
(2014) 10 KAR CK 0096
In the Karnataka High Court
Case No : Writ Appeal No. 5925 of 2001 (S-DIS)

Union of India

APPELLANT

Vs

Minter Marvel Jelly

RESPONDENT

Date of Decision : 31-10-2014

Acts Referred:

Army Act, 1950 — Section 121, 122, 19, 20, 40
Constitution of India, 1950 — Article 136, 20(2), 21, 226, 227
Penal Code, 1860 (IPC) — Section 352

Citation : (2015) 1 AKR 569 : (2014) ILR 5861 : (2015) LabIC 1636

Hon'ble Judges : Rathnakala, J;N.K. Patil, J

Bench : Division Bench

Advocate : B.K. Soodi, CGC, Sriyuths S. Kalyan Basavaraj, Dwarakanath Abakari and V. Padmanabha Kedilaya, Advocate for the Appellant; Arun for L. Govindraj, Advocate for the Respondent

Judgement

Rathnakala, J.—The Union of India/Ministry of Defence is challenging the order dated 5th September 2001 passed by the learned Single Judge of this Court in Writ Petition No. 37710/1995 whereby the respondent is ordered to be reinstated into service along with consequential service benefits.

2. For the sake of convenience, the parties would be referred to as per their ranking in the Writ Petition.

3. Briefly stated the facts are:

The petitioner was working in Army as "Nayak" in 841, Light Regiment, 56 APO, Ajmeer. On the allegation that on 17.3.1994 in the midnight at Ajmeer Railway Station, he assaulted a superior officer, he was tried under Court Martial by issuing charge memo dated 8.4.1994. The Commanding Officer conducted Court Martial as prescribed by the procedure under Rule 22 to 24 of the Army Rules ("the Rules" for short) and Section 80 of the Army Act ("the Act" for short). Vide order dated 13.4.1994 punishment of reduction in rank was imposed on him. Subsequently, another charge memo dated 26.12.1994 was issued for the same

offence. This time the proceedings ended with the punishment of "severe reprimand" and this order was communicated to him on 2.1.1995. Surprisingly on 4.4.1995, he received a show cause notice by the Brigadier of his Unit calling upon him to show cause as to why administrative action should not be taken against him under Section 20 of the Act read with Rule 17 of the Rules and further why his services should not be terminated for the offences committed under Sections 63 and 40(a) of the Act. The petitioner submitted his reply to the show cause notice.

The Brigadier of the Unit by rejecting the cause shown by the petitioner passed the order on 27.4.1995 dismissing his services by exercising his jurisdiction under Section 20 of the Act read with Rule 17 of the Rules. The petitioner challenged the said order under Articles 226 and 227 of the Constitution of India.

4. The petition was contested.

5. When the matter came up for consideration before the learned Single Judge, it was noticed that because of successive trial and punishment, the petitioner was subjected to double-jeopardy. The authority has violated the procedure contemplated under Rule 22(1) of the Rules. It is on the advice of the Deputy Judge Advocate General, the Disciplinary Authority has dismissed the petitioner under Rule 17, but said Deputy Judge Advocate General is a legal Advisor to the Chief of the Army Staff in matters of Military, Martial (in its fighting service aspect) and international law; he assists the Adjutant General in the matters relating to discipline involving application of Military Law; he reviews the Court Martial proceedings for the purpose of advising the Commander-in-Chief whether they are free of legal error.

6. Learned Single Judge further held, as per Regulation 442 of the Regulations, the power to review punishment awarded under Section 80 of the Act is vested in an Officer superior in command to the Officer, who awarded the punishment. Said superior officer in command can exercise this power, if in his opinion, the punishment or sentence awarded is either illegal, unjust or excessive. After such review, he may cancel, vary or remit the punishment and also he is authorized to issue such direction as may be appropriate in the circumstances of the case and no such re-trial to which the petitioner was subjected to, is contemplated is shown by the respondents. Once a person is dealt under the provisions of Section 80 of the Act, second trial was impermissible. The earlier order of punishment dated 13.4.1994 whereby his rank was lowered to that of a "Sepoy" having been set aside and after the re-trial he was imposed the punishment of severe reprimand vide order dated 2.1.1995, the order of dismissal dated 27.4.1995 under the administrative powers vested under Section 20 of the Act read with Rule 17 of the Rules is violative of Article 20(2) of the Constitution of India. Once it was decided to hold Court Martial proceedings against a person, thereafter the authorities are not competent to take action by resorting to extraordinary and wide powers under Section 20 of the Act read with Rule 17 of the Rules. The punishment imposed earlier under Section 80 of the Act after the

