

A

UNION OF INDIA & ORS.

v.

LT. COL. KULDEEP YADAV

(Civil Appeal No.7603 of 2019)

B

SEPTEMBER 25, 2019

[A. M. KHANWILKAR AND AJAY RASTOGI, JJ.]

C *Service Law – Censure – Respondent was commissioned in the Army Corps of Electronics and Mechanical Engineering (EME) in the year 1997 – In 2009, he came in contact with a foreign national and remained in contact with her for over two years from 2009 to 2011 – He also stayed with her at the Army premises/Army guest house and did not disclose her true identity – A staff enquiry was conducted, consequent to which a show cause notice was issued to the respondent – The competent authority found*

D *respondent blameworthy of all the lapses and conveyed Severe Displeasure (Recordable) to the respondent – Respondent filed a statutory complaint before the competent authority, which was rejected – Thereafter, respondent filed original application before the Armed Forces Tribunal – Tribunal despite noting that the*

E *punishment of censure awarded by the competent authority, cannot be faulted, held that punishment of ‘Severe Displeasure (Recordable)’ was not commensurate with the act and conduct of the applicant – Further, Tribunal remanded the matter to the competent authority to award censure other than ‘Severe Displeasure (Recordable)’ – On appeal, held: The Tribunal is*

F *competent and empowered to interfere with the punishment awarded by the appropriate authority in any departmental action, however, exercise of the power is circumscribed and it can be invoked only in exceptional and rare cases – The Tribunal, ordinarily, is not expected to examine the quantum and the nature of punishment*

G *awarded by the disciplinary authority as a Court of appeal and substitute its own view and findings by replacing the subjective satisfaction arrived at by the competent authority in the backdrop of the evidence on record – In the instant case, the Tribunal took an erroneous approach despite having noticed that the respondent had admitted all the allegations made against him in the show*

H *cause notice – It was not a case of an aberration or a one time*

indiscretion of the respondent – Respondent continued to remain in contact with foreign national for over two years – Further, he furnished wrong information in the guest list of the guest house – Respondent admitted that he unauthorisedly kept ‘official’ documents in his laptop including the crucial information regarding his rank, name and unit location and the laptop was routinely connected to the internet and made easily accessible to a foreign national – Tribunal committed manifest error in interfering with the award of censure of Severe Displeasure (Recordable) – Therefore, the award of censure of ‘Severe Displeasure (Recordable)’ passed by the competent authority upheld.

Allowing the appeal, the Court

HELD: 1. It is no more *res integra* that the Tribunal is competent and empowered to interfere with the punishment awarded by the appropriate authority in any departmental action, on the ground that the same is excessive or disproportionate to the misconduct proved against the delinquent officer. However, exercise of that power is circumscribed. It can be invoked only in exceptional and rare cases, when the punishment awarded by the disciplinary authority shocks the conscience of the Tribunal or is so unreasonable that no reasonable person would have taken such an action. The Tribunal, ordinarily, is not expected to examine the quantum and nature of punishment awarded by the disciplinary authority as a court of appeal and substitute its own view and findings by replacing the subjective satisfaction arrived at by the competent authority in the backdrop of the evidence on record. [Para 22] [679-H; 680-A-B]

2. Indeed, it is open to the Tribunal to direct the disciplinary authority to reconsider the penalty imposed by it; and in exceptional and rare cases, may itself impose appropriate punishment to shorten the litigation by recording cogent reasons therefor. The reported decisions pressed into service by the appellants have consistently taken this view. In the present case, the Tribunal has adopted the former option, of relegating the respondent before the competent authority for reconsideration of the punishment but, at the same time, hedged by an observation that awarding of censure in the facts of the present case was inevitable. [Para 23] [680-C-D]

