

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.4140 OF 2002

Abhimanyu s/o. Dhondiram Lahane,
Age-21 Years, Occu:Nil,
R/o. Makegaon, Tq. Renapur,
Dist. Latur

PETITIONER

VERSUS

- 1] The Union of India
[Copy served through the
Standing Council for Union
of India in the High Court
Bench at Aurangabad]
- 2] The Commanding Officer,
3 Adm, and DVRS Trg Regt.
Artillery Center,
Hyderabad-500031.
- 3] The General / Chief of the
Army Staff of Indian Army,
Army Headquarter, R.K.Puram
New Delhi

RESPONDENTS

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Mr.B.R.Kedar, Advocate for the petitioner
Mr.Bhushan B. Kulkarni, ASG for Respondent
Nos.1 to 3.

...

**CORAM: S.S.SHINDE &
SANGITRAO S.PATIL,JJ.**

Reserved on : 06.06.2016
Pronounced on : 21.06.2016

JUDGMENT: [Per S.S.Shinde, J.]:

This Petition takes exception to the impugned judgment and order dated 23rd July, 2001 passed by the Commanding Officer 3 Adm and Dvrs Trg. Regt. Artillery Center, Hyderabad in Summary Court Martial No. 15145400A and the order No.C/07488/DV-3 passed by the Chief of the Army Staff on 31st May, 2002 in Petition under Section 164 of the Army Act. The petitioner further seeks direction that the punishment awarded to the present petitioner by the respondent nos.2 and 3 is excessive and therefore the petitioner is entitled to be reinstated in service with full back-wages, and consequential benefits with 18% interest.

The Relevant facts in brief, for the purpose of deciding the present Petition are as under:

2] It is the case of the petitioner

that on 29th September, 2000, he was enrolled as Gunner Soldier through regular recruitment process in Army at B.R.O. Aurangabad and sent for training. He had successfully and without any break completed the training and served with the Indian Army up to 23rd July, 2001. It is further the case of the petitioner that before joining the Army, he had prosecuted his studies at taluka place, which is far away from his village. According to the petitioner, due to group politics in his village, the persons from opposite party lodged a false criminal complaint against the petitioner and his family members with an intention to harass them even though the petitioner was not present in the village at the relevant time, and his father was dealing with the case since he was minor, and not residing in the village nor attending the court any time. Therefore, the petitioner was not really concerned with the criminal

proceeding when he was enrolled in the Army. After his enrolment, the record from the Police Station was called by the Army Office and in the said record it was found that the Regular Criminal Case No.147/1999 was pending against the petitioner for the offences punishable under Section 326, 324, 504, 506 r/w. 34 of IPC. As the consequence of which the Commanding Officer had framed the tentative charge against the petitioner under Section 44 of the Army Act, 1950 on 9th May, 2001 for giving negative answer at the time of enrolment when query was put to him that 'Have you ever been imprisoned by the Civil power or are under trial for any offence or has any complaint or report been made against you to the Magistrate or Police for any charge?'. .

3] It is the case of the petitioner that without following the proper procedure and provisions of the Army Act and Army

Rules, the Summary Court Martial was conducted against the petitioner and he has convicted for one months rigorous imprisonment and also has been dismissed from service by the order in Summary Court Martial No.15145400A on 23rd July, 2001.

4] It is further the case of the petitioner that though he has already undergone one month rigorous imprisonment, he has challenged the validity of the order of conviction and dismissal dated 23rd July, 2001 in Summary Court Martial No.15145400A before the Commander in Chief of the Army in Petition under Section 164 of the Army Act. However, the Appellate Authority rejected the same without recording any reasons and without considering the legal provisions. Hence this Petition.

