

Reserved

IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL

Special Appeal No. 63 of 2008

15368768- Y Signal Man A.N. Singh ...Appellant.

Versus

Union of India and another. ...Respondents.

Mr. B.S. Adhikari, Advocate for the appellant.

Mr. Raman Kumar Sah, Advocate for the respondents.

Dated : 31.5.2010

Coram: Hon'ble J.S. Khehar, C.J.
Hon'ble Sudhanshu Dhulia, J.

Sudhanshu Dhulia, J.

1. Present Special Appeal has been filed under Chapter VIII Rule 5 of High Court Rules challenging the order of the learned Single Judge dated 20.2.2008, by which writ petition (bearing No. 6191(S/S) of 2001) filed by the petitioner against his conviction and sentence of the Summary Court Martial dated 14.12.1994 was dismissed.

2. Brief facts of the case are that since 19.12.1988, the petitioner was a Sepoy in the Army Corps of Signals in the Indian Army. He went on a sanctioned casual leave between 7.8.1994 to 19.8.1994, but thereafter he did not report for his duties. Duties were joined by him only on 22.11.1994 at 11 P.M. in the Unit, i.e. after overstaying leave for 95 days. Subsequently, after a Court of Inquiry and Summary of Evidence, the petitioner was subjected to face a Summary Court Martial (**from hereinafter referred to as the SCM**) on the charge of overstaying leave. SCM found the petitioner (appellant) guilty of the charges and convicted him of the same and awarded three months' rigorous imprisonment as well as dismissal from service. This order was challenged by the petitioner

before the learned Single Judge, who did not find any merit in the submission of the petitioner and rejected the writ petition, vide its order dated 20.2.2008. The present Special Appeal is against the aforesaid order of a learned Single Judge.

3. The solitary question raised by the appellant before this Court is that the sentence passed by SCM is wholly without jurisdiction inasmuch on the charges against the petitioner, SCM could have only awarded a sentence of a maximum of imprisonment for a period of three years, he could not have awarded a sentence of dismissal from service. Section 39 of the Army Act, 1950 reads as follows:

“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 or march, without sufficient cause or without leave from his superior officer, quits the parade or line or 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 course, 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.”

4. However, on a closer scrutiny of various provisions of the Army Act, it becomes clear that SCM had the powers to pass the sentence against the petitioner/appellant for the following reasons:

5. Section 71 of the Army Act, 1950 (from hereinafter referred to as Act of 1950) refers to the punishment which can be awarded by a Court-Martial. It reads as under:-

“71. Punishment awardable by courts-martial.—

Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by courts-martial, according to the scale following, that is to say.—

- (a) death;
- (b) transportation for life or for any period not less than seven years;
- (c) imprisonment either rigorous or simple, for any period not exceeding fourteen years;
- (d) cashiering, in the case of officers;
- (e) dismissal from the service;
- (f) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to the ranks or to a lower rank or grade, in the case of non-commissioned officers:

Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy;

- (g) forfeiture of seniority of rank, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers; and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of service;
- (h) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose;
- (i) severe reprimand or reprimand, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers;
- (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service;

(k) forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal.

(l) stoppage of pay and allowances until any proved loss or damage occasioned by the offence of which he is convicted is made good.”

6. Section 71 has further to be seen in the light of Section 72 of the Act of 1950, which states that the Court Martial may, on convicting a person subject to this Act of any of the offences specified in sections 34 to 68 award either the particular punishment prescribed for the offence or in lieu thereof any one of the punishments lower in the scale, which is set out in Section 71. Not only this, Section 73 of the Act of 1950 further states that the Court Martial can award 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. Under Section 120 of the Act of 1950 powers of a Summary Court Martial have been given, which clearly state that a Summary Court Martial may try any offence punishable in this Act and sub-section (4) of Section 120 of the Act of 1950 states that a Summary Court Martial may pass any sentence, which may be passed under this Act except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).

7. Sections 34 to 68 of the Army Act prescribe the offences, which are punishable under the Army Act and the punishments that can be inflicted on conviction for these offences. The appellant before this Court was tried for an offence under Section 39(b) of the Act of 1950, which is without sufficient cause overstaying leave

granted to him. Section 39 of the Act of 1950 has already referred above. Absence without leave is a genus whereas without sufficient cause overstaying leave actually granted is a specie to the aforesaid offence. The appellant was on a sanctioned leave between 7.8.1994 to 19.8.1994 and therefore, should have reported by 20th August, 1994. He only joined his duties on 22.11.1994. Therefore, between 7.8.1994 to 22.11.1994, the appellant overstayed his leave granted to him without sufficient cause. This was the charge against him. The maximum punishment under Section 39 of the Act of 1950 for this offence, on conviction by a Court Martial, is a punishment, which may extend to three years. However, since the appellant was awarded an imprisonment of two months as well as dismissal from service, the counsel for the appellant has contended that Section 39 of the Act of 1950 does not prescribe the punishment of dismissal from service as a punishment, even when a person is convicted of overstaying leave granted to him without sanction. The maximum punishment prescribed under Section 39 of the Act of 1950 is three years of imprisonment.

8. Before the argument of the learned counsel for the appellant can be appreciated, it is worthwhile to first read Sections 72 and 73 of the Act. The two provisions read as follows:

“72. Alternative punishments awardable by court-martial.—Subject to the provisions of this Act, a court-martial may, on convicting a person subject to this Act of any of the offences specified in sections 34 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to be punishable, or, in lieu thereof, any of the punishments lower in the scale set out in section 71, regard being had to the nature and degree of the offence.

