

**(1996) 03 AHC CK 0109**

**Allahabad High Court**

**Case No:** C.M.W.P. No. 9989 of 1984

Basti Ram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

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**Date of Decision:** March 14, 1996

**Acts Referred:**

- Army Act, 1950 - Section 52(A), 66
- Constitution of India, 1950 - Article 136, 14, 16, 21

**Hon'ble Judges:** Paritosh K. Mukherjee, J; Kundan Singh, J

**Bench:** Division Bench

**Advocate:** Tej Pratap Singh, for the Appellant; S.C. and Sumit Kumar, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

Paritosh K. Mukherjee, J.

Basti Ram, the Petitioner instituted the present writ petition in 1984. He was 48 years old at that point of time. We are now in 1996, and, thus, the Petitioner must have attained the age of superannuation by now. According to law, the writ petition ought to have been amended.

2. Sri T. P. Singh learned counsel for the Petitioner submitted that the amendment, at this stage, will further delay the proceeding. He drew our attention to the following prayer made in the writ petition:

issue writ, order or direction in the interest of the Petitioner which this Hon'ble Court may deem fit and proper,

and submitted that the writ petition be heard and disposed of, on merits, as otherwise, the matter will further linger on.

3. Sri Sumit Kumar, who appeared for Union of India, did not raise any objection to the aforesaid submission. Accordingly, without going into hyper-technicality of the matter, we are of the view that it would be in the fitness of things, as well as,

interest of justice that the writ petition be disposed of, on merits, treating the Petitioner to have attained the age of superannuation.

4. According to the case of the Petitioner, at the relevant point of time, the Petitioner was posted as Subedar Technical Vehicle 614, Electrical Engineering Battalion 56, Army Post Office, Dehradun. He was Junior Commissioned Officer--Incharge of the workshop.

5. One Captain Swami Nathan Vijayan was charged u/s 66 of the Army Act for abetment as on his direction, the cylinder heads of the vehicles were removed. They were sold out and in their place, two unserviceable cylinder-heads were brought from the shop of one M/s. Edison Sales Corporation, Dehradun and substituted. This mischief was done by one Sri C. H. M. Sahu.

6. Since the Petitioner was officer-in-charge of the workshop concerned, he was charged with the following offence:

Abetment within the meaning of the Indian Penal Code of an offence specified in Section 52(A) of the Army Act in consequence of which abetment of such an offence was committed.

7. On the other hand, the aforesaid Sri C. H. M. Sahu had confessed his guilt. He was, therefore, awarded the following punishment after trial by Summary Court Martial:

(i) forfeiture of seniority for four years.

(ii) to be severely reprimanded.

However, in the case of the Petitioner and aforesaid Capt. Vijayan, General Court Martial was held and the following punishments were imposed:

Basti Ram (the Petitioner)

To be dismissed from service.

Capt. Swami Nathan Vijayan

(i) forfeiture of loss of seniority for three years and 6 months for the purposes of promotion.

(ii) to be severely reprimanded.

8. Sri T. P. Singh, learned counsel for the Petitioner contended that there is a positive finding recorded by General Court Martial that it was Capt. Vijayan, who directed Sri C. H. M. Sahu to open the cylinder heads, and to sell them in open market so as to fetch undeserved money. It has also come in evidence that Capt. Vijayan had informed the Petitioner in May 1980 that two cylinder heads of Lorry 3-tonne TMB were required to be removed from the engine. On being asked as to why, by the Petitioner, he was told that he was not required to ask for the reason as according to Sri Vijayan, whatever orders are given by the higher ups, they are for

the benefit of the unit. It has been established, by evidence, that it was Capt. Vijayan, who was solely responsible for the whole episode.

9. It has been next contended by Sri Singh, that the only thing, which goes against the Petitioner and proved by evidence, is that the Petitioner had asked Sri C. H. M. Sahu to obey the instructions of his immediate superior, namely, Capt. Vijayan.

10. Be that as it may, against the finding of Summary Court Martial, the Petitioner had previously moved a writ petition before this Court, which was disposed of with the observation that since the Petitioner had alternative remedy, by way of preferring appeal, the writ petition was not maintainable.

11. In compliance of the aforesaid direction, the Petitioner preferred an appeal, which is contained in Annexure 2 to the writ petition. The appeal too was decided against the Petitioner by order dated 30.7.1983.