A 3. The Tribunal erroneously assumed that the competent
authority opted to resort to administrative action by awarding
censure instead of Court Martial, because it had condoned the
misconduct of respondent being of a minor nature and not being
B a case involving moral turpitude, fraud, theft, dishonesty and
misappropriation. This basis is plainly misdirected and not in
conformity with the applicable policy regarding award of censure
to Officers and JCO's circulated vide communication dated 23rd
C April, 2007. In fact, the Tribunal has extracted the relevant
portion of the said policy, which clearly predicates that in cases,
which are not of a minor nature and not an act involving moral
D turpitude, fraud, theft, dishonesty, financial irregularities or
misappropriation where trial by a Court Martial is not practicable
or is inexpedient due to other reasons, may if found appropriate,
be forwarded to Integrated HQ of MoD (Army) (DV Dte) at the
discretion of the GOC-in-C for consideration of the award of
E censure by the COAS/Government. The case of the respondent
would certainly fall within the purview of the said clause.
Indubitably, just because the competent authority chose to
dispense with the disciplinary action of Court Martial *qua* the
respondent, does not make the misconduct and misdemeanour
of the respondent any less serious much less to be of a minor
F nature as assumed by the Tribunal. Notably, the Tribunal has
taken such erroneous approach despite having noticed that the
respondent had admitted all the allegations made against him
in the show cause notice. [Para 26] [681-B-E]

4. The Tribunal was then impressed by the fact that the
F respondent had admitted the allegations made against him in the
show cause notice. That conduct of the respondent, according
to the Tribunal, unravelled the fair and candid intention of the
respondent - to not conceal anything from the authority. The
Tribunal completely glossed over the seriousness of the
G allegations articulated in the show cause notice - that the
respondent continued to remain in contact with the foreign
national for over two years including facilitated her to visit India
and then also stayed with her in the official mess at Goa by not
disclosing her real identity. If that misconduct of the respondent
had not come to the notice of the appropriate authority, the
H respondent would have continued to indulge in the same manner.

Concededly, it is not a case of an aberration or a one time indiscretion of the respondent as pleaded by him. Initiating Staff Court of Inquiry against the respondent, therefore, in no way, tantamount to condoning his lapses by the authority concerned as such. [Para 27] [681-F-H; 682-A-B] A

5. The Tribunal also committed a palpable error in opining that the show cause notice does not contain allegation against the respondent, regarding furnishing wrong information in the guest list of the Army Guest House. The show cause notice vividly describes the serious lapses committed by the respondent such as in clause 2(a) (iv), namely, “unauthorisedly” bringing and staying with a foreign national, in the Army premises in Goa from 12th October, 2011 to 15th October, 2011. This allegation was sufficient to include the misdemeanour of the respondent of having furnished wrong information in the guest list of the guest house. This allegation has been admitted by the respondent. [Para 28] [682-D-E] B C D

6. The Tribunal also got swayed away by the fact that the allegation made in the show cause notice did not mention about “classified” documents on the laptop. It was of the view that only if reference was to be made to “classified” documents, it would have been a case of sensitive nature touching upon the security of the nation. What has been glossed over by the Tribunal, is that, the allegation against the respondent in the show cause notice is about unauthorisedly keeping “official” documents in his laptop including the crucial information regarding his rank, name and unit location, and further the laptop containing such official documents/information was routinely connected to the internet and made easily accessible to a foreign national. This allegation has been admitted by the respondent in his response to the show cause notice. The respondent merely wanted the competent authority to take a lenient view, being momentary loss of indiscretion. [Para 29] [682-F-H] E F G

7. Having carefully analysed the erroneous basis on which the Tribunal came to hold that the punishment of Severe Displeasure (Recordable) is not commensurate with the lapses of the respondent, we have no hesitation in concluding that the Tribunal committed manifest error in interfering with the award H