Court Martial is not confirmed by the competent authority. On the dictation of the Deputy Judge Advocate General, the authority after holding the court Martial could not have resorted to proceedings under Section 20 of the Act read with Rule 17 of the Rules.

7. Learned Single Judge further finds that the show cause notice issued to the petitioner on 4.4.1995 under Section 20 of the Act read with Rule 17 of the Rules proposing his termination did not display the subjective satisfaction of the authority to dispense the enquiry and his Court Martial was inexpedient or impracticable for reasons other than probable failure to establish the charges and his retention in service is undesirable. The notice issued was only on the dictation of the Deputy Judge Advocate General and not on the subjective satisfaction of the second respondent. On the above line, the initiation of proceedings by issuing notice dated 4.4.1995 was held contrary and violative of the mandatory provisions of Section 20 of the Act read with Rule 17 of the Rules and reinstatement with backwages is ordered.

8. Sri. B.K. Soodi, learned Counsel appearing for the appellants submits that the earlier Court Martial held were not confirmed by the DJAG and on his advice, the show cause notice dated 4.4.1995 was issued. Of course, the show cause notice may not specifically mention the details of the misconduct, but it cannot be overlooked that, the petitioner is well aware of the nature of the charges he was faced with. During the Court martial he had pleaded not guilty for the charges, this time, he has admitted his misconduct and pleaded guilty and tendered apology. The Disciplinary Authority/Brigadier Comrade has certified in the dismissal order that due to certain technical reasons, it has now become impracticable and inexpedient to try him in another court. There is also a mention that his act of misbehavior with the Comrade in uniform and in subordination with superiors reflect his unbecoming soldierly conduct which is detrimental to the military decorum and discipline. Proviso to Rule 17 of the Rules authorizes for dismissal by administrative action by dispensing procedure contemplated in the main part of Rule 17 in an appropriate case and the same is not amenable to judicial review. Using criminal force against the superior officer in the eye of a common man may not be too severe and grave but in the military discipline, if such misconduct is not dealt firmly, it will have long lasting effect on the safety and security of the nation itself. The petitioner is a habitual offender. This was the second offence of similar nature committed by him between December 1993 and March 1994. He has committed the offence of insubordination and exhibited his criminal tendency. Hence, continuing such persons in the Army is detrimental to the interest of the nation. Even after the Court Martial, departmental action is not prohibited and is permissible. The order of dismissal is legal and justified and the impugned order is liable to be set aside.

9. Sri Arun for Sri L. Govindraj, learned Counsel for the respondent in reply submits that this is a case of colourable exercise of power by the authority. The respondent herein was subjected to ordeal of court martial twice and the

administrative action for the third time. Since they could not achieve the required result in the court martial, he is sacked by way of administrative action. If the authority were to invoke Rule 17, it is incumbent for the Officer competent to order, firstly, to form an opinion to the effect that it is not expedient or reasonably practicable to conduct a departmental enquiry. He has to satisfy himself on some tangible material other than the charge to that effect and order for dismissal. Basically, during the departmental enquiry, no corroborative evidence could be collected for the prosecution, the show cause notice lacks material particulars of the misconduct alleged and it is vague. Hence, the punishment order is in utter disregard to the principle of natural justice. Added to that, the punishment imposed was disproportionate to the alleged misconduct. The petitioner having crossed the age of superannuation, now has no expectation of reinstatement. However, he may be ordered back wages with complete retiral benefits by dismissing the appeal.

10. Having heard both learned Counsel and on perusal of the order impugned, we are prompted to address following points:

1) Whether a punishment order passed on administrative side under Section 20 of the Act read with Rule 17, is legal?

