

CASE NO.:
Appeal (civil) 5185 of 2001

PETITIONER:
M.M. MALHOTRA

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT: 04/10/2005

BENCH:
ARIJIT PASAYAT & H.K. SEMA

JUDGMENT:
JUDGMENT

ARIJIT PASAYAT, J.

Appellant calls in question legality of the judgment rendered by a Division Bench of the Bombay High Court (Nagpur Bench) dismissing the writ petition filed by him holding that the order of compulsory retirement passed by the authorities was in order.

The background facts leading to the passing of the order of compulsory retirement are as under:-

Appellant was appointed to the permanent Commission as a Pilot Officer in the Logistics Branch of Indian Air Force on 14.4.1973. Prior to his posting at Nagpur vide order dated 17.11.1990 he was posted at Trivandrum since 28.10.1987. During tenure of his service in the Indian Air Force, the appellant was posted at Leh in Laddakh, Nal in Rajasthan and few other places.

Appellant was married to Mrs. Roopa Malhotra on 19.10.1973 as per Hindu rites. The marriage was also registered with the Registrar of Marriage on 5.9.1974. On 21.3.1992, Mrs. Roopa Malhotra lodged a complaint with the then Chief of the Air Staff against mis-deeds of the appellant and prayed for maintenance as well as appropriate action against him. In the said complaint Mrs. Roopa Malhotra (described for convenience as 'complainant') stated that in the year 1990, she came to know that the appellant had developed illicit relations with one Miss Anna Suja John when he was posted at Trivandrum. She strongly objected to their illicit relations and on account of that, the appellant started torturing her brutally. The appellant was posted at Nagpur on 12.11.1990. The complainant also came to Nagpur from Ambala and started residing with the appellant at Nagpur. Since 1991, appellant started asking complainant for mutual divorce. However, she did not agree for the same. The appellant started beating her brutally and torturing her mercilessly because of Miss Anna Suja John. It was further stated in the complaint that in the year 1991 itself, Miss Anna Suja John came to Nagpur and started staying with the appellant and complainant Mrs. Roopa Malhotra at their residence at Nagpur. The complainant strongly objected to this and requested the appellant not to have any relationship with Miss Anna Suja John and told her to leave Nagpur. When complainant could not bear the torture, she sought an interview with the then Air Marshal I.G. Krishna, HQ Maintenance Command, Indian Air Force and narrated her plight to him. Younger brother of the appellant came to Nagpur and told the complainant that if she files a complaint against her husband, his career would be spoiled. He also promised that Miss Anna Suja John would go back to Kerala. However, it was noticed by the complainant that the situation did not improve and appellant continued his illicit relations with the other woman i.e. Miss Anna Suja John. When the complainant had gone to Kanpur she saw Miss Anna Suja John with her child residing in the parental house of the appellant at Kanpur. At that time, she realized that

she had been cheated by the appellant as well as his brother. The appellant abused the complainant in front of Miss Anna Suja John in filthy language. When they were at Kanpur, appellant and Miss Anna Suja John used to sleep in one room and complainant was asked to sleep in another room. At Kanpur, the appellant told the complainant that he and Miss Anna Suja John are married. While they were at Kanpur, appellant and Miss Anna Suja John were behaving as husband and wife and going to hotels and various other places together. The same thing continued at Nagpur. The complainant tried her best to keep her nineteen years' old marriage intact. However, it became impossible for the complainant to survive in that situation. The appellant stopped providing her basic amenities, which are necessary for survival of an individual. The appellant in spite of being allotted official residence in Vayu Sena Nagar, Nagpur started residing in rented accommodation in Nagpur along with Miss Anna Suja John as husband and wife. The physical and mental torture continued to increase alarmingly and life of the complainant became hell and, therefore, she was constrained to file the above referred complaint.