5] The learned counsel appearing for the petitioner submits that the questions

which are required to be asked to the candidate while enrolling him are provided under Appendix-I Form No.II of Army Rules of 1954. In the said Appendix, the question no. 7 is regarding the order of imprisonment passed by the Civil power and the same does not cover query regarding any pending complaint or trial. Therefore, the punishment provided under Section 44 of the Army Act can be awarded only in respect of the false answers given in respect of questions provided under Appendix-I, Form No.II. It is submitted that, before conducting Summary Court Martial and imposing punishment on delinquent, it is necessary to ask him that, whether he objects to be tried by any Officer sitting in Court Martial. However, the said procedure was not followed. It is submitted that the Judicial Magistrate First Class at Ahmedpur acquitted the petitioner in RCC No. 147/1999. The learned counsel invited our

attention to the provisions of Section 44 of the Army Act and submits that on plain reading of the said provision, in cases where the candidates giving false answer wilfully at the time of enrolment, the punishment is provided. The petitioner being unaware of the pending criminal case and below 18 years of age, while answering the question no.7, answered the same in negative. Therefore, the act of the petitioner was not wilful so as to attract the provision of Section 44 of the said Act. In case the Commanding Officer was of the opinion that charge deserved to be proceeded with and not otherwise, the case should have been referred to the Superior Authority and he himself should not have decided the case and pass the order of dismissal for punishing the delinquent. The learned counsel for the petitioner pressed into service the provisions of Rule 17 of the Army Rules, 1954 and submits that, no person

shall be dismissed or removed from the service under Section 20 of the said Act, unless he has been informed of the particulars of the case and action likely to be taken against him and he is given reasonable time to reply in writing. Before ordering the Court Martial every charge should be heard in the presence of the accused and he should be given full liberty to call any witness in his defence and cross examine witnesses. However, the said procedure has not been followed. No prior warning of trial as provided under Rule 34 of the said Rules was given to the petitioner, nor documentary evidence supplied to him as provided under Rule 25 of the said Rules. The defence of the petitioner was not properly considered by the Commanding Officer, and therefore, the order passed by him is bad in law. It is submitted that for one offence petitioner cannot be punished

under Rule 65 by imposing one month rigorous imprisonment and dismissal from service. It was necessary for the Authority to consider the provision of the Probation of Offenders Act, 1958, keeping in view the antecedents of the petitioner that there was no conviction for any offence to his credit. The Authority did not follow the provisions of Article 311 of the Constitution of India. The learned counsel appearing for the petitioner relied upon the judgment of the Supreme Court in the case of *Ex.Naik Sardar Singh Vs. Union of India*¹ and submits that, while awarding punishment the doctrine of proportionality has to be followed. He also pressed into service the judgment of the Supreme Court in the case of *Ranjit Thakur Vs. Union of India and others*² and submits that while conducting proceedings of Summary Court Martial for imposing punishment, the procedural

1 AIR 1992 SC 417

2 AIR 1987 SC 2386 (1)

safeguards have to be followed. The delinquent need to be asked whether he objects to be tried by any officer sitting at Court Martial, in case he is not asked then proceedings stands vitiated as there is no fair trial.

6] The learned counsel further invites our attention to the unreported judgment of the Division Bench of the Bombay High Court, Bench at Aurangabad in the case of the *State of Maharashtra Vs. Balu* in Writ Petition No. 1994 of 2002, decided on 29.10.2014, and submits that, in the similar fact situation, the Division Bench of this Court in the case of *Commissioner of Police and Ors. Vs. Sandeep Kumar*³ has taken a view that, the incident that took place in the petitioner's life particularly when he was young, should be condonable. Therefore, the learned counsel for the petitioner relying upon the pleadings

3 2011 [4] SCC 644

in the Petition, annexures thereto and relevant provisions of the Army Act and the Rules and the Judgment of the Supreme Court in the case of *Ex.Naik Sardar Singh Vs. Union of India [supra]* and *Ranjit Thakur Vs. Union of India and others [supra]* and the High Court in the case of *State of Maharashtra Vs. Balu [supra]* submits that, the Petition deserves to be allowed.