2) Whether the impugned dismissal order is not amenable for judicial review?

11. It is a fact that firstly the petitioner was tried by the Commanding Officer of the Unit in a Summary Court Martial for the offence punishable under Section 40(a) of the Act. After completion of the proceedings and promulgation of the sentence imposed, the proceedings of the Summary Court Martial was forwarded to Deputy Judge Advocate General, for his review. The Deputy Judge Advocate General pointed out certain serious lapses in the procedure adopted during the enquiry and advised for setting aside the Summary Court Martial and also punishment imposed. The Brigadier of the Regiment on receipt of the intimation from the Deputy Judge Advocate General ordered for re-trial of the accused as indicated in the intimation. This time, the Commanding Officer of 841, Light Regiment, held a Summary Court Martial proceedings by issuing the charge memo to the writ petitioner and imposed punishment of "severe reprimand".

12. The records of Summary Court Martial proceedings were once again submitted for review to Deputy Judge Advocate General, Headquarters, 12 Corps by Commanding Officer of 841, Light Regiment, on 8.1.1995. On review of the proceedings, the Deputy Judge Advocate General found several infirmities in the procedure adopted by the Commanding Officer while holding Summary Court Martial proceedings and he set aside the entire proceedings, so also the punishment imposed on the petitioner vide communication dated 3.2.1995 Apart from passing remarks against the Officer, who held the trial, it was said in his note at para-7 that:

"7. Keeping in view the seriousness of the offence you may consider to have the services of No. 14358631H Nk (Opr) MM Jelly terminated administratively under

the provisions of Army Act Section 20 read with Army Rule 17."

13. Consequent upon the above, the Brigadier of the Unit initiated administrative action under Section 20 of the Act read with Rule 17 of the Rules against the petitioner and vide his order dated 27.4.1995 he dismissed the petitioner from Army service. For our ready reference, we will have the statute on hand, which was pressed into action by the Disciplinary Authority.

14. Section 20 of Army Act and Rule 17 of Army Rules, read as under:

"Section 20: Dismissal, removal or reduction by the Chief of the Army staff and by other officers--

(1) The Chief of the Army Staff may dismiss or remove from the service any person subject to this Act, other than an officer.

(2) The Chief of the Army Staff may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.

(3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer.

(4) Any such officer as is mentioned in subsection (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer under his command.

(5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.

(6) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a noncommissioned officer, or if he has no permanent grade above the ranks, to the ranks.

(7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder.

Rule 17: Dismissal or removal by Chief of the Army Staff and by other officers--

Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section (3) of section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service:

Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not

been complied with shall be reported to the Central Government."

15. That being the legal position for facility of reference, we will reproduce the show cause notice issued to the employee prior to the dismissal and also the dismissal order:

"Show cause notice:

1. Reference:-

(a) Army Act Sec. 40(a) of Manual of Military Law Volume II.

(b) Army Act Section 20 read with Army Rule 17 of Manual of Military Law Volume II.

2. It has been noticed that you lack the desired standard of military discipline. You have committed the following offence:-

(a) AA Sec. 63. In that, you misbehaved with a military person on 21 Dec 93 and were awarded "Reprimand".

(b) AA Sec. 40(a). In that, you struck your superior officer JO-186526H sub (TA) Ram Singh of 13 Field Regiment with your fist on ni. 17, 18 Mar. 1994.

3. Your above acts of misbehaviour with comrade in uniform and in subordination with senior officer reflects your unbecoming soldierly conduct which is detrimental to the military decorum and discipline.

4. You are hereby called upon to show cause as to why your services should not be terminated under the provision of Army Act Sec. 40(a) of Manual of Military Law Volume II read in conjunction with Army Act Sec. 20 and Army Rule 17 for using criminal force to your superior officer.

5. The reply to this show cause notice should reach this HQ with 20 days from the date of receipt of the notice. If no reply is received within the stipulated period, it will be assumed that you have nothing to say for your defence and an ex-parte decision will be taken.