12. It is the aforesaid order of rejection of appeal, which has been challenged by means of the present writ petition.

13. Sri T. P. Singh, learned counsel for the Petitioner vehemently urged before us that S/Sri Vijayan, C. H. M. Sahu and the Petitioner were involved for the same offence. However, S/Sri Vijayan and C. H. M. Sahu have been retained in service and awarded minor punishments, whereas the Petitioner has been singled out and dismissed from service. It, therefore, perpetrates hostile discrimination, and is hit by Articles 14, 16 and 21 of the Constitution of India.

14. Sri Sumit Kumar, learned counsel appearing for the Union of India informed us that Capt. Vijayan too has been dismissed from service. It is only Sri C. H. M. Sahu, who has been retained in service, with minor punishment, which has already been quoted in the body of this judgment. He also drew our attention to paragraph 7 of the counter-affidavit.

15. The counter-affidavit is not on record. However, we accept the averment made in paragraph 7 of the counter-affidavit which contains the statement that Sri Vijayan was, later on, dismissed from service.

16. Having heard learned counsel for the parties and gone through the record of the case, we find that the order passed by appellate authority is cryptic and it clearly displays that the appellate authority has not applied his mind to the facts and circumstances of the case, and, the submissions made by the Petitioner. The appellate order, which is contained in Annexure 4, is being quoted hereinbelow:

I am directed to refer to your petitions dated 20.7.82 and 6.10.82 against the findings and sentence of the General Court Martial and to say that the Central Government have considered your petitions and rejected the same.

We are of considered view that the punishment imposed upon the Petitioner is not commensurate to the charge. It is certainly disproportionate to the charge.

17. In [Bhagat Ram Vs. State of Himachal Pradesh and Others](#), , it was held that penalty imposed, must be commensurate to the gravity of charge of misconduct, and any penalty, disproportionate, would be violative of Article 14 of the Constitution of India.

18. In [Ranjit Thakur Vs. Union of India \(UOI\) and Others](#), , a Division Bench of Supreme Court, consisting of Hon"ble Mr. Justice A. P. Sen and M. N. Venkatachaliah held as follows:

...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 not be immune from correction. Irrationality and perversity are recognised grounds of Judicial review.... In the instant case, the punishment is so strikingly disproportionate as to call for and Justify interference. It cannot be allowed to remain uncorrected injudicial review.

19. In Ranjit Thakur's case (supra), the Hon"ble Supreme Court, in Paragraph 9 of its judgment, has quoted the following observations of Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Services (1984) 3 WLR 1174 (HL):

...Judicial Review has, I think, developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by Judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community....

20. The Hon"ble Supreme Court has clarified the position, further, in [Union of India \(UOI\) Vs. Parma Nanda](#), . The following observations are relevant:

...Our attention was drawn to the decision of this Court in [Bhagat Ram Vs. State of Himachal Pradesh and Others](#), . We do not consider that this decision is of any assistance to support the contention urged for the Respondent. There the facts found were entirely different. This Court...in the interest of justice and fair play thought that a minor penalty would be sufficient....

This decision is, therefore, no authority for the proposition that the High Court or the Tribunal has Jurisdiction to impose any punishment to meet the ends of justice. It may be noted that this court exercised the equitable jurisdiction under Article 136 and the High Court or Tribunal has no such power or jurisdiction.

21. Even after the aforesaid decision in Parmanand's case (supra), the Apex Court, in the latest decision rendered by Hon"ble Mr. Justices K. Ramaswamy and B. P. Jeevan

Reddy and B. L. Hansaria, JJ. in [B.C. Chaturvedi Vs. Union of India and others,](#), reconciled the decision in Bhagat Ram's case (supra) and held that the High Court is not powerless to reduce or modify the punishment.

22. From the facts and in the circumstances of the present case, we are of the view that since a minor punishment was imposed, in similar set of circumstances, rather, in the same offence in which Petitioner is involved, on Sri C. H. M. Sahu, punishment of dismissal from service, awarded to the Petitioner is not commensurate to the charge of misconduct and a case of hostile discrimination has been made out by the Petitioner. The impugned order of punishment, therefore, cannot be sustained in law.

23. The writ petition, therefore, is allowed. The impugned order, dismissing the Petitioner from service is set aside. The Petitioner will be treated as if he was in service throughout the period from the date of dismissal till attainment of age of superannuation. However, this period will be treated as "Dies non" and the Petitioner will not be entitled to salary for the aforesaid period, but, will be entitled to pensionary benefits, computing the aforesaid period towards service. The punishments, which were awarded to Sri C. H. M. Sahu, and have been quoted in the body of this judgment, are also to be imposed on the Petitioner. The Respondents are directed to finalise the retiral benefits of the Petitioner within a period of three months from the date of production of a certified copy of this judgment and order. On the facts and in the circumstances of the present case, the parties are directed to bear their own costs.