

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 7872 OF 2023

Avinash Shamrao Billore

... Petitioner

V/s.

Union of India and Ors.

... Respondents

Mr. Sudip Mallick with Mr. Ranjeet Kumar Singh with Mr. Farzana Khan for the Petitioner

Mr. Amarendra Mishra for the Respondents

***CORAM : NITIN JAMDAR &
M.M. SATHAYE, JJ.***

DATE : 30 JANUARY 2024

P.C. :-

The Petitioner was enrolled in the Indian Army, Corps of Signals as a Signalmán. He was posted with 6 Mountain Divisional Signal Regiment, attached to the Depot Regiment. He was granted 20 days casual leave in the year 2020 from 11 July 2020 to 30 July 2020. Upon termination of the said leave, he did not report to his Unit/Transit Camp when the troops were on move towards China border and left the station without informing the Unit Authorities while on leave, until voluntarily surrendering to

Depot Regiment after 5 October 2020. A Summary Court Martial was held under Section 38 of the Indian Army Act. The Applicant was awarded the punishment of dismissal from service 5 February 2021. Subsequently the Petitioner filed Original Application No.100 of 2021 before the Armed Forces Tribunal, Mumbai. The Tribunal, after considering the arguments, the position of law, and the decisions cited by the Petitioner, dismissed the Appeal by an order dated 26 August 2022. Challenging the order of dismissal from service and the dismissal of the Original Application, the Petitioner is before us invoking the writ jurisdiction.

2. We have heard the learned Counsel for the parties.

3. Under the Armed Forces Tribunal Act, 2007, an appeal is provided from the final decision of the Tribunal to the Hon'ble Supreme Court with grant of leave to appeal. The aspect of maintainability and entertainability of the Writ Petition challenging the order passed by the Armed Forces Tribunal and the forum to be provided in the cases relating to service matter of the members of the armed forces was considered by the Hon'ble Supreme Court in the case of *Union of India and Others v/s. Parashotam Dass*¹. The observations of the Hon'ble Supreme Court are as under :-

“28. We can say with some experience of handling these matters in exercise of jurisdiction under Article

1 2023 SCC OnLine SC 314

226, prior to the creation of the Armed Forces Tribunal, that there used to be a large number of pension matters. Persons who had served in the Armed Forces were left at bay at the stage of pension. This jurisdiction is also vested with the Armed Forces Tribunal. It would be difficult to say that there would be a larger public interest involved in a pension matter, but then, for that concerned person, it is of great importance. To deny the High Court to correct any error which the Armed Forces Tribunal may fall into, even in exercising jurisdiction under Article 226, would be against the constitutional scheme. The first independent judicial scrutiny is only by the Armed Forces Tribunal. To say that in some matters, a judicial scrutiny would amount to a second appeal would not be the correct way to look at it. What should be kept in mind is that in administrative jurisprudence, at least two independent judicial scrutinies should not be denied, in our view. A High Court Judge has immense experience. In any exercise of jurisdiction under Article 226, the High Courts are quite conscious of the scope and nature of jurisdiction, which in turn would depend on the nature of the matter.

29. We believe that there is no necessity to carve out certain case from the scope of judicial review under Article 226 of the Constitution, as was suggested by the learned Additional Solicitor General. It was enunciated in the Constitution Bench judgment in *S.N. Mukherjee* case that even in respect of Courts-martial, the High Court could grant appropriate relief in a certain scenario as envisaged therein, i.e. "if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error or any error of law apparent on the face of the record.

30. *How can courts countenance a scenario where even in the aforesaid position, a party is left remediless ? It would neither be legal nor appropriate for this Court to say something to the contrary or restrict the aforesaid observation enunciated in the Constitution Bench judgment in S.N. Mukherjee case. We would loath to carve out any exceptions, including the ones enumerated by the learned Additional Solicitor General extracted aforesaid as irrespective of the nature of the matter, if there is a denial of a fundamental right under Part III of the Constitution or there is a jurisdictional error or error apparent on the face of the record, the High Court can exercise its jurisdiction. There appears to be a misconception that the High Court would re-appreciate the evidence, thereby making it into a second appeal, etc. We believe that the High Courts are quite conscious of the parameters within which the jurisdiction is to be exercised, and those principles, in turn, are also already enunciated by this Court.*

31. *We also fail to appreciate as to why there should be any apprehension of diluting the jurisdiction of the Supreme Court as envisages under the Ac or the constitutional scheme, based on observations made by us in the present judgment.*

