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STATE (UNION OF INDIA)

v.

RAM SARAN

.. DECEMBER 4, 2003

B

[DORAISWAMY RAJU AND ARIJIT PASAYAT, JJ.]

Service Law:

C

Central Reserve Police Force Act, 1949: Ss. 10(m), 16(2)/Central Reserve Police Force Rules, 1959; Rules 3 (a), (b), (e) and (f)/Code of Criminal Procedure, 1973; Ss. 4, 5, 11, 12 and 13:

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Assistant Commandant exercising power of Judicial Magistrate convicted and sentenced an errant employee/constable on ground of unauthorised absence—Jurisdiction to record conviction—Challenge to—Sessions Court holding that Assistant Commandant had no jurisdiction—Revision petition dismissed by the High Court—On appeal, Held: Conferment of such power could not be challenged in a proceeding/revision under the Cr.P.C.—Since members of CRPF are part of the armed forces, new/specified offences have been created to enforce discipline amongst the members—Hence, Assistant Commandant had jurisdiction to try such offences as defined under the Act—Entry 2, List 1—Seventh Schedule to the Constitution of India.

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Statute—Vires in a particular provision—Jurisdiction—Held: Exclusively vested with the Courts exercising power of Judicial Review under Article 32/226—It is impermissible for the Courts to decide on vires of the provision in exercise of appellate or revisional jurisdiction—Constitution of India; Articles 32/226.

Words and Phrases:

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'more heinous offences', 'less heinous offences' and 'specially created offences'—Meaning of in the context of Ss. 9 and 10 of the CRPF Act.

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Respondent-employee, a Constable, while serving in the ITBP remained absent beyond sanctioned period of leave. Assistant Commandant, Central Reserve Police Force in exercise of powers of

Judicial Magistrate, 1st Class conferred on him as per provisions of the Central Reserve Police Force Act, held trial and found respondent guilty and sentenced him to undergo imprisonment for 3 months. Respondent-accused challenged the order in the Sessions Court which was allowed by the Sessions Court and affirmed by the High Court. Hence the present appeal by the State (Union of India).

It was contended for the appellant-Union of India that since CRPF Act is a special law being operated in specified field, provisions of the Act could be applied by the authorities for holding trial for the specified offences to convict and sentence an errant employee.

On behalf of the Respondent-employee, it was submitted that the Assistant Commandant had no jurisdiction to function as Judicial Magistrate; and that the Central Government could not confer any power on the authorities to act as Judicial Magistrate.

Allowing the appeal, the Court

HELD : 1.1. The Courts below have overlooked certain essential and vital aspects necessary to appreciate the relevant issues arising in their proper perspective. Entry 93 of List I, VII Schedule to the Constitution of India enables Parliament to provide for offences against laws with respect to any of the matters enumerated in list I. Sections 9 and 10 of the Act create by enumerating what are stated to be 'more heinous offences' and 'less heinous offences' respectively and many of such specially created offences for the purposes of this Act cannot constitute or amount to be offences under the ordinary criminal law of the land. To that extent they are new class of offences created with punishments therefor, which are unknown to ordinary criminal law in force. [481-F-G-H; 482-A]

1.2. The fallacy in the reasoning of the Courts below lies in their superficial and cursory nature of consideration undertaken therein, without reference to the competence and powers of Parliament to specifically and specially provide for trial and punishment of offences separately created under a special enactment of Parliament, in a manner distinct and separate from the method of trying other ordinary criminal offences under the general criminal law of the country. [482-E-F]

A 1.3. Unauthorised absence of an employee staying beyond the sanctioned period of leave is not an offence in the normal course under the ordinary criminal law of the land. But, disciplined forces with the intention of enforcing discipline have made them punishable considering them as offences and have prescribed various sentences. For such particular purposes the designated officials have been conferred with magisterial powers. The Assistant Commandant who passed the order undisputedly acted as a Judicial Magistrate in view of the powers conferred on him under the Act. The conferment of such power has not been distinctly questioned and could not have been questioned in a proceeding, appeal or a revision under the Code. As long as the specific provision in Act exists enabling the competent Authority to pass the order under challenge, the same will have full force and efficacy. [483-A-B-C-D]