On the basis of the said complaint, on or about 8.4.1992, the Court of Enquiry was initiated against the appellant by the concerned authority. During pendency of the enquiry, a detailed statement of complainant-Mrs. Roopa Malhotra was recorded by the Enquiry Officer in which she gave minute details and sequence of events and under what circumstances she was constrained to file the complaint dated 21.3.1992 to the Chief of Air Staff. The Enquiry Officer also examined Shri V.K. Grover, Wing Commander as an independent witness, who was also asked to conduct investigation regarding allegations made by complainant Mrs. Roopa Malhotra against the appellant. The report in this regard was submitted by Shri Grover. The appellant had also taken part in the Court of Enquiry.

After conclusion of the Court of Enquiry on 22.5.1993, entire material along with reports was forwarded to the Chief of the Air Staff and after considering these reports, Chief of the Air Staff was of the opinion that trial of the Officer by the Court Martial is inexpedient, but retention of such Officer in service is undesirable and, therefore, show-cause notice dated 10.9.1992 was issued to the appellant by which he was called upon to show-cause as to why he should not be dismissed/removed from service under Section 19 of the Air Force Act, 1950 (in short the 'Act') read with Rule 16 of the Air Force Rules, 1969. The charges levelled in the show-cause notice against the appellant on the basis of which proposed action was contemplated are as follows:

(i) illicit relations of appellant with Miss Anna Suja John and ill-treatment meted out and criminal force used by the appellant to complainant Mrs. Roopa Malhotra as per complaint dated 21.3.1992;

(ii) the appellant had contracted "plural marriage" with Miss Anna Suja John, which is contrary to para 578 of the Regulations for the Air Force (Revised Edition), 1964, and birth of a child out of the said illegal wedlock;

(iii) though appellant was posted at Nagpur with effect from 12.11.1990 and was allotted an official accommodation at House No.95/2, instead of staying with the family in the said accommodation, he had taken on rent of rupees two thousand one hundred per month a house 'Ram Raksha' at N-5 Lakshmi Nagar, Nagpur and was staying with said Miss Anna Suja John as husband and wife;

(iv) when appellant's legally wedded wife Mrs. Roopa Malhotra objected to his behaviour, appellant used criminal force on her by slapping, kicking and beating her on numerous occasions. The appellant had also demanded mutual divorce and on refusal by her to agree to the same, appellant physically and mentally tortured her, deprived her of basic amenities and refused to give her sufficient subsistence allowance for her survival and the behaviour and conduct of the appellant was most unbecoming of an Air

Force Officer.

The appellant submitted his reply and requested to keep the show-cause in abeyance in view of clause 578(g) of the Regulations of Air Force (Revised Edition), 1964 and further requested for grant of time to file reply. Time was prayed for till 21.11.1992. In his letter dated 22.12.1992, allegations of malafide were made against the then Air Chief Marshal Shri N.C. Suri as being instrumental for issuing show-cause notice dated 10.9.1992. In the communication it was indicated that Mrs. Roopa Malhotra @ Ruby Basu had filed written statement on 1.10.1992 in Regular Civil Suit no.887/1992 filed by the appellant wherein she had stated that she was already married to one D.J. Basu, her husband. The marriage was subsisting at the time when she married the appellant. It is to be noted that the said suit was filed by the appellant in the Court of Civil Judge, Senior Division, Nagpur, inter alia, for a declaration that defendant Roopa was not his wife as her spouse was living on the date they started living as husband and wife. Suit was decreed on 19.6.1993. It was appellant's stand that in view of the said statement he should not be required to submit his explanation in view of Rule 16(4) of the Rules. The enquiry continued and after a certain stage appellant did not effectively participate. On consideration of materials, it was observed that there was irrefutable evidence of plural marriage and disgraceful conduct of not only sleeping with Miss Anna in the presence of his legally wedded wife, but also use of criminal force against his wife. Reference note was submitted to Ministry of Defence. Finally, the order of compulsory retirement was passed. Same was challenged before the Bombay High Court, Nagpur Bench. The High Court noted that the letter dated 22.12.1992 written by the appellant was totally silent in regard to the name of the person who filed regular civil suit no.887/1992, against whom suit was filed, the purpose for which the suit was filed and relief sought in the suit. The appellant submitted that there was no plural marriage as so-called marriage was non-existent in the eyes of law. Since there was no valid marriage at the first instance the question of plural marriage did not arise. The High Court did not find any substance in the plea and held that the conduct of the appellant was unbecoming of a member of the disciplined force like Air Force. It was held that he was guilty of act which is prejudicial to the good order and discipline in the Air Force. In any event it was felt that the conduct of the appellant was certainly deplorable and the order of compulsory retirement as passed did not suffer from any infirmity.