- A of censure of Severe Displeasure (Recordable), in the facts of this case. In our opinion, the basis on which the Tribunal chose to interfere being indefensible, the conclusion reached by the Tribunal on such edifice must fall to the ground. [Para 31] [683-C-D]
- B *Ranjit Thakur v. Union of India and Others* (1987) 4 SCC 611 : [1988] 1 SCR 512 ; *B.C. Chaturvedi v. Union of India and Others* (1995) 6 SCC 749 : [1995] 4 Suppl. SCR 644 ; *Union of India and Others v. Bodupalli Gopalaswami* (2011) 13 SCC 553 : [2011] 11 SCR 326 ; *Union of India v. Parma Nanda* (1989) 2 SCC 177 : [1989] 2 SCR 19 ; *Mithilesh Singh v. Union of India and Others* (2003) 3 SCC 309 : [2003] 2 SCR 377 ; *General Court-Martial and Others v. Col. Aniltej Singh Dhaliwal* (1998) 1 SCC 756 : [1997] 6 Suppl. SCR 470 ; *Union of India and Others v. Dwarka Prasad Tiwari* (2006) 10 SCC 388 : [2006] 7 Suppl. SCR 217 ; *S.R. Tewari v. Union of India and Another* (2013) 6 SCC 602 : [2013] 8 SCR 988 – referred to.
- C
- D

Case Law Reference

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|---|-------------------------|-------------|---------|
| E | [1988] 1 SCR 512 | referred to | Para 15 |
| | [1995] 4 Suppl. SCR 644 | referred to | Para 15 |
| | [2011] 11 SCR 326 | referred to | Para 15 |
| | [1989] 2 SCR 19 | referred to | Para 15 |
| | [2003] 2 SCR 377 | referred to | Para 15 |
| F | [1997] 6 Suppl. SCR 470 | referred to | Para 15 |
| | [2006] 7 Suppl. SCR 217 | referred to | Para 15 |
| | [2013] 8 SCR 988 | referred to | Para 15 |

- G CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7603 of 2019.

From the Judgment and Order dated 07.12.2016 of the Armed Forces Tribunal, Principal Bench at New Delhi in O.A. No. 555 of 2014.

- ANS Nadkarni, ASG, V. D. Makhija, Sr. Adv., S. S. Rebello, Rajat Nair, Praveen, A. K. Sharma, Mukesh Kumar Maroria, Advs. for the Appellants.
- H

Rahul Kaushik, Ms. Bhuvneshwari Pathak, Ms. Shilpi Satyapriya A
Satyam, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. M. KHANWILKAR, J.

1. Admit. B

2. The moot question involved in this appeal is: whether the Armed Forces Tribunal despite noting that the punishment of censure awarded by the competent authority cannot be faulted, ought to have interfered on the specious ground that “Severe Displeasure (Recordable)” was not commensurate and excessive in the facts of the present case; and to direct the competent authority to award censure other than “Severe Displeasure (Recordable)”, merely because censure can also be of Severe Displeasure (Non-Recordable) or mere Displeasure, as the case may be? The incidental question is: whether this approach, inevitably, entails in sitting over the subjective satisfaction of the competent authority in the matter of awarding punishment? C D

3. The respondent was commissioned in the Army Corps of Electronics and Mechanical Engineering (EME) on 6th December, 1997. He was posted to UNDOF, Golan Heights as Transport Officer w.e.f. 5th July, 2008 to 4th July, 2009. In January 2009, or around that time, he came in contact with a foreign national Miss De Oliveira Sueli Montilha (in short Ms. Sueli) of Brazil, who was working with Nazha and Darwish a sub-contractor company for United Nations in Syria. While posted at UNDOF, the work place of the respondent was Headquarters Counter Insurgency Force (U) (HQ CIF (U)) w.e.f. 5th July, 2009 as AQMG. He was then detailed for Officers Advance Computer Technical (OACT) course Serial No.20 at Military College of Electronics and Mechanical Engineering (MCEME), Secunderabad w.e.f. 4th June, 2011 to 23rd March, 2012. E F

4. It is stated that the respondent continued to remain in contact with Ms. Sueli through e-mails, phone calls, skype, short messaging system (SMS) and personal meetings for over two years from 2009 to 2011. He also stayed with her at the Army premises, 2 STC Officers Mess, Guest Room in Goa from 12th October, 2011 to 15th October, 2011. G H