"DISMISSAL FROM SERVICE

1. You were tried for an offence under Army Act Sec. 40(a) of Manual of Military Law for "USING CRIMINAL FORCE TO SUPERIOR OFFICER". Your act of misbehavior with comrade in uniform and insubordination with superiors reflect your unbecoming soldierly conduct which is detrimental to the military decorum and discipline. Due to certain technical reasons, it has now become impracticable and inexpedient to try you by another Court.

2. In view of proven misconduct, you were serviced show cause notice vide this HQ letter No. 502401/XX/A dated 04 April 1995.

3. Your reply to the show cause notice dated 17 April 95 has been perused by me and has not been found satisfactory.

4. Keeping in view the seriousness of the offence committed by you, I, hereby, dismiss you from service under Army Act Section 20 read in conjunction with Army Rule 17 of Manual of Military Law Volume II with effect from the First Day of May Nineteen Hundred and Ninety Five.

16. Admittedly, it is not a case of prior conviction by a criminal Court. On two counts the administrative action is invoked. Firstly, regarding an incident dated 21.12.1993, while the employee misbehaved with a military person and was reprimanded and secondly, for the misconduct dated 17/18.03.1994, for the misconduct attracting punishment under Section 40 of the Army Act. This Section deals with offences relating to the "use of criminal force or assault, by using threatening language to such officer or using insubordinate language to such officer", these offences except for use of insubordinate language are more severely punishable when committed during active service. The first plank of argument that once the authority failed to prove the second misconduct by way of departmental enquiry dismissing the employee by way of administrative action is impermissible, does not find legal support.

17. As per the judgment of the Apex Court in Union of India and Others Vs. Harjeet Singh Sandhu etc., , such departmental action is permissible. That was the case of a Captain in the Army and the Apex Court elaborated on the administrative power under Section 19 of the Act and Rule 14 of the Rules applicable to his cadre in the matter of termination from service. Section 19 and Rule 14 are in pari materia to Section 20 and Rule 17 respectively applicable to the cadre of "Nayak"/employee herein. It was noted as follows:

"Having thus explained the law and clarified the same by providing resolutions to the several illustrative problems posed by the learned ASG for the consideration of this Court (which are illustrative and not exhaustive), we are of the opinion that the expiry of period of limitation under Section 122 of the Act does not ipso facto take away the exercise of power under Section 19 read with Rule 14. The power is available to be exercised though in the facts and circumstances of an individual case, it may be inexpedient to exercise such power or the exercise of such power may stand vitiated if it is shown to have been exercised in a manner which may be called colourable exercise of power or an abuse of power, what at times is also termed in administrative law as fraud on power. A misconduct committed a number of years before, which was not promptly and within the prescribed period of limitation subjected to trial by court martial, and also by reference to which the power under Section 19 was not promptly exercised may cease to be relevant by long lapse of time. A subsequent misconduct though less serious may aggravate the gravity of an earlier misconduct and provide need for exercise of power under Section 19. That would all depend on the facts and circumstances of an individual case. No hard and fast rule can be laid down in that behalf. A broad proposition that power under Section 19 read with Rule 14 cannot be exercised solely on the ground of court martial proceedings having not commenced within the period of limitation prescribed by Section 122 of the Act,

cannot be accepted. In the scheme of the Act and the purpose sought to be achieved by Section 19 read Rule 14, there is no reason to place a narrow construction on the term "impracticable" and therefore on availability or happening of such events as render trial by court-martial impermissible or legally impossible or not practicable, the situation would be covered; by the expression- the trial by court-martial having become "impracticable".

18. The principle of "double jeopardy" is called in the aid of the employee, but that is of no relevance in the facts and circumstances of the case. His contention is in respect of charge of misconduct under Section 63 of the Act (misbehaviour with a military person), he had been punished by way of reprimand, and could not have been again proceeded for the same charge by way of administrative action. A second trial is prohibited under Section 121 of the Act. Section 121 reads thus:

"121. Prohibition of second trial.-When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court-martial or dealt with under the said sections."

It is to be noted that, he is not tried in respect of any of the offence punishable under Sections 80, 83, 84 and 85 of the Act. He is not punished for any of these offences. Section 121 does not prohibit an administrative action after any person in Army service has been acquitted or convicted by a court martial. Moreover, validity of earlier Summary Court Martial are not before us, since they are already given up by the competent officer. The dismissal order passed under Section 20 and Rule 17 is not by way of trial in a departmental enquiry.