D 1.4. It is well-settled that creature of any statute cannot consider the vires of a particular provision in that statute or any other statute as well. Exclusive power for such purposes are vested under the Constitution of India only on Courts exercising powers of judicial review under Articles 32/226 of the Constitution alone. While exercising appellate or revisional jurisdiction under the Code, it is impermissible for any Court to decide on the vires of the provision. That is precisely what the Sessions Court and the High Court have done in the present case. The vires of a provision can only be questioned in a writ proceeding before the constitutional Court. [483-D-E]

F 1.5. Entry 2 of List I of Seventh Schedule to the Constitution makes the position clear that members of CRPF are part of the armed forces of the Union Government. The punishments to be imposed under the Act for various offences are defined by Sections 9 and 10, which have been created by statute. They are deemed offences and in the scheme of enforcing discipline they have been treated as infractions unbecoming of members belonging to disciplined forces like the CRPF. That being the position, the Sessions Court and the High Court were not justified in holding that the Assistant Commandant had no jurisdiction to deal with the respondent in the concerned trial. [483-F-G-H]

H 1.6. Provisions of the Cr.PC. would be applicable to the investi-

gations, inquiries into and trials of cases by criminal Courts of various descriptions, being the parent statute, in the absence of any contrary provision in any special statute or special provision excluding jurisdiction or applicability of the Cr.P.C. The Assistant Commandant was clothed with necessary jurisdiction for trial of the matter as per specified provision of law in the Act. [485-D; 486-D]

Directorate of Enforcement v. Deepak Mahajan & Anr., [1994] 3 SCC 440; *Niratan Sircar v. Lakshmi Narayan Ram Niwas*, AIR (1965) SC 1 and *Maru Ram Etc. Etc. v. Union of India & Ors.*, [1981] 1 SCC 107, relied on.

2. In the facts and circumstances of the case, the fine of two months pay which respondent was drawing at the time when the proceedings were initiated would meet the ends of justice. However, deterrent punishment must be resorted to only when such absence is resorted to avoid and evade undertaking a testing or trying venture or deployment – essential at any given point of time, and not as a routine. [486-F-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 410 of 1997.

From the Judgment and Order dated 16.11.94 of the Himachal Pradesh High Court in CrI. A. No. 172 of 1989.

P.P. Malhotra, Y.P. Mahajan, Ms. Sushma Suri and P. Parmeswaran for the Appellant.

S.C. Maheshwari, M.P.S. Tomar, Wajahat Ansari and Ms. Sandhya Goswami for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. Questioning conviction made by the Assistant Commandant of Central Reserve Police Force (in short the 'CRPF') made under Section 10(m) of the Central Reserve Police Force Act, 1949 (in short the 'Act') and consequential sentences imposed, the respondent filed an appeal before the Sessions Judge, Solan and Sirmaur. The Sessions Judge held that the Assistant Commandant had no jurisdiction to record

- A** conviction and impose sentence. The said judgment was questioned before the High Court of Himachal Pradesh by a revision petition filed by the Union of India. The revision was also dismissed. Both the Sessions Judge and the High Court held that the Assistant Commandant, III Battalion, ITBP, Nahan could not have exercised powers of Judicial Magistrate Ist Class and, therefore, the trial and conviction of the accused-respondent were illegal. The High Court held that combined reading of Sections 11, 12 and 13 of the Code of Criminal Procedure, 1973 (in short the 'Code') clearly rule out the appointment of any person exercising powers of Judicial Magistrate, Ist Class in the absence of conferment of powers by the High Court. This, according to the Sessions Judge and the High Court stemmed from the fact that there was separation of judiciary from the Executive in 1973 and thereafter the powers of appointment and conferment for functioning as Judicial Magistrate either of First Class or Second Class could only be done by the High Court and the Central Government or the State Government had no power to invest any person with powers of Judicial Magistrate of any class. Reference was also made to Section 5 of the Code and observed that the expression "in the absence of a specific provision to the contrary" used therein did not render Section 16(2) of the Act redundant.
- E** At this juncture, it would be necessary to take note of the factual position.

