

**(2014) 12 J&K CK 0017**  
**In the Jammu And Kashmir High Court**  
**Case No : LPASW No. 241/2001**

|                           |    |            |
|---------------------------|----|------------|
| Madan Lal                 | Vs | APPELLANT  |
| Union of India and Others |    | RESPONDENT |

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**Date of Decision :** 04-12-2014

**Acts Referred:**

**Citation :** (2015) 1 JKJ 246

**Hon'ble Judges :** M.M. Kumar, CJ; Tashi Rabstan, J

**Bench :** Division Bench

**Advocate :** Surinder Kour, Sr. Advocate and Vandana Sharma, Advocate, for the Appellant; Ajay Sharma, C.G.S.C., for the Respondent

**Final Decision :** Dismissed

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## Judgement

Tashi Rabstan, J.â?"This Letters Patent Appeal is directed against the judgment, and order dated 06.07.2001 passed by the Writ Court in SWP

No. 527/1998, whereby the learned Single Judge has dismissed the writ petition filed by the appellant herein. The facts in brief, as borne out from

the writ record, are that the appellant-writ petitioner was appointed as a Constable on 30.07.1966 in the Border Security Force. He earned

promotions upto the rank of Head Constable. He served for about 28 years up to 05.05.1994 when he was dismissed from service vide Order

No. Estt/273/10/94/9509-27 dated 05.05.1994 issued by the Commandant, 10 Bn. BSF, impugned before the Writ Court. The charges against

him were that he directly accepted gratification from different persons for himself for procuring their enrolment in the service. He was accordingly

charge sheeted and eight charges were framed against him under Section 41(e) of the BSF Act. He was tried by the General Security Force Court

and was held guilty of 1st, 5th and 6th charges. He was accordingly dismissed from service. Petition filed by the appellant-writ petitioner under

Section 117(d) of the BSF Act too came to be rejected vide order dated 31.01.1995. Aggrieved by the same, appellant-writ petitioner filed SWP

No. 527/1998 before the Writ Court. The Writ Court vide order dated 06.07.2001 dismissed the petition filed by the appellant-writ petitioner.

Hence the petitioner has filed the present appeal.

2. Heard learned counsel appearing for the parties and perused the writ record as well as the relevant record produced by the Union of India.

3. The grounds taken by the appellant-writ petitioner are that the writ respondents while holding the inquiry did not comply with Rules 48, 170,

173, 175 & 176 of BSF Rules and the Inquiry Officer who conducted the inquiry was not competent to hold the inquiry. Further, it has been

pleaded that the affidavits filed by the appellant-writ petitioner were not taken into consideration nor he was given an opportunity of hearing. It has

also been pleaded that the statements of three material witnesses, namely, Parveen Singh, Major Singh and Madan Lal were not recorded. In

addition, Mrs. Kour, learned senior counsel also argued that the punishment of dismissal from service is disproportionate to the nature of charges.

4. The Writ Court after discussing the evidence dismissed the writ petition, relevant portion whereof is reproduced hereunder:

As indicated above, charges 1st, 5th and 6th stand proved. The findings, which have been recorded by the General Security Force Court are

based on material which had come on record. Material which has been taken into consideration is the statement of Chuni Lai, who appeared as

PW-4. He met the petitioner through his cousin, Sham Saroop. The petitioner informed Chuni Lal that he would arrange recruitment and

demand a sum of Rs. 5000/-. This witness is said to have arranged Rs. 2000 at the first stage. The petitioner asked for rest of the money also.

The statement of this witness that he had paid the money to the petitioner was corroborated by Sham Saroop. It was also established that the

petitioner had also accepted money. For proving 5th charge, evidence of Makhan Singh, PW-1 was taken note of. This witness stated that Pritam

Singh brother of Madan Lal met him at his residence and told him that he can get him recruited in case he pays a sum of Rs. 10,000/- to him. This

witness is said to have paid a sum of Rs. 3500/-. This amount was accepted by the petitioner. Similarly regarding 6th issue, Sher Singh has

appeared as PW-7. He is said to have paid a sum of Rs. 7000/- to the petitioner. This amount was accepted by him. Other evidence has also

come on record, which also establish this charge. As indicated above, it is on the basis of evidence which have come on record, the petitioner has

been found guilty. This court is not supposed to act as court of appeal. So far as procedural aspect is concerned, the respondents did comply with

the procedure. The petitioner made demand for appointment of persons to defend him. A person of his choice was given to him. The evidence

which has come on the record, has been examined by the competent authority. On that basis, findings have been recorded.

5. We have perused the proceedings of General Security Force Court. The record reveals that the appellant-writ petitioner during the entire

proceedings did not raise any objection of composition of General Security Force Court; rather he participated in the entire proceedings. Further,

how the appellant-writ petitioner could take a plea that he was not provided an opportunity of being heard, when in terms of the rules he was

provided a friend to defend his case. In addition, two practicing Advocates from High Court of Jammu & Kashmir as well as High Court of Punjab

& Haryana also defended his case in the General Security Force Court proceedings. With regard to the plea of appellant-writ petitioner that he

was not conversant with the English Language and was thus deprived of his right to know about the proceedings of his case, the record reveals that

he was heard and he had pleaded not guilty to the charges. Thereafter, the Commandant directed for recording of evidence, on the basis of which

the General Security Force Court was convened in which the appellant-writ petitioner was assisted by two practicing advocates along with an

officer of the Force in terms of BSF Rules. Appellant-writ petitioner also participated in the entire proceedings and cross-examined the witnesses.

The Certificate appended with the proceedings also indicates that the petitioner has signed the proceedings, which negates his plea that he was not

aware of the proceedings.