- A 5. Upon cognition of the stated misdemeanour of the respondent, a Staff Court of Inquiry was convened by the Headquarters, Southern Command to investigate into the circumstances under which the respondent came in contact with a foreign national and stayed with her at the Army premises in Goa, in contravention of the “Instructions on Contact with Foreign Nationals, 1987” (for short, “**1987 Instructions**”).
- B The Staff Court of Inquiry was finalised with directions of General Officer Commanding-in-Chief, Southern Command (GOC-in-C). Consequent thereto, a show cause notice was issued to the respondent vide letter dated 25th January, 2013, so as to give an opportunity to the respondent to explain and show cause as to why
- C censure be not awarded to him. The relevant extract of the show cause notice reads thus:

“SHOW CAUSE NOTICE

- D 1. A court of inquiry was convened by HQ Southern Command to investigate into the circumstances under which you allegedly made contact with a foreign national and stayed with Miss De Oliveira Sueli Montilha of Brazil at HQ 2 STC Officers Mes, Goa with effect from 12 Oct to 15 Oct 2011 in contravention of the “Instructions on contact with Foreign Nationals 1987”
- E 2. The proceedings of said court of inquiry were placed before the General Officer Commanding in Chief, Southern Command, who has found you prima facie blameworthy for the following lapses:
- F (a) For violating the provisions of paras 7, 13, 44 and 45 of “instructions on contact with foreign nationals 1987” issued by Army Headquarters on following counts:
- G (i) Unauthorisedly having contact with Miss Sueli De Oliveira Montilha, a foreign National, through emails, phone calls, skype, short messaging system (SMS) and personal meetings for over two years from 2009 to 2011.
- H (ii) Unauthorisedly and improperly writing letters dated 11 October 2010 and 3 March 2011 of sponsorship to Indian Embassy Damascus (Syria) for facilitating Miss Sueli De Oliveira Montilha’s visit to India.

(iii) Personally meeting Miss Sueli De Oliveira Montilha A
during her visits to India four time from 03 to 08 Jul
2010, 13 to 24 December 2010, 01 to 05 April 2011
and 12 to 15 October 2011.

(iv) Unauthorisedly bringing and staying with Miss Sueli B
De Oliveira Montilha in the Army premises in Goa
from 12 to 15 October 2011.

(b) For violating the instructions on use of internet by Army C
personnel issued vide directorate General of Military
Intelligence, General Staff, Integrated Headquarters of
Min of Defence (Army) vide their letter No. A/38024/
1/MI-11 dated 03 October 2011 on following counts:

(i) Unauthorisedly keeping official documents in your D
laptop which was being routinely connected to the
internet as brought out by the court of inquiry.

(ii) Maintaining facebook account revealing your rank, D
name and unit location

.....”

6. The respondent submitted his response to the show cause E
notice, which was duly considered by the competent authority. Finally,
the competent authority vide decision dated 10th May, 2013, found
respondent blameworthy of all the lapses attributed to him in the show
cause notice and conveyed Severe Displeasure (Recordable) to the
respondent. The relevant portion of the said communication reads thus:

“..... F

3. Commandant Military College of Electronics and Mechanical G
Engineering, Secunderabad has opined that although the lapse
committed by the officer is inexcusable on moral grounds but now
the officer has been conducting himself in exemplary manner.
The officer on professional front has an outstanding record and
achieved consistently phenomenal grades right from his school
days and thereafter on all courses in the Army. He is a high
caliber officer and considering the lapses as one time indiscretion
as claimed by the officer and the fact that he has a long way
ahead, a lenient view may be taken. H

A 4. From the record of service of the officer attached with his
Reply to his Show Cause Notice, it is evident that officer has
done well in all the courses. He was accordingly graded as per
his performance. **However, doing exceedingly well in his
service as brought out above, does not give license to the
officer to commit lapses / misdemeanors and conduct
himself in an unofficer like manner as mentioned in the
Show Cause Notice bearing No A/2405020/338/DV-2 dated
25 January 2013. Infact, such officers with good career
profile are expected to conduct themselves in a more
exemplary manner worth emulating by others. Further, the
officer had put in sufficient service and was holding the
rank of Lieutenant Colonel at the relevant time of
committing the lapses / misdemeanors. His remaining in
constant contact with the foreign national for about two
years, staying with her in Officer's Mess at Goa and
violating instructions on use of internet by Army personnel
as mentioned in the Show Cause Notice are inexcusable
as these are not one time indiscretion / aberration but
repetition of the same time and again.**