7] On the other hand the learned counsel appearing for the respondents invites our attention to the reasons recorded by the General Chief of the Army Staff in his order dated 31st May, 2002 and submits that the Appellate Authority has given cogent reasons and confirmed the order of sentence of Summary Court Martial held on 23rd July, 2001. It is submitted that, the petitioner was arraigned on a charge under Section 44 of the Army Act for giving at the time of enrolment a wilfully false answer to a question set

forth in the prescribed form of enrolment which was put to him by the enrolling Officer before whom he appeared for the purpose of being enrolled, particulars of the charge averred that while being enrolled as Branch Recruiting office, Aurangabad, on 29th September, 2000, when he appeared before Ris Maj VN Singh, Assistant Recruiting Officer for the purpose of being enrolled for service in the Regiment of Artillery to the question put to him, "Have you ever been imprisoned by the civil power or are under trial for any offence or has any complaint or report been made against you to the Magistrate or police for any charge?", answered "NO", where as cases under Section 326, 504, 506 and 34 of IPC were registered against his name as per the verification by the Supdt. of Police, Latur, Maharashtra. The accused pleaded 'Not guilty' to the charge. He further submits that, the Court after examining the

prosecution witnesses, found the petitioner 'Guilty' to the charge and sentenced him to suffer rigorous imprisonment for one month in civil prison and to be dismissed from the service. It is submitted that, while exercising the writ jurisdiction limited judicial review is permissible. The learned counsel placed reliance upon the ratio laid down in the case of *Shri Sanjay Marutirao Patil Vs. Union of India* in Writ Petition No. 423 of 2005, decided on 31.01.2008 and submits that, the order passed by the respondent authorities is within jurisdiction, and therefore, no interference is warranted in the said order. He further placed reliance in the case of *Shri Shantilal Nagarwal Vs. Union of India* in Writ Petition No.292 of 2003, decided on 19.09.2008, and submits that, the punishment imposed upon the petitioner is not disproportionate and his dismissal from the service has been rightly

ordered by the respondent authorities. The learned counsel further placed reliance on the exposition of law in the case of *Daya Shankar Yadav Vs. Union of India and Ors.*⁴ and submits that, while considering the provisions of Central Reserve Police Force Act and the Rules thereunder, the Supreme Court has taken a view that, the termination of the services of the petitioner therein on the ground that he had given false information is proper. Therefore, he submits that, the Petition may be rejected.

8] We have heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents. With their able assistance, carefully perused the pleadings in the Petition, annexures thereto, the relevant provisions of the Army Act and the Rules and also the Judgments of the Supreme Court and the High Court cited across

4 2011 AIR SCW 396

the bar by the learned counsel appearing for the parties. While considering the case of the petitioner, this Court is bound to keep in view the observations of the Supreme Court in para 42 of its Judgment in *S.N.Mukherjee Vs. Union of India*. The Division Bench of this Court in the case of *Shri Sanjay Marutirao Patil* [supra] while dealing with somewhat similar controversy as has arisen in the present case in para 32 held thus:

32. The Apex Court in paragraph 42 of its judgment in *S.N.Mukherjee v. Union of India* MANU/SC/0346/1990 : 1990CriLJ 2148a has observed that the Constitution contains special provisions in regard to Armed Forces. Chapter III of the Constitution granting fundamental rights is restricted or abrogated in respect of members of armed forces under Article 33 of the Constitution. The appellate jurisdiction of the Apex Court under Article 136 of the Constitution has

been excluded in relation to judgments under the Army Act. Similarly the supervisory jurisdiction of the High Court under Article 227 (4) is excluded in matters relating to armed forces. Only the power of judicial review under Articles 32 and 226 of the Constitution to grant appropriate relief in cases of denial of fundamental rights or if the proceedings suffer from a jurisdictional error or any error apparent on the face of the record remains for being agitated. The finding of the Court of Inquiry cannot, therefore, be gone into. The petitioner's Advocate has fairly not sought to rely upon those proceedings. All that has to be seen is whether the administrative action could be initiated after the Summary Court Martial proceedings were completed and whether due procedure was followed thereat as in the case of Major Suresh Chand Mehta v. The Defence Secretary, (U.O.I.) and Ors. MANU/SC/0129/1991 : AIR

1991 SC 483 followed in Ram Sunder Ram v. Union of India and Ors. 2007 DGLS 751.

Therefore, while exercising the writ jurisdiction under Article 226 of the Constitution of India judicial review is available to the extent stated by the Supreme Court as stated herein above.