19. It is obvious that the show cause notice is not accompanied with specific details of the misconduct. But that is not the reason to negate the show cause notice. The unconditional apology offered in response to the show cause notice presupposes that he has the knowledge of the allegation made against him. It is not his case before this Court that the apology extended by him was under undue coercion or false assurance. The statutory requirement of Rule 17 is that on informing him of the particulars of the cause of action against him, he shall be given reasonable time to state in writing his say in the matter. Proviso to Rule 17 dispenses even such show cause notice and the principle of audi alteram partem. The only procedure contemplated in proviso to Rule 17 is that a certification by the competent officer that it is not expedient or reasonably practicable to comply with the provisions set out therein; after passing the punishment order, the matter shall be reported to the Central Government. That certification is made by competent officer as per the requirement of Rule 17 in the dismissal order.

20. Elaborating on the features of proviso appended to Rule 17, the Apex Court in the case of Romesh Kumar Sharma Vs Union of India reported in Appeal (Civil) No. 7308/2003 has held as follows:

"The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in *Mullins v. Treasurer of Survey* [1880 (5) QBD 170 , (referred to in *Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha*,) and *The Calcutta Tramways Co. Ltd. Vs. The Corporation of Calcutta*, when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in *West Derby Union v. Metropolitan Life Assurance Co.* (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See *A.N. Sehgal and others Vs. Raje Ram Sheoram and others*, , *Tribhovandas Haribhai Tamboli Vs. Gujarat Revenue Tribunal and others*, and *Kerala State Housing Board and Others Vs. Ramapriya Hotels (P) Ltd. and Others*,).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146) "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in *Forbes v. Git* [1922] 1 A.C. 256). A statutory proviso "is something engrafted on a preceding enactment" (*R. v. Taunton, St. James*, 9 B. & C. 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in *Re Barker*, 25 Q.B.D. 285). A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See *Jennings v. Kelly* [1940] AC. 206).

Under the proviso to Rule 17 the Chief of the Army Staff and other officers are competent to order dismissal or removal without complying with the procedure set out in the main part of the Rule after certifying that it is not expedient or reasonably practicable to comply with the provisions so set out. There is a

further requirement that such cases of dismissal or removal shall be reported to the Central Government."

21. In the above case also, a contention was raised that the enquiry which was initiated should not have been abandoned in between and it should have been continued and the said contention was brushed aside in the writ petition with the observation that the enquiry was not for the appellant but it related to the incident. That clarifies doubts, if any, relating to legality of dismissal/termination by way of administrative action taken in exercise of Section 20 of the Act read with Rule 17 of the Rules.

22. In view of the discussion supra, we have landed up to a phase that the competent officer was well within his jurisdiction in invoking the administrative jurisdiction against the employee. Even after reaching to this stage, we cannot conveniently uphold the dismissal order. Though the scope of inference of the courts in the punishment order is narrow in view of the peculiarity of the circumstances, we are prompted to go further in the matter.

23. In *S.N. Mukherjee Vs. Union of India*, , the Apex Court 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...."

24. The learned Single Judge observes in the body of his order that the show cause notice issued was contrary and violative of the mandatory provisions of Section 20 of the Act read with Rule 17 of the Rules. We respectfully disagree to endorse the said finding, in view of the discussions made supra. Of course, in the show cause notice, the employee was called upon to show cause as to why his service should not be terminated under the provisions of Army Act Section 40(a) of Manual of Military Law Volume 2 read in conjunction with Army Act Section 20 and Army Rule 17. But on the employee admitting the allegation and apologizing for the same, the competent officer has dismissed him from service.

25. In general parlance, the word "termination" is usually looked down upon as it normally entails any wrongdoing on the part of the employee; it is an end of contract between the employer and the employee whereas dismissal order is by way of punishment to a delinquent employee and there are chances that said dismissal order can be set aside by the order of the court and thereby reinstating him in service.