E 5. Considering all the facts and circumstances of the case, I find
IC-57351N Lieutenant Colonel Kuldeep Yadav blameworthy of
all the lapses attributed to him in Headquarters Southern Comd.
Show Cause Notice bearing No A/2405020/338/DV-2 dated 25
January 2013.

F 6. In view of the above, I direct that my 'Severe Displeasure
(Recordable)' conveyed to IC-57351N Lieutenant Colonel
Kuldeep Yadav of Military College Electronics and Mechanical
Engineering, Secunderabad."

(emphasis supplied)

G 7. The respondent resorted to a statutory complaint before the
competent authority, which, after due consideration of all the grounds
urged by the respondent vide order dated 26th February, 2014, rejected
the same. The relevant part of the said order reads thus:

".....

H AND WHEREAS, the Complainant has prayed for the
following:-

- (a) The award of ‘Sever Displeasure (Recordable)’ be set aside and he be pardoned considering it to be a one-time aberration. A
- (b) Alternatively, ‘Sever Displeasure (Recordable)’ be mitigated to ‘Sever Displeasure (Non Recordable)’ considering his outstanding career and 16 years of unblemished service record to enable him to go through the Number 3 Selection Board based on his merit and not let one mistake affect his entire life and career. B

AND WHEREAS, perusal of documents on record reveal the following :- C

- (a) **The Complainant was found blameworthy for violating provisions of para 7, 13, 44 and 45 of “Instructions on Contact with Foreign Nationals 1987”.** He had unauthorized contact with Ms Sueli De Oliveira Montilha, a Foreign National through e-mail, phone calls, Skype, SMS and personally meeting four times during her visits to India between January 2009 to October 2011. D
- (b) The Complainant unauthorizedly wrote letters of sponsorship to Indian Embassy in Damascus (Syria) for facilitating Ms Sueli De Oliveira Montilha’s visit to India. E
- (c) The Complainant violated the policy instructions on use of internet by Army personnel issued by Directorate General of Military Intelligence, Integrated Headquarters of Ministry of Defence (Army) vide their letter dated 03 October 2011 by keeping official documents in his laptop which was routinely connected to internet and maintained a ‘Face Book Account’ revealing his rank, name and unit location. The laptop was also used personally by Ms Sueli De Oliveira Montilha on a number of occasions thereby giving her access to classified documents. F G
- (d) The Complainant had put in 13 years and 10 months of service at the relevant time and was holding the rank of Lieutenant Colonel. **The lapses on his part for violation of ‘Instructions on Contact with Foreign H**

- A **Nationals-1987’ and Policy Instructions dated 03**
 October 2011 on use of internet by Army
 Personnel, issued by Directorate General of
 Military Intelligence, Integrated Headquarters of
 Ministry of Defence (Army) are serious in nature,
B **The award of ‘Severe Displeasure (Recordable)’**
 by GOC-in-C Southern Command on 10 May 2013
 is commensurate to the lapses on the part of the
 Complainant.
- C (e) **Exemplary Record of Service and outstanding**
 performance of the Complainant prior to and after
 the award of Censure are as such no grounds for
 redressal.
- D (f) **The Complainant remained in constant contact with the**
 foreign national for about two years; staying with tier
 in Officer’s Mess of Number 2 Signals Training Centre,
 Goa from 12 October 2011 to 15 October 2011, thereby
 violating the laid down instructions. Considering his
 rank and status, the award of ‘Severe Displeasure
 (Recordable)’ to the Complainant is fair, just and
 legal and does not merit any mercy.
- E (g) **The Complainant has contended that he will be screened**
 by Number 3 Selection Board for promotion to the next
 rank in May 2014 and Censure will have adverse affect
 on his entire career. The award of a Censure does
 not debar an officer from being considered for
F **promotion |and may not by itself affect his**
 promotion. However, while it is operative, it is
 taken cognizance of as part of the officer’s overall
 Record of Service in assessing his performance for
 such promotion. The effect of a Recordable
G **Censure on promotion would be considered in its**
 totality based on his overall performance.