- F** The respondent while functioning as a Constable (Sweeper) in the III Battalion, ITBP, Nahan did not join duty after expiry of the leave granted to him. Though he was granted leave for the period from 9.4.1987 to 24.5.1987, he did not join after expiry of the period. There was no intimation to the competent authority or request for extension of leave. The respondent accepted that he had stayed beyond the period of leave, but indicated several reasons as to why the same was necessitated. Complaint was lodged by the concerned authorities and the Assistant Commandant exercising powers of Judicial Magistrate, Ist Class in terms of Section 10 (m) of the Act, issued notice in terms of Section 251 of the Code and after trial found him guilty and sentenced him to undergo imprisonment for three months. The said order as noted above was questioned before the Sessions Judge by the respondent and in view of the relief granted to him by the Sessions Judge, the matter was carried in revision by the Union of India.
- H**

But the same having been rejected, this appeal has been filed. A

In support of the appeal, learned senior counsel for the appellant submitted that the Sessions Judge and the High Court clearly lost sight of Section 16(2) of the Act and Rule 36 (a), (b), (e) and (f) of the Central Reserve Police Force Rules, 1955 (in short the 'Rules') as well as Sections 4 and 5 of the Code. Section 16(2) of the Act clearly indicates that notwithstanding anything contained in the Code, the provisions of the Act could be applied. Section 4(2) of the Code permits action under any law other than the Indian Penal Code, 1860 (for short the 'IPC'). Section 5 refers to absence of a specific provision to the contrary in any special or local law. The Act was a special law which operated in a specified field. These aspects were not considered in their proper perspective by the Sessions Judge and the High Court. B C

Per contra, learned counsel for the respondent submitted that the Sessions Judge and the High Court were justified in interfering with the order passed by the Assistant Commandant as he had no jurisdiction to function and his appointment by a Notification issued by the Central Government could not have conferred on him any power to act as a Judicial Magistrate when the sole repository of the power to so notify is the High Court after the Code was enacted in 1973. The position may have been different under the Code of Criminal Procedure, 1898 (in short the 'Old Code'), but the present position is entirely different and the Ministry of Home Affairs' Notification dated 25.1.1978 was really of no consequence. D E

The Courts below have overlooked certain essential and vital aspects necessary to appreciate the relevant issues arising in their proper perspective. Under Section 3(1) of the Act, CRPF is constituted to be an 'armed force' maintained by the Central Government, and consequently it would be 'any other armed forces of the union' as envisaged in Entry 2 of List I of the VII Schedule to the Constitution of India. Entry 93 of List I enables Parliament also to provide for offences against laws with respect to any of the matters enumerated in List I. Sections 9 and 10 create by enumerating what are stated to be 'more heinous offences' and 'less heinous offences' respectively and many of such specially created offences for the purposes of this Act cannot constitute or amount to be offences under the ordinary criminal law of the land. To that extent they are new F G H