In support of the appeal, appellant who appeared in-person submitted that the decree passed by the competent court holding that the marriage of Ruby Basu @ Roopa Malhotra with Mr. D.J. Basu was in existence when the appellant purportedly entered into marital ties with so-called Roopa Malhotra. That being so, there was no marriage in the eyes of law. Once a marriage is declared void it related back to the date of marriage. Further no reason was indicated as to why court martial was not held. No fair opportunity was granted. Certain pages which have been utilized for the purpose of finding the appellant guilty were not signed by him as they were not recorded at the relevant point of time. The appellant had objected to the manner in which the proceedings were conducted. Reliance was placed on Rule 16 of the Rules. It was further submitted that if the allegations of plural marriage fail, the foundation on which the order of compulsory retirement was passed loses its base and, therefore, the High Court was not justified in its conclusion.

In response, learned counsel for the Union of India submitted that the High Court's judgment highlights various facts which clearly show that the continuance of the appellant in the Air Force would be detrimental to the interest of the force, his acts were clearly unbecoming of a member for disciplined force and, therefore, the High Court's judgment does not warrant any interference.

We shall first deal with the question as to whether there was a plural marriage. The factual scenario is very confusing. It was Roopa Malhotra who

alleged that during the subsistence of the appellant's marriage with her he had conducted another marriage with Miss Anna Suja John. But the fact remains that there is a decision rendered by a competent jurisdiction to the effect that the marriage of Ruby Basu @ Roopa Malhotra was subsisting at the time when the appellant undisputedly married her. Nobody has questioned correctness of the said decision.

For appreciating the status of a Hindu woman marrying a Hindu male with a living spouse some of the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Marriage Act') have to be examined. Section 11 of the Marriage Act declares such a marriage as null and void in the following terms:

11. Void marriages. - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5".

Clause (i) of Section 5 lays down, for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. By reason of the overriding effect of the Marriage Act as mentioned in section 4, no aid can be taken of the earlier Hindu law or any custom or usage as a part of that law inconsistent with any provision of the Act. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnised in violation of Section 5(i) of the Act. Sub-section (2) of Section 12 puts further restrictions on such a right. The cases covered by this section are not void ab initio, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void ipso jure, that is, void from the very inception, and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16, which is quoted below, also throw light on this aspect :

16. Legitimacy of children of void and voidable marriages:-

(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Sub-section (1), by using the words underlined above clearly implies that a void marriage can be held to be so without a prior formal declaration by a court in a proceeding. While dealing with cases covered by Section 12, sub-section (2) refers to a decree of nullity as an essential condition and sub-section (3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. The marriage of the appellant must, therefore, be treated as null and void from its very inception.

The above position was highlighted in Smt. Yamunabai Anantrao Adhav v. Anantro Shivram Adhav and Anr., (AIR) 1988 SC 644.

