissal of the services of the petitioner and also awarded rigorous imprisonment for two months. The petitioner's appeal against this order was also dismissed.

3. The petitioner's case is that he was suffering from infective hepatitis from 15-5-1991 to 20-8-1991 and therefore, he could not join duties after the expiry of period of his leave. He sent application for grant of leave supported by a medical certificate of Dr. R.S. Chadda, Assistant Surgeon, Government Victoria Hospital, Jabalpur. Summary of evidence was not recorded in his presence on 27-9-1991. He pleaded guilty to the charge before the Summary Court Martial on 19-11-1991 as he was assured by some of the Army Officers that if he pleads guilty he would be dealt with leniently. According to the petitioner the friend of accused also did not provide any assistance to him on that date. He has also pleaded that no Court of inquiry was held after his absence beyond the period of 90 days as provided in Section 106 of the Army Act. It is further stated that the proceedings of the Summary Court Martial were not sent to the higher authorities so that the punishment imposed upon the petitioner could be reviewed by them. According to the petitioner punishment imposed upon him is highly disproportionate. He has stated that his appeal has been rejected without proper consideration.

4. The respondents' case is that the petitioner was not suffering from infective hepatitis. He did not send any medical certificate in support of his application for leave. He did not get himself treated in any Military Hospital and did not obtain any medical certificate from such hospital. It is pointed out that the petitioner remained absent earlier also on two occasions for 34 days and 39 days respectively and he was punished for those lapses. It is pointed out that the petitioner was an undisciplined soldier and he was in the habit of remaining absent from duty without prior sanction of leave. The summary of evidence was recorded in the presence of the petitioner. He pleaded guilty during the Court Martial proceedings of his own accord. The proceedings of the Court Martial were sent to the Headquarter, Western Command and same were duly vetted by DJAG, Headquarter, Western Command and these were found to be just and legal. The Court of inquiry was also held after the absence of the petitioner for more than 30 days on 24-7-1991 and he was declared as deserter as per Section 106 of the Army Act. The punishment imposed upon the petitioner can not be said to be disproportionate. He was absent earlier also on two occasions and that also justifies his dismissal from service. He was really a habitual offender.

5. Learned Counsel for both the sides have been heard. The petitioner was granted leave from 9-5-1991 to 18-5-1991 and he was permitted to suffix Sunday on 19-5-1991. But he remained absent from 20-5-1991 to 24-8-1991. He claimed to have taken treatment for infective hepatitis from Dr. R.S. Chadda of the Government Victoria Hospital, Jabalpur. The petitioner did not send the medical certificate with his application. He has produced a copy of the medical certificate dated 21-6-1991 with his rejoinder. As this certificate was not sent by the petitioner with his application it could not be considered for grant or refusal of leave. It was not produced by him even at the time when the Summary Court Martial proceedings were held. He has produced copy of the certificate with the rejoinder in this Court. It is not possible for this Court to hold on the basis of the certificate that the petitioner was suffering from infective hepatitis. This certificate ought to have been produced either with the application for leave or before the Summary Court Martial by the petitioner in support of his evidence. The plea of the respondents is that the petitioner ought to have taken treatment from Military Hospital at Jabalpur and not from a doctor of the Victoria Hospital, Jabalpur. The

certificate dated 21-6-1991 shows that Dr. R.S. Chadda was a doctor for treatment of T.B. patients. He was not a doctor for treatment of infective hepatitis. This certificate has been issued by Dr. R.S. Chadda on his letterhead. He has done so as a doctor of Victoria Hospital. But there is no record of the hospital showing that the petitioner was either admitted in the hospital for this treatment or he was being regularly examined in the Government Hospital by this doctor. Therefore, the certificate issued by Dr. R.S. Chadda does not inspire confidence. The Military authorities were right in contending that the petitioner who remained absent for about 98 days should have taken treatment, if he was suffering from infective hepatitis, from the Military Hospital so that it could be ascertained with reasonable certainty whether he was really suffering from this disease. The infective hepatitis is generally cured in 3-4 weeks. It does not take 98 days. Therefore, the view taken by the Military authorities can not be said to be unreasonable. The petitioner admittedly pleaded guilty to the charge before the Court Martial. He is said to have done so at the instance of some of the officers under whom he was working. This disputed question of fact can not be examined in a petition under Article 226 of the [Constitution of India](#). It is beyond judicial review. This Court can not give a finding on the point that the petitioner pleaded guilty at the behest of some officers of the Military. It is well settled that the High Court in its writ jurisdiction can not sit as a Court of Appeal upon the finding of the Summary Court Martial. The High Court can not go in such a petition into disputed question of fact and give a finding on the truth or otherwise of an allegation or a counter allegation. The case in a writ petition has to be decided on admitted and undisputed facts. The officer holding the Court Martial held that the certificate dated 21-8-1991 (Annexure D-1) produced by the petitioner was not reliable and took the view that the petitioner can not be believed as he did not bother to take treatment from the Military Hospital at Jabalpur. The petitioner was working in the Army for seven years and if he had been really ill he would have taken treatment from the Military Hospital, Jabalpur. Therefore, the finding of the Court Martial on the basis of admission of guilt by the petitioner can not be disturbed by this Court.

6. The Court Martial found that the petitioner was absent on earlier two occasions also and he was punished for absence from duty for 34 days and 39 days. He was granted leave. In June, 1991 leave due to the petitioner was 30 days and he

applied leave for 98 days. Leave due in the year 1991 had already been drawn by him in the year 1990. Therefore, the Army authorities have rightly held that the petitioner is an indisciplined soldier and he is in the habit of remaining absent from duty.

7. Maintenance of discipline in the Army is of paramount importance. Discipline is back-bone of the Indian Army. The petitioner remained absent for 98 days for which he was tried by the Court Martial. He was absent earlier also for 34 days and 39 days. Therefore, keeping in view all the facts and circumstances of the case, the imposition of penalty of dismissal from service and rigorous imprisonment of two months can not be said to be either too severe or shockingly disproportionate. This Court can not interfere in such a case. The Supreme Court has recently held in *Union of India v. R.K. Sharma*, AIR 2001 SC 3053 : 'Once an army personnel is found to be guilty of the charges made against him it is not open for the Court to interfere with the sentence awarded by the Court Martial. The awarding of sentence is within the powers of the Court Martial. These are not matters in which Court should interfere. While exercising powers under Article 226 or 227 and/or under Article 32, the Court can not interfere with the punishment merely 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.' Earlier in *Union of India v. Major A. Hussain*, (1998) 1 SCC 537, it has been observed that Court Martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is not a case of irrationality and perversity where this Court should interfere by way of judicial review as held in *Ranjit Thakur v. Union of India*, (1987) 4 SCC 611.

8. Learned Counsel for the petitioner has cited an order dated 5-8-2003 of the Central Administrative Tribunal, Jabalpur in which there was interference with the quantum of punishment imposed by the Court Martial. This Court does not agree with the view taken therein. The principles laid down by the Supreme Court in the decisions referred above must be followed. The learned Counsel for the petitioner has also cited the decision of the Supreme Court in *Union of India v. Giriraj Sharma*, (1994) 28 ATC 770, in which the employee under compelling

circumstances overstayed the period of leave by twelve days and in that situation it was held that punishment which was imposed is disproportionate. That case is distinguishable from the present case on facts given above. In Vidya Prakash v. Union of India, AIR 1988 SC 705, it has been held by the Supreme Court that the dismissal of an Army Soldier from service for repeated absence from duty is not disproportionate.

9. The petition is dismissed.

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