73. Combination of punishments.—A sentence of a court-martial may award 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 (1) of that section.”

9. Since Section 71 of the Act of 1950 prescribes the punishment, which may be awarded by a Court Martial on a descending scale. The most severe punishment, which can be awarded by a Court Martial, is death which is the first punishment prescribed under Section 71 of the Act of 1950. Thereafter, the punishment is the transportation for life or for any period not less than seven years and so on. A perusal of the aforesaid Act shows that imprisonment is given under Section 71 (c) and thereafter, under Section 71 (d) is cashiering in the case of officers and then Section 71(e) is for dismissal from service, which are lower in scale under Section 71 of the Act. Section 72 of the Act of 1950 further empowers a Court Martial to award alternative punishments. In short by Section 72 of the Act of 1950, a Court Martial has been empowered to punish a person, who has been convicted of an offence specified under Sections 34 to 68, of any of the punishments which is either prescribed under the particular penal clause or any punishment, which is lower than the punishment prescribed. In other words, if a particular offence prescribes a punishment of dismissal from service, the Court Martial is well empowered to award a punishment of reduction in rank or to a lower rank or grade. Section 73 of the Act of 1950 further prescribes a combination of two punishments in certain cases.

10. All the same, the contention of the learned counsel for the appellant is that regardless of the aforesaid provisions of the Act of 1950, a Summary Court Martial

is not empowered to award the punishment of dismissal from service in addition to a punishment of imprisonment, which it can award under Section 39 of the Act of 1950.

11. According to the learned counsel for the appellant under Section 39 of the Act of 1950, the punishment specified in clause (d) or clause (e) of Section 71 alone can be combined with one or more of the punishments specified in clauses (f) to (l) of that Section.

12. This question, however, stands settled by a Division Bench of the Allahabad High Court in **Ranjit Singh Chaurasia Vs. The Union of India AIR 1976 Allahabad 405**, where it has been stated as follows:

“... According to learned counsel, under Section 73 the punishment specified in clause (d), or clause (e) of Section 71 alone can be combined with one or more of the punishments specified in clauses (f) to (l) of that Section. Learned counsel would have us read Section 73 as though it stood as follows:-

“A sentence of a court-martial may award in addition to the punishment specified in clause (d) or clause (e) of Section 71 any one or more of the punishments specified in clauses (f) to (l) of that section.”

We can see no justification for omitting the words “or without any one other punishment” and the word “and” from the section. The use of the word ‘and’ between the words ‘specified in clause (d) or clause (e) of Section 71’ and the words ‘any one or more of the punishments specified in clauses (f) to (l) of that section clearly shows that these types of punishments may be inflicted in combination with some other type of punishment. The other types of punishments can only be those specified in clause (a), (b) or (c) of Section 71 which are punishments prescribed by Section 34 to 68 for the various offences mentioned therein. The words ‘in addition to, or without any one other punishment’ have also to be given some meaning. In our opinion, these words cover the following two situations, namely,

- (i) in addition to any other punishment; and
- (ii) or without any other punishment.

Read thus, Section 73 empowers a Court-martial to inflict in addition to the punishments specified for the various offences in Sections 34 to 68, the punishments specified in clause (d) or clause (e) of Section 71 and also any one or more of the punishments specified in clauses (f) to (1) of Section 71. It also empowers a court-martial to inflict the punishment specified in clause (d) or clause (e) of Section 71 together with any one or more of the punishments specified in clauses (f) to (1) of that section even if the punishments provided in Sections 34 to 68 are not inflicted.

4. Learned counsel for the appellant urged that, on this interpretation, Section 72 will become redundant as Section 73 itself would empower a court-martial to award the punishments specified in clauses (d) to (1), even when the punishments specified in Section 34 to 68 are not inflicted. In our opinion, the scope of Section 72 is different from that of Section 73. Section 72 empowers a court-martial to inflict some alternative punishment in lieu of the punishments prescribed by Sections 34 to 68. Section 73 empowers a court-martial to combine various types of punishments. Where a court-martial does not desire to inflict the punishments mentioned in Section 34 to 68 but desires to award an alternative punishment lower in scale set out in Section 71, it has to exercise the power under Section 72; but where it desires to combine more than one punishment, it has to take recourse to the power under Section 73.

5. On our interpretation of Section 73 as set out above we are of the opinion that the summary court-martial in the present case had jurisdiction under Section 73 to inflict the punishment of dismissal on the appellant in addition to the punishment of imprisonment for three months. The order of the summary court-martial was in accordance with the provisions of Section 73 and cannot be successfully challenged as being without jurisdiction.”

13. Apart from the above, a Division Bench of this High Court as well in **Chief of Army Staff and others Vs. Naik Padam Bahadur Gurang (Special Appeal No. 139 of 2007)** decided on 31.3.2008 has held that there is no

illegality in the order of Court Martial where combination of punishments has been made.

14. This Appeal, therefore, has absolutely no merit. This Court finds no anomaly in the judgment of the learned Single Judge dated 20.2.2008. Accordingly, the judgment of the learned Single Judge dated 20.2.2008 is upheld and the present Appeal is hereby dismissed.

15. No order as to costs.

(Sudhanshu Dhulia, J.) (J.S. Khehar, C.J.)

31.5.2010

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