The effect of the decree passed is that the marriage with Roopa Malhotra @ Ruby Basu was void and, therefore, there was no marriage in the eyes of law. That being so, the appellant's subsequent marriage with Miss Anna Suja John cannot be said to be case of plural marriage. To that extent the appellant is right in his submission that the case of "plural marriage" has not been established. But that is not the end of the matter. Even if it is so, his so-called marriage with Roopa Malhotra was void. Obviously, therefore, he was staying with Roopa who was not his wife as husband and wife. If marriage with Miss Anna Suja John was not a case of plural marriage in view of the subsisting marriage of Ruby Basu @ Roopa Malhotra then also question has been rightly raised by the learned counsel for the respondents about the moral conduct of the appellant in living as husband and wife with some other spouse during subsistence of Roopa @ Ruby's marriage. The decision to order compulsory retirement was taken additionally for acts involving moral turpitude. The High Court has highlighted several aspects as to how the appellant was treating Roopa Malhotra with cruelty and torturing her. It has highlighted as to how such acts were prejudicial to good order and air force discipline. Use of criminal force against a woman is an act unbecoming of an officer and is an offence under Section 45 of the Act. The said provision reads as follows:

"45. Unbecoming Conduct: Any Officer or Warrant Officer who behaves in a manner unbecoming his position and a character expected from him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and if he is a Warrant Officer, be liable to be dismissed or to suffer such less punishment as is in this Act mentioned."

Section 46 enumerates certain forms of disgraceful conduct. It reads as under:

"46. Certain forms of disgraceful conduct - Any person subject to this Act who commits any of the following offences, that is to say, -

- (a) is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind; or
- (b) malingers, or feigns, or produces disease or infirmity in himself, or intentionally delays his cure or aggravates his disease or infirmity; or
- (c) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or that person;

shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

Under the Scheme of the Act, and the Rules any act of misconduct of an officer involving moral turpitude and/or amounting to offence can be dealt with in two ways. It can be by way of disciplinary action i.e. Summary

Disposal of Charges and Court-Martial or administratively under Sections 18 and 19 of the Act. While dealing with the matter under Section 19 of the Act, the procedure contained in the Rule 16 of the Rules has to be followed. This rule incorporates principles of natural justice i.e. issuance of show-cause notice, consideration of reply. Para 667(b) of the Regulations for Air Force, 1964 on which the appellant relies no doubt stipulates initiation of action on the part of the Commanding Officer to bring the offender to trial by the Court-Martial. In a given case, however, considering the nature of the accusations and the type of evidence a decision can be taken to deal with the case administratively in terms of Rule 16(4) of the Rules. In the instant case it was concluded that it would neither be expedient nor practicable to have trial by Court-Martial and, therefore, the action was taken by departmental proceedings. This Court had occasion to consider an identical provision in the Army Act, 1950 (in short 'Army Act') and Army Rules, 1954 (in short 'Army Rules'). Constitutional validity of Rule 14 of the Army Rules which is on the same line as Rule 16(4) of the Rules was questioned in *Union of India v. Capt. S.K. Rao*, [1972] 1 SCC 144. The challenge was found unsustainable. It was, *inter alia*, observed as follows:

"14. Section 19 itself suggests that there should be rules, and subject to the provisions of the Act and such rules, the Central Government may dismiss or remove from the service any person subject to the Army Act. Section 191(2)(a) specifically gives power to make a rule providing for the removal from the service of persons subject to the Act. It follows that there may be a valid rule whereunder, subject to the other provisions of the Act the Central Government may remove a person from the service. Rule 14 is such a rule; it is, therefore, not *ultra vires*.

15. It was argued that the words "subject to the provisions of this Act" occurring in Section 19 makes Section 19 subject to Section 45, and the Central Government has thus no power to remove a person from the service in derogation of the provisions of Section 45. But the power under Section 19 is an independent power. Although Section 19 uses the words "subject to the provisions of this Act", it speaks of removal of a person from the service. Section 45 provides that on conviction by court-martial an officer is liable to be cashiered or to suffer such less punishment as is in this Act mentioned. For removal from service under Section 19 of the Army Act read with Rule 14 of the Army Rules, 1954, a court-martial is not necessary. The two Sections 19 and 45 of the Act are, therefore, mutually exclusive."

Above being the position, the appellant's stand that the departmental proceeding was invalid has to be rejected.