H 6. AND NOW THEREFORE, having considered the Statutory
 Complaint in its entirety alongwith available documents on record,
 the Central Government finds that the contentions raised by the
 Complainant lack merit. The Statutory Complaint dated 22 June

2013 submitted by IC-57351N Lieutenant Colonel Kuldeep Yadav, A
is rejected.

(VN Raveendran)

Under Secretary to the Government of India”

(emphasis supplied) B

8. Eventually, the respondent carried the matter before the Armed Forces Tribunal Principal Bench, New Delhi (for short, “**Tribunal**”) by filing Original Application No.555 of 2014. The Tribunal first considered the ground urged by the respondent - that the show cause notice was not legal and valid as the same was issued in violation of 1987 and 2011 Instructions. According to the respondent, the said Instructions could not be invoked against him. The Tribunal, however, opined that the purpose of 1987 Instructions would be defeated, if a narrow interpretation was to be given thereto i.e., it applies only at the initial contact with the foreign national and not to cases involving subsequent and continued contact with the officer. The Tribunal then noted that in response to the subject show cause notice, respondent admitted the allegations made against him but had prayed for a lenient view. The Tribunal thus held that the challenge to the validity of the show cause notice cannot be countenanced at the instance of the respondent. C
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9. The Tribunal then dealt with the next ground urged by the respondent regarding non applicability of 2011 Instructions. Even that plea came to be rejected on the finding that mere clerical error pertaining to incorrect mention of the date of Instructions, would not change the nature of allegations or vitiate the show cause notice, moreso, in light of acceptance of the allegations by the respondent. The Tribunal noted that due to quoting of incorrect year of instructions, no prejudice is caused to the respondent. Besides, the respondent had clearly understood the allegations made against him in the show cause notice. It further noted that the challenge was not with regard to the source of power of the competent authority. F
G

10. The Tribunal then considered the next ground urged by the respondent that the rejection of his statutory complaint was not due to foreign national having opportunity to have access to “Classified Documents”. Whereas, the allegation was only about the possibility of access to official documents on the respondent’s laptop. The Tribunal, H

A however, observed that it would make no difference nor render the order of Severe Displeasure (Recordable) invalid on that count alone. It then went on to observe that even non-consideration of exemplary service record of the respondent, whilst rejecting the statutory complaint by the appropriate authority *per se* would not vitiate the order of Severe Displeasure (Recordable).

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11. The Tribunal then proceeded to consider the argument of the appellant herein that the order of Severe Displeasure (Recordable) should not be interfered with. While dealing with this contention, the Tribunal noted that the respondent had not intentionally suppressed his real identity and had offered explanation in reference to Question No.19 of the Staff Court of Inquiry Proceeding. The respondent had clearly stated that he did not disclose that he was staying with foreign national lady, due to personal reasons from family point of view. The Tribunal held that that fact had commended to the competent authority for which, no allegation is noted in the show cause notice - relating to wrong personal details given by the respondent in the register of the Army Guest House.