9] In the facts of the present case, admittedly, the petitioner was an accused in RCC No.147/1999 for the offences punishable under Section 326, 324, 504, 506 r/w. 34 of IP Code. The relevant question which was asked to the petitioner during verification was that, "Have you ever been imprisoned by the civil power or are under trial for any offence or has any complaint or report been made against you to the Magistrate or police for any charge? While answering the said question, admittedly, the petitioner answered "No". Therefore, the petitioner had given

false information. The Supreme Court in the case of *Daya Shankar Yadav [supra]* while considering the provisions of the Central Reserve Police Force Act and the Rules thereunder, in para 15 and 16 held thus:

15. But in this case, the appellant is not entitled to any benefit of doubt on the question whether he knew the meaning and purport of questions 12(a) and (b). Even assuming that there was ambiguity in the English version of the questions, a reading of the Hindi version of the questions shows a clear indication of the information that was required to be furnished by the declarant. The appellant read the questions in Hindi and answered them in Hindi. We extract below an English translation of query 12(a) in Hindi to show that there was no ambiguity in regard to the question :

English Translation of the question in Hindi

"Have you ever been arrested for any offence or have been prosecuted or have been taken in custody or have been released on bail or have been fined/convicted by court of law or have been debarred/disqualified by any Public Service Commission from appearing at its examination/selection or debarred from taking any examination/restricted by any university or any other educational authority/institution?"

(Emphasis supplied)

The fact that a criminal case was registered against the appellant is not disputed. The fact that no criminal case was pending against him, when he gave the verification declaration in the year 2004, or the fact that he was not convicted or fined or bound down in any case, loses relevance, when he clearly suppressed the material fact that he was prosecuted and thereby made a false statement. Though the English version of the questions could have used a little more clarity, we

cannot agree with the contention that he was misled into answering the question wrongly, as the Hindi version of the questions which were answered by the appellant did not suffer from any vagueness or ambiguity.

16. We are satisfied that the appellant had knowingly made a false statement that he was not prosecuted in any criminal case. Therefore, the employer (CRPF) was justified in dispensing with his services for not being truthful in giving material information regarding his antecedents which were relevant for employment in a uniformed service, and that itself justified his discharge from service. Consequently, we dismiss this appeal as having no merit.

The order passed in the case of *Commissioner of Police and others [supra]* on which heavy reliance has been placed by the petitioner does not take into consideration

the law laid down by the Supreme Court in the following reported cases; (i) in the cases of R.Radhakrishnan Vs. Director General of Police & Ors.⁵, (ii) Union of India & Ors. Vs. Bipad Bhanjan Gayen⁶, (iii) Kendriya Vidyalaya Sangathan Vs. Ram Ratan Yadav⁷, (iv) Delhi Administration through its Chief Secretary and others Vs. Sushil Kumar⁸.

10] The Supreme Court in the case of *Delhi Administration through its Chief Secretary and others Vs. Sushil Kumar [supra]* held that, verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to a post under the State. Though the respondent was found physically fit, passed the written test and interview and was provisionally selected, on account of his antecedent record, the appointing authority

5 AIR 2008 SC 578

6 2008 AIR SCW 4058

7 AIR 2003 SC 1709

8 [1996] 11 SCC 605

found it not desirable to appoint a person of such record as a Constable in the disciplined force. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offences, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequences.

The Supreme Court in the case of *Kendriya Vidyalaya Sangathan Vs. Ram Ratan Yadav* [supra] held, a criminal case was pending on the date when the respondent filled the attestation form. Hence the

information given by the respondent as against column Nos. 12 and 13 as "No" is plainly suppression of material information and it is also a false statement. The information in the said columns are sought with a view to judge the character and antecedents of the respondent to continue in service or not. Therefore, in the facts of that case it is held that, the dismissal from service was proper.

The Supreme Court in the case of R.Radhakrishnan Vs. Director General of Police & Ors. [supra], while considering non disclosure of the material fact as to involvement of the applicant in criminal case that too a cognizable offence under Section 294 (b) of IPC. When the applicant applied for the post of Fireman amounts to suppression of material fact, and therefore, question of exercising an equitable jurisdiction in favour of the applicant would

not arise. While considering the provisions of Railway Protection Force Act and the Rules, the Supreme Court in the case of Union of India & Ors. Vs. Bipad Bhanjan Gayen held that, Probationer Constable withheld relevant information, as to his involvement in criminal cases, while filing attestation form was not proper. An employment as a Police Officer presupposes a higher level of integrity as such a person is expected to uphold the law, and on the contrary, such a service born in deceit and subterfuge cannot be tolerated. Therefore, it was held that, the service of termination of the respondent was proper. The Supreme Court in the case of Daya Shankar Yadav Vs. Union of India and ors. [supra] has taken into consideration the ratio laid down in judgments referred above. Therefore, this Court is bound by the exposition of law laid down by the Supreme Court in the aforementioned judgments.