The residual question is whether there is need for remand to the authorities to re-consider the question of punishment once it is held that plural marriage was not established. We have given our anxious consideration to his plea. Normally, when the foundation for an order is partially held not in accordance with law, reconsideration of the quantum of punishment can be directed. But that is not the invariable rule. If the Court on considering the material before it concludes that the punishment awarded is not shockingly disproportionate it can maintain the order. In the instant case the findings of the disciplinary authority show as to how the acts of the appellant were clearly unbecoming of a member of disciplined force and his continuance would be prejudicial to good order and discipline.

The Scheme of the disciplinary rules in general is to identify the conduct which is made punishable and then to provide for the various punishments which may be imposed for the acts which are inconsistent with such conduct. For example, the Central Civil Services (Conduct) Rules, 1964 contain provisions which pertain to the standards of conduct which the Government servant (within the meaning of those rules) are to follow whereas the Central Civil Services (Classification, Control and Appeal) Rules, 1965 provide the punishment or penalties which may be imposed for misconduct.

The conduct rules and the rules for punishment may be provided in separate rules or combined into one. Moreover, there are a host of departmental instructions which elucidate, amplify and provide guidelines regarding the conduct of the employees.

The range of activities which may amount to acts which are inconsistent with the interest of public service and not befitting the status, position and dignity of a public servant are so varied that it would be impossible for the employer to exhaustively enumerate such acts and treat the categories of misconduct as closed. It has, therefore, to be noted that the word "misconduct" is not capable of precise definition. But at the same time though incapable of precise definition, the word "misconduct" on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statute and the public purpose it seeks to serve.

In *Union of India and Ors. v. Harjeet Singh Sandhu*, [2001] 5 SCC 593, in the background of Rule 14 of the Army Rules, it was held that any wrongful act or any act of delinquency which may or may not involve moral turpitude would be "misconduct" under Rule 14.

In *Baldev Singh Gandhi v. State of Punjab and Ors.*, [2002] 3 SCC 667, it was held that the expression "misconduct" means unlawful behaviour, misfeasance, wrong conduct, misdemeanour etc.

Similarly, in *State of Punjab and Ors. v. Ram Singh Ex. Constable*, AIR (1992) SC 2188, it was held that the term "misconduct" may involve moral turpitude. It must be improper or wrong behaviour, unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character.

"Misconduct" as stated in *Batt's Law of Master and Servant* (4th Edition) (at page 63) is "comprised positive acts and not mere neglects or failures." The definition of the word as given in *Ballentine's Law Dictionary* (148th Edition) is "A transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, it is a violation of definite law, a forbidden act. It differs from carelessness."

It may be generally stated that the conduct rules of the Government and public sector corporations constitute a code of permissible acts and behaviour of their servants.

The scheme of the Conduct Rules, almost invariably, is to first of all enunciate a general rule of conduct and behaviour followed by specific prohibitions and restrictions. For example, Rule 3 of the Central Civil Services (Conduct) Rules, 1964 which occurs under the heading "General" provides that every Government servant shall at all times:

- (i) maintain absolute integrity;
- (ii) maintain devotion to duty; and
- (iii) do nothing which is unbecoming of a Government servant.

It has been pointed out by learned Additional Solicitor General that in the past also appellant's conduct was found to be objectionable. He was tried for general court-martial on a charge of using improperly travel voucher of another officer's wife for his wife's travel. He was awarded sentence of 12 months' forfeiture of service for the purpose of promotion and severe

reprimand. He was also awarded severe displeasure for a period of eighteen months w.e.f. 16th September, 1987 for making false allegations against superior officers and misbehaving with canteen sales girl. Though these were not factors which weighed with the authorities in passing the order of compulsory retirement yet it throws light on desirability to retain the officer in service. On the facts of the present case the order of compulsory retirement cannot be said to be one which is shockingly disproportionate to warrant interference.

While, therefore, holding that the charge of plural marriage has not been established, yet taking into account the other allegations we do not think it a fit case where any interference is called for.

Appeal is dismissed without any order as to costs.

JUDIS