- A class of offences created with punishments therefor, which are unknown to ordinary criminal law in force. Section 16 provides for empowering Competent Authorities in the hierarchy of the force itself with powers or duties conferred or imposed on a police officer of any class or grade by any law for the time being in force and by further enacting a provision with a specific “non obstante” clause stipulates that notwithstanding anything contained in the Code, the Central Government may invest the Commandant or Assistant Commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by a member of the force and punishable “under this Act” or any offence committed by a member of the force against the person or property of another member. Consequently, what is purported to be done by these provisions are merely to refer to the nature and extent of powers possessed by such authorities under the other laws being made available to the authorities designated under this Act, for discharging their duties under this Act, without exhaustively enumerating the details of all such powers or without re-enacting all such provisions in detail as part and parcel of this law — the Act, and not to constitute them to be or empower them as Magistrates as such for all or any of the purposes for which Courts of ordinary criminal justice have been constituted under the Code. Section 5 of the Code sufficiently protects the authorities empowered to function and exercise powers under the Act, from any such challenge as are directed against them, in this case. The fallacy in the reasoning of the Courts below lies in their superficial and cursory nature of consideration undertaken therein, without reference to the competence and powers of the Parliament to specifically and specially provide for trial and punishment of offences separately created under a special enactment of Parliament, in a manner distinct and separate from the method of trying other ordinary criminal offences under the general criminal law of the country.

- At the outset, it must be noted that certain infractions which are relatable to service broadly fall within the spectrum of disciplinary proceedings. Section 10(m) is an infraction which though normally would have attracted departmental proceedings, keeping in view the essentiality of force and imminent and ever alert situation in which with high sense of morale and duty consciousness the member of this service is expected to be demonstrate at all times, a serious view of the same is being taken.
- H But the CRPF, the Army, the Navy and the Air Force are disciplined forces

and even any infraction which otherwise would not be an offence is **A**
 deemed to be an offence under certain provisions like Section 10(m) of
 the Act. Unauthorised absence of an employee staying beyond the sanc-
 tioned period of leave is not an offence in the normal course under the
 ordinary criminal law of the land. But as noted above, disciplined forces **B**
 with the intention of enforcing discipline have made them punishable
 considering them as offences and have prescribed various sentences. For
 such particular purposes the designated officials have been conferred with
 magisterial powers. The Assistant Commandant who passed the order
 undisputedly acted as a Judicial Magistrate in view of the powers conferred
 on him under the Act. The conferment of such power has not been **C**
 distinctly questioned and could not have been questioned in a proceeding,
 appeal or a revision under the Code. As long as the specific provision in
 Act exists enabling the competent Authority to pass the order under
 challenge, the same will have full force and efficacy. It is well settled that
 creature of any statute cannot consider the vires of a particular provision **D**
 in that statute or any other statute as well. Exclusive power for such
 purposes are vested under the Constitution of India, 1950 (in short 'the
 Constitution') only on Courts exercising powers of judicial Review under
 Articles 32/226 of the Constitution alone. While exercising appellate or
 revisional jurisdiction under the Code it is impermissible for any Court to **E**
 decide on the vires of the provision. That is precisely what the Sessions
 Judge and the High Court have done in the present case. The vires of a
 provision can only be questioned in a writ proceeding before the Consti-
 tutional Court. That being the position, neither the Sessions Judge nor the
 High Court could have found fault with the exercise of jurisdiction by the **F**
 Assistant Commandant in exercising magisterial powers. It will also be
 relevant to note that in List I of Seventh Schedule to the Constitution in
 Union List, Entry 2 makes the position clear that members of CRPF are
 part of the armed forces of the Union Government. The punishments to
 be imposed under the Act for various offences are defined by Sections 9
 and 10, which have been created by statute. As noted earlier, they are **G**
 deemed offences and in the scheme of enforcing discipline they have been
 treated as infractions unbecoming of members belonging to disciplined
 forces like the CRPF. That being the position, the Sessions Judge and the
 High Court were not justified in holding that the Assistant Commandant
 had no jurisdiction to deal with the respondent in the concerned trial. **H**

A It would also be necessary to take note of Sections 10(m), 16(2) of the Act and Sections 4 and 5 of the Code:

Act

B “Section 10 (m)- Every member of the Force who absents himself without leave, or without sufficient cause overstays leave granted to him shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to three months’ pay, or with both”.