D
12. The Tribunal then proceeded to deal with the justness of the order awarding “Severe Displeasure (Recordable)”. While doing so, it adverted to the policy regarding award of Severe Displeasure (Recordable) to Officers and JCOs vide letter dated 23rd April, 2007 and another policy on “Code of Conduct of Selection Boards by Quantification System” issued by the Military Secretary Branch, IHQ MoD (Army) dated 4th January, 2011. After adverting to these policies, the Tribunal noted that the competent authorities of Army, while taking cognizance of the misdeed of the respondent in maintaining contact with a foreign national without due permission and violating security related instructions, did not find the charge serious enough to proceed against the respondent with disciplinary action. However, the appropriate authority was content to deal with the respondent administratively, by awarding him Severe Displeasure (Recordable). The Tribunal then noted that this award coincided with all three chances of No.3 Selection Board for the respondent. After having said this, the Tribunal proceeded to observe as follows:

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“36. We have perused the communication dated 03.06.2013 on “Lifting of DV Ban on IC 57351N Lt Col Kuldeep Yadav”, the document in the dossier of the applicant put up to the Members

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of No.3 Selection Board, whose para 2 (j) has been amended vide letter dated 12.09.2016, when the hearing of this case was in progress. The said action on the part of the respondent has no bearing on the proceeding of No.3 Selection Board, as the receiver does not reveal non selection of the applicant only on the ground of award of censure.

37. Having held so, we shall now proceed to examine as to whether punishment of 'Severe Displeasure (Recordable)' is too harsh, having regard to his conduct as well as service profile, as the same leads to the denial of promotion to the applicant. As noticed above, the applicant has a brilliant service profile and is a very efficient and meritorious officer. There was no blemish against him prior to issuance of show cause notice which led to awarding the censure.

38. The Policy of awarding of censure provides that the censure, which can be 'Severe Displeasure (Recordable)', 'Severe Displeasure (Non-Recordable)' and 'Displeasure', is awarded for an act, conduct, omission or offences of minor nature and not in case involving moral turpitude, fraud, theft, dishonesty and misappropriation. The respondent authority having issued the show cause notice asking the applicant to show cause as to why he should not be censured, has accepted the fact that the applicant's act or conduct is not serious, but of minor nature and not an act involving moral turpitude, fraud, theft, dishonesty or misappropriation, for which one has to be tried either by Court Martial or by prosecution in a Civil Court. The applicant in his reply to the show cause notice has admitted the allegations, made against him which also reflects his intention of not concealing anything from the authority. The respondent authority has also condoned the action of the applicant in furnishing wrong information in the guest list of the guest room relating to his service details by not levelling said allegation in the show cause notice issued. The documents in the Laptop of the applicant were also not 'Classified' documents. Had those documents be of sensitive nature touching even remotely the security of the state the applicant would have been tried by the Court Martial. That apart, as discussed above, had the award of censure not coincide with all the three chances of No.3 Selection Board, the applicant

A would have been selected for promotion. As noticed above, the respondents themselves have found those allegations as not serious warranting trial by Court Martial.

B 39. The applicant, however, undoubtedly has to punished for his lapses, which he has admitted. Hence though we are of the considered opinion that while the action of the respondents in awarding censure cannot be faulted, punishment of 'Severe Displeasure (Recordable)' does not commensurate with the act and conduct of the applicant having regard to the facts and circumstances involved as it leads to denial of promotion to otherwise a bright officer.

C 40. We, therefore, while setting aside the impugned order dated 10.05.2013 passed by the Respondent No.3, awarding 'Severe Displeasure (Recordable)', remand the matter to the Respondent No.3 to reconsider the same and to take any of the administrative action permissible under the Policy laid down on Award of Censure of Officers and JCO's circulated vide communication dated 23.04.2007, other than 'Severe Displeasure (Recordable)'. Based on the said decision, the Competent Authority shall consider the Applicant for promotion by No.3 Selection Board as a 'fresh case' in accordance with the Rules.

E 41. The OA is accordingly allowed to the extent indicated above. No costs."

F 13. This decision is the subject matter of challenge in the present appeal. Thus, the limited challenge is regarding the interference with the awarding of Severe Displeasure (Recordable) by the disciplinary authority. That has been done despite a categorical finding that the fact situation of this case warrants a censure against the respondent, for having violated the above stated Instructions.