6. Appellant-writ petitioner has also disputed the question of facts which cannot be examined under Article 226 of the Constitution of India unless

the findings are based on "no evidence". The present case is of "appreciation of evidence" and not a case of 'no evidence'. A perusal of the proceedings of General Security Force Court and the evidence recorded reveals that the sentence imposed in the present case is not disproportionate to the gravity of offence. In the given circumstances this Court cannot exercise the power of judicial review in the circumstances of the case.

7. The Apex Court in *Union of India and Others Vs. R.K. Sharma*, , while observing that the High Court or the Supreme Court should not interfere with the punishment merely because it considers the punishment to be disproportionate, has held as under:

11. The law on the subject is aptly set out in the case of *Union of India (UOI) and Others Vs. Major A. Hussain (IC-14827)*, . This was a case where a Major had been court-martialed and dismissed from service. The High Court quashed the Court Martial and the sentence on the ground that the delinquent had been denied a reasonable opportunity to defend himself. This Court, after considering various Army Orders, Rules and Provisions of the Army Act, concluded that the Court Martial had been properly held. It was then held as follows:

23. Though court martial proceedings are subject to judicial review by the High Court under Article 226 of the Constitution, the court-martial is not subject to the superintendence of the High Court under Article 227 of the Constitution. If a court-martial has been properly convened and there is no challenge to its composition and the proceedings are in accordance with the procedure prescribed, the High Court or for that matter any court must stay its hands. Proceedings of a court-martial are not to be compared with the proceedings in a criminal court under the Code of Criminal Procedure where adjournments have become a matter of routine though that is also against the provisions of law. It has been rightly said that court-martial remains to a significant degree, a specialised part of overall mechanism by which the military discipline is preserved. It is for the special need for the armed forces that a person subject to Army Act is tried by court-martial for an act which is an offence under the Act. Court-martial discharges judicial function and to a great extent is a court where provisions of Evidence Act are applicable. A court-martial has also the

same responsibility as any court to protect the rights of the accused charged before it and to follow the procedural safeguards. If one looks at the provisions of law relating to court-martial in the Army Act, the Army Rules, Defence Service Regulations and other Administrative Instructions of the Army, it is manifestly clear that the procedure prescribed is perhaps equally fair if not more than a criminal trial provides to the accused. When there is sufficient evidence to sustain conviction, it is unnecessary to examine if pre-trial investigation was adequate or not. Requirement of proper and adequate investigation is not jurisdictional and any violation thereof does not invalidate the court-martial unless it is shown that the accused has been prejudiced or a mandatory provision has been violated. One may usefully refer to Rule 149 quoted above. The High Court should not allow the challenge to the validity of conviction and sentence of the accused when evidence is sufficient, court martial has jurisdiction over the subject matter and has followed the prescribed procedure and is within its powers to award punishment.

12. As stated above, both the single Judge as well as the Division Bench have held that the four charges set out have been proved and that the Respondent was guilty of those charges. Having so held it was not open to the Court to have interfered in the sentence. The awarding of sentence is within the powers of the Court Martial. These are not matters in which Court should interfere.

13.....On such a ridiculous charge rigorous imprisonment of one year was imposed. He was then dismissed from service, with the added disqualification of being declared unfit for any future civil employment. It was on such gross facts that this Court made the observations quoted above and held that the punishment was so strikingly disproportionate that it called for interference. The above observations are not to be taken to mean that a Court can, while exercising powers under Article 226 or 227 and/or under Article 32, interfere with the punishment 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.

8. Hon'ble Supreme Court in Major General Inderjit Kumar Vs. Union of India (UOI) and Others, , has observed that Court of Inquiry is a fact

finding committee. Since the petitioner was present and had even cross-examined the witnesses, he cannot complain against the procedure

followed by the Court of Inquiry Proceedings. Moreover, the petitioner having cross-examined the witnesses is not prejudiced by the procedure

followed in the Court of Inquiry. Their Lordships observed that:

8. ....The procedure relating to a Court of inquiry and the framing of charges was examined by this Court in the case of Major G.S. Sodhi v.

Union of India. This Court said that the Court of Inquiry and participation in the Court of Inquiry is at a stage prior to the trial by court-martial. It is

the order of the court-martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of

evidence be recorded or that a court-martial be convened. Principles of natural justice are not attracted to such a preliminary inquiry. Army Rule

180, however, which is set out earlier gives adequate protection to the person affected even at the; stage of the Court of Inquiry. In the present

case, the appellant was given that protection. He was present at the Court of Inquiry and evidence was recorded in his presence.....

9. Lastly Mrs. Kour, learned senior counsel argued that the General Security Force Court had been convened under the direction of Inspector

General, whereas in terms of Section 65 of the Act, the same was to be convened by the Central Government or Director General or any officer

empowered in this behalf by the warrant of Director General. Mr. Ajay Sharma, learned CGSC, while agreeing with the same has produced copy

of Warrant for convening GSFC issued by the Director General on 17.01.1981, whereby Inspector General has been empowered to convene the

same in terms of Section 65 of the Act. Therefore, the argument put forth by learned senior counsel is not sustainable.

10. In view of what has been discussed hereinabove and the law cited supra, we do not find any infirmity in the trial of appellant-writ petitioner.

Learned Single Judge has rightly dismissed the writ petition while relying on the judgment of Apex Court in Union of India (UOI) and Others Vs.

Major A. Hussain (IC-14827), . Therefore, on finding no ground to interfere with the judgment passed by the learned Writ Court, we uphold it

and the appeal filed by the appellant-writ petitioner is dismissed along with connected CMA(s), if any. Registry is directed to return the record to

Mr. Ajay Sharma, learned counsel for Union of India, against proper receipt.