C *Section 16(2)*- Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (5 of 1898) the Central Government may invest the Commandant or an Assistant Commandant with the powers of a Magistrate of any class for the purpose of inquiring into or trying any offence committed by member of the Force and punishable under this Act, or any offence committed by a member of the Force against the person or property of another member:

Provided that-

E (i) when the offender is on leave or absent from duty, or

(ii) when the offence is not connected with the offender’s duties as a member of the Force, or

F (iii) when it is a petty offence, even if connected with the offender’s duties as a member of the Force,

G the offence may, if the prescribed authority within the limits of whose jurisdiction the offence has been committed, so directs, be inquired into or tried by an ordinary criminal court having jurisdiction in the matter”.

Code

H *Section 4 : Trial of offences under the Indian Penal Code and other laws-* (1) All offences under the Indian Penal Code (45 of

1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained. A

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. B

Section 5 : Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force". C

Provisions of the Code would be applicable to the investigations, inquiries into and trials of cases by criminal Courts of various descriptions, being the parent statute, in the absence of any contrary provision in any special statute or special provision excluding jurisdiction or applicability of the Code. Sub-section (1) of Section 4 deals with offences under the IPC. Second limb of sub-section (2) deals with the exclusion, reading ".....but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences". (See *Directorate of Enforcement v. Deepak Mahajan and Anr.*, [1994] 3 SCC 440.) In a case involving Bombay Prevention of Gambling Act, 1887 it was held that the Act was a special law providing special procedures for the manner or place of investigating or inquiring into the offences under it, and therefore the provisions thereof must prevail and no provisions of the Code can apply. [See *Niratan Sircar v. Lakshmi Narayan Ram Niwas*, AIR (1965) SC 1]. D E F

Section 5 consists of three components, and as observed in *Maru Ram etc.etc. v. Union of India and Ors.* [1981] 1 SCC 107, they are as follows: G

"(1) The Code covers matters covered by it;

(2) If a special or local law exists covering the same area, the said law is saved and will prevail; H

A (3) If there is a special provision to the contrary, that will
 B override the special or local law. A “special law”, as observed in
Kaushalya Rani v. Gopal Singh, AIR (1964) SC 260, means a law
 enacted for special cases, in special circumstances, as distin-
 guished from the general rules of law laid down as being
 applicable to all cases dealt with by the general law. The Act fits
 the description. Additionally, Section 16(2) of the Act begins with
 a non obstante clause relating to the Code.”

C There are parallel provisions to Section 10(m) of the Act in the Army
 Act, 1950 (hereinafter referred to as the ‘Army Act’). In fact Section 39
 of the Army Act deals with ‘absence without leave’. The maximum period
 of imprisonment may extend to three years or with such less punishment
 as is mentioned in the said Act itself.

D The inevitable conclusion is that the Assistant Commandant was
 clothed with necessary jurisdiction for trial of the matter.

E Residual question is what would be an appropriate sentence. It is not
 disputed and rather fairly conceded that for a person in a disciplined service
 like the CRPF, any act of indiscipline deserves adequate and stringent
 punishment under the Act. In terms of Section 10(m) an employee who
 absents himself without leave or without sufficient cause overstays leave
 granted to him can be punished with imprisonment for a term which may
 extend to one year or with fine which may extend to three months pay or
 with both. The offence has been treated as one of “less heinous offences”.
 More heinous offences are provided in Section 9. The Assistant Comman-
 F dant has found the explanation given by the respondent to be not
 acceptable. Therefore, he has been rightly held to have committed a less
 heinous offence. Taking note of the relevant aspects, we feel the fine of
 two months pay which respondent was drawing at the time when the
 proceedings were initiated would meet the ends of justice. By altering the
 G punishment we are not belittling the gravity of offence but, in our
 view deterrent punishment must be resorted to when such absence is
 resorted to avoid and evade undertaking a testing or trying venture or
 deployment - essential at any given point of time, and not as a routine in
 the normal course. The appeal is allowed to the extent indicated above.