11] At this juncture, it would be apt to reproduce herein below the provisions of Section 44 of the Army Act, 1950, which reads thus:

44. False answers on enrolment. - Any person having become subject to this Act who is discovered to have made at the time of enrolment a wilfully false answer to any question set forth in the prescribed form of enrolment which has been put to him by the enrolling officer before whom he appears for the purpose of being enrolled shall, on conviction by Court-Martial, be liable to suffer imprisonment for a term which may extend to five years or such less punishment as is in this Act mentioned.

As already discussed, admittedly, the petitioner did not disclose about registration of the offence against him and pending criminal case. Therefore, the respondent authority has rightly invoked the provisions of Section 44 of the Army Act, 1950 and rightly convicted him for the said

offence. The said conviction does not call for any interference.

12] The learned counsel for the petitioner submits that the sentence / punishment awarded to the petitioner is harsh and excessive. He submits that the petitioner has been wrongly awarded two punishments for the offence under Section 44 of the Army Act, 1950, though, the nature of the offence is not serious or heinous. We find substance in this contention. As per Section 44 of the Army Act, a person, who is found to be guilty under the said Act, on conviction by Court-Martial, is liable to suffer imprisonment for a term which may extend to five years or such less punishment as is mentioned in the said Act. The Summary Court-Martial sentenced the present petitioner to suffer rigorous imprisonment for one month and dismissal from the service. The dismissal from the service is one of the punishments prescribed under

clause (e) of Section 71 of the Army Act. As per Section 72, a Court-Martial may, on convicting a person of any of the offences specified in sections 34 to 68, both 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 section 71, regard being had to the nature or degree of the offence. A Court-Martial may award a sentence vide Section 73 of the Army Act, in addition to, or without any one other punishment, the punishment specified in clause (d) or clause (e) of section 71 and any one or more of the punishments specified in clauses (f) to (l) of that section.

13] Considering nature of the offence, the Court Martial is expected to award adequate sentence / punishment. In the present case, as seen from the facts stated

in the Petition, the petitioner was confused by the complex question No.7 and could not answer it properly, moreover he has been acquitted of the offences for which he was prosecuted and he was aged about 20 years when he filled up the attestation form. In the circumstances, the Summary Court-Martial should have shown leniency to the petitioner in the matter of inflicting punishment. The punishment awarded to the petitioner, considering nature of the offence alleged against him and the circumstances under which it was committed by him, seems to be harsh and excessive. When the Summary Court-Martial decided to award punishment of dismissal from the service, it was not expected to award the punishment of rigorous imprisonment also. As held in the case of Ex.Naik Sardar Singh [supra], the penalty imposed must be commensurate with the gravity of the misconduct, and that any penalty

disproportionate to the gravity of the misconduct would be violative of Article 14 of the Constitution. Considering the facts and circumstances of the present case, we are inclined to set aside the sentence of rigorous imprisonment for one month awarded to the petitioner, though he has already undergone it, because the said sentence of imprisonment would come in his way in getting some other Government service in future. So far as the punishment of dismissal from the service awarded to the petitioner is concerned, we are of the view that it is quite adequate to the nature of the offence committed by the petitioner. Therefore, we are not inclined to interfere with the said punishment. In the result, we pass the following order:

ORDER

i] The Writ Petition is partly allowed.

ii] The conviction of the petitioner for the offence under Section 44 of the Army Act, 1950 is maintained, however, sentence of rigorous imprisonment for one month awarded to him is set aside.

iii] The punishment of dismissal from the service awarded to the petitioner is maintained.

Writ Petition is disposed of in the above terms. No costs.

Sd/-
[**SANGITRAO S.PATIL**]
JUDGE

Sd/-
[**S.S.SHINDE**]
JUDGE