32. *We have, thus, no hesitation in concluding that the judgment in Major General Shri Kant Sharma case does not lay down the correct law and is in conflict with judgments of the Constitution Benches rendered prior and later to it, including in L. Chandra Kumar case, S.N. Mukherjee case, and Rojer Mathew case making it abundantly clear that there is no per se restriction on the exercise of power under Article 226 of the Constitution by the High Court. However, in respect of matters of self-discipline, the principles already stand enunciated.”*

Thus Supreme Court while concluding that there cannot be a restriction on the High Court exercising powers under Article 226 of the Constitution of India, held that it would be in the restricted circumstances. While exercising the writ jurisdiction the High Court will not carry out a scrutiny akin to an appeal. Thus the question is whether the case brought before us by the Petitioner can be considered as such a nature where it has resulted in denial of fundamental rights or there is a jurisdictional error or there is any error apparent on the face of the record. cashiering

4. The Petitioner contends that there were justifiable reasons to remain absent for 67 days as he had taken leave since the wife was pregnant and after delivery the Petitioner himself had surrendered and had tendered an apology for overstaying for 67 days. It was contended that the punishment imposed is disproportionate and harsh relying on Clause 448 of the Manual dealing with the scales of punishment awarded by the Summary Court Martial. It was contended that for the absence without leave or overstaying leave, rigorous imprisonment for three months or less to be undergone in the military custody is provided and dismissal from service is not contemplated. The Respondents submitted that in view of Section 71(e) of the Army Act, this contention raised by the Petitioner is not correct. The Respondents submitted that it was not only a case of overstaying beyond leave but it was the case of

desertion when all units were asked to mobilize in an operation launched in response to movement of Chinese army.

5. In the Summary Court Martial, the Petitioner was given full opportunity to provide details in writing. After conclusion of hearing of charges, the Petitioner could exercise his right to call for any defense witness, but Petitioner neither cross-examined the witnesses nor provided any documentary proof. During the trial, the Petitioner pleaded guilty in the presence of two independent witnesses. Yet, the enquiry was not based only on his pleading as guilty but it was carried out as per the Rules. No contention is raised before us that the enquiry in the Summary Court Martial proceedings was not as per the Rules.

6. The Petitioner was granted 20 days casual leave to look after his wife and child. Thereafter, the relatives of his wife took his wife to their home. The Petitioner had sought permission to accompany them but he was not allowed to leave the station. Thereafter, on 31 July 2020 he was asked telephonically to rejoin the Unit as he had to leave the Unit to the operational area of Ladakh as a part of Operation Snow Leopard which the Petitioner did not join. Petitioner when reported to duty on 5 October 2020, had overstayed for 67 days for which there was no written application seeking extension of leave. Respondent tried to contact the petitioner on telephone but he was out of reach. The Respondents

considered the absence of the Petitioner as desertion from the active field area during the Operation Snow Leopard. We do not find that the Deputy Judge Advocate General, who approved the same was in error to do so.

7. As regard the contention of the Petitioner that the punishment was disproportionate, it is on record that there was buildup of Chinese troops on the border and subsequent aggression reflecting the sensitivity of the deployment. Despite his Unit was mobilized against the Chinese on an operation in the high altitude areas, the Petitioner was given leave. However, the Petitioner put himself out of reach and deserted for 67 days to avoid the operational work. Respondents thus were not in error to conclude that the Petitioner deliberately avoided to participate in the operation and therefore, he had shown himself to be unfit to be part of the Army. It is on this basis punishment of dismissal is awarded. We do not find that there was any error in imposing penalty of dismissal from the service. Nor the punishment of dismissal in these circumstances is disproportionate.

8. It was sought to be contended that the order passed by the Tribunal is without hearing the Petitioner. We are informed that the Petitioner had engaged an advocate. There is no cogent reason given whatsoever as to why the Petitioner did not remain present even during the hearing of the Original Application. Before the

Tribunal, the Petitioner had filed a detailed appeal memo and reply affidavit. The Tribunal has therefore gone through the record and has passed a reasoned order recording the conclusion. We do not find that there is any impugned orders suffer from any jurisdictional error or error apparent on the face of the record or are perverse.

9. The Writ Petition is accordingly rejected.

M.M. SATHAYE, J.

NITIN JAMDAR, J.

JYOTI
PRAKASH
PAWAR

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