26. The allegation against the employee was under Section 43 of the Act, which attracts punishment of imprisonment upto 14 years. Had if he was tried by the criminal court in the ordinary course for the offence under Section 352 of IPC, which reads thus:

"352. Punishment for assault or criminal force otherwise than on grave provocation. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both."

the maximum punishment that could have been imposed upon him was imprisonment for three months or fine of Rs. 500/- or both. It shall not be lost sight of the fact that, at the relevant time, the employee was not working directly under the complainant. The incident appears to have occurred in the waiting room of the Railway Station in a spur of the moment. It is also not shown that there was a history to the alleged incident. In that view of the matter, we are of the view that the punishment order was harsh and severe and disproportionate, which warrants our interference.

27. In *Kehar Singh and Another Vs. Union of India (UOI) and Another*, , a question arose before the Apex Court with regard to the extension of judicial review against the order passed by the supreme power of President under Section 72 of the Constitution. Their lordships observed thus:

".....Whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution..... This Court in fact proceeded in *State of Rajasthan and Others v. Union of India*, [1978] I S.C. R. 1 at 80-81 to hold:

.....So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so.....this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so. what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law..... and in *Minerva Mills Ltd. and Others Vs. Union of India (UOI) and Others*, , Bhagwati, J. said:

....the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such PG NO 1114 limits are transgressed or exceeded.. The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent Machinery is the judiciary which is vested with the power of judicial review..... It Will be noted that the learned Judge observed in *S.P.*".

28. It is the well settled law that the right to life enshrined under Article 21 of the Constitution of India would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardizing not only his/her livelihood but also career and livelihood of dependants. By the time of the impugned order, the employee had put in, as per the submission at the Bar, 13 years of service and would have been entitled for the benefits of the service rendered by him for the institution. Even otherwise, in the earlier two Summary Court Martial, he was once imposed with punishment of reduction in rank and another time with severe reprimand.

29. Even in respect of a case where the employee is convicted by a Court of law on criminal charges, then also it is not always a rule to sack him. The Apex Court in the judgment of Union of India and Another Vs. Tulsiram Patel and Others, has held thus:

"Where a disciplinary authority comes to know that a Government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose, it will have to peruse the judgment of the Criminal Court and consider all the facts and circumstances of the case. Once the disciplinary authority reaches the conclusion that the Government servant's conduct was such as to require his dismissal or removal from service or reduction in rank, he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the Government servant concerned by reason of the exclusionary effect of the second proviso, However, conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government Servant.....".

30. Though we are endorsing on the administrative power of the competent officer to impose punishment as contemplated under Section 20 of the Act, in our considered opinion, the punishment of dismissal from service in the midst of his service without any retrial benefits available disturbs our judicial conscience. While saying so, we are very much conscious of the power of the Parliament under Section 33 of the Constitution of India, which reads thus:

33. Power of Parliament to modify the rights conferred by this Part in their application to forces, etc.

Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-

- (a) the members of the Armed Forces; or
- (b) the "members of the Forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organization established by the State for the purposes of intelligence or counter intelligence;

or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any force, bureau or organization referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Thus discharge of the duties by the members of the Armed Forces and the maintenance of the discipline amongst them is considered of such a vital importance to the country that in order to ensure this, the Constitution has conferred power upon the Parliament to restrict or abrogate any of the fundamental rights applicable to them. Here is a case where the misconduct alleged was not touching the interest of the security of the State or any financial implication on the Government, but inappropriate soldierly behaviour exhibited by the employee on two occasions. Since the punishment order is passed on admission of the charges by the employee, we are of the considered opinion that the misconduct shall not go unpunished otherwise it would send a wrong signal. It is the submission at the Bar that the employee has crossed the age of superannuation and cannot be reinstated. In that view of the matter, if the order passed by the learned Single Judge is modified by declining backwages, that would serve the ends of justice being met.

Accordingly, the appeal is allowed in part. The impugned order of the learned Single Judge is modified to the extent that the petitioner/respondent herein is not entitled for any backwages from the date of dismissal order till the date of his attaining the age of superannuation. For calculating his retiral benefits, he shall be treated as on continuous duty from the date of his dismissal i.e., 13.4.1994 till the date of his superannuation. He is eligible for all pension benefits admissible to him.