G 14. It is urged that the quantum and nature of punishment is the sole prerogative of the disciplinary authority; and in the present case, that discretion has been exercised with due consideration of all the relevant matters. It is urged that the punishment awarded to the respondent by no standards can be labelled as shockingly disproportionate. However, the Tribunal got swayed away on tenuous reasoning; and interfered with a just decision of the appropriate authorities. The reasoning adopted by the Tribunal is palpably replete with error apparent on the face of the record, if not perverse. Inasmuch

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as, merely because the authorities chose to proceed against the respondent administratively instead of resorting to Court Martial, does not warrant a conclusion that awarding of Severe Displeasure (Recordable), despite the nature of misdemeanour of the respondent, was excessive or shockingly disproportionate. Further, the Tribunal has completely undermined, if not glossed over, the seriousness of the allegations against the respondent as noted in the show cause notice, which, the respondent had unwaveringly accepted and beseeched the authority to take a lenient approach being a one-time aberration or to borrow his words, “a momentary loss of indiscretion”.

15. It is urged by the appellant that brilliant service record of the respondent cannot wash away the indiscretion which could have escalated to threats concerning national security. Further, the authorities were fully conscious about the service record of the respondent and after duly considering all aspects decided to award Severe Displeasure (Recordable). The acts of commission and omission of the respondent, which, he admitted to have indulged in, were inexcusable and warranted a serious departmental action. Indisputably, the respondent had admitted to have remained in touch with a foreign national for over two years including having facilitated her to visit India and also stayed with her in the Army officers’ mess guest room by making false entries in the respective diary and giving false identity that foreign national was his wife. The lesser action of censure of Severe Displeasure (Recordable), therefore, by no standards can be said to be untenable on facts or in law. To buttress the above submissions, reliance is placed on *Ranjit Thakur Vs. Union of India and Others*¹, *B.C. Chaturvedi Vs. Union of India and Others*², *Union of India and Others Vs. Bodupalli Gopalaswami*³, *Union of India Vs. Parma Nanda*⁴, *Mithilesh Singh Vs. Union of India and Others*⁵, *General Court-Martial and Others Vs. Col. Aniltej Singh Dhaliwal*⁶, *Union of India and Others Vs. Dwarka Prasad Tiwari*⁷ and *S.R. Tewari Vs. Union of India and Another*⁸.

¹ (1987) 4 SCC 611

² (1995) 6 SCC 749

³ (2011) 13 SCC 553

⁴ (1989) 2 SCC 177

⁵ (2003) 3 SCC 309

⁶ (1998) 1 SCC 756

⁷ (2006) 10 SCC 388

⁸ (2013) 6 SCC 602

- A 16. The respondent, on the other hand, would adopt the reasons recorded by the Tribunal, to justify the interference with the censure of “Severe Displeasure (Recordable)”. According to the respondent, since the Tribunal granted him substantive relief by directing the competent authority to award any other censure (namely, “Severe Displeasure (Non-Recordable)” or “Displeasure”), he did not deem it necessary to assail the impugned order. It is urged that the impugned censure order deserves to be quashed because the very foundation of the show cause notice was misplaced. Moreover, the members to No.3 Selection Boards (SB-3) were misled due to furnishing of wrong disciplinary inputs concerning the respondent, leading to incorrect decision. Further, the extant Discipline & Vigilance Policy (DV Policy) came to be wrongly applied. Similarly, the Military Secretary Branch Policy (MSB Policy) was inapplicable. Additionally, the order of the Central Government on the statutory complaint filed by him was unsustainable. It is urged that awarding of censure of Severe Displeasure (Recordable) has had a punitive effect, including on career progression of the respondent. Thus, it is urged that in the interest of justice, the respondent may be allowed to challenge the order of the Tribunal rejecting his claim on merits.
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17. According to the respondent, the GOC-in-C, Southern Command had found lapses of respondent to be of a minor nature. The Tribunal also took note of the fact that the documents on the respondent’s laptop were not classified documents. That would dilute the seriousness of the allegation against the respondent. In that, presence of official documents on the laptop (albeit easily accessible to a foreign national), would still not be a case of serious security issue warranting award of censure.
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18. The respondent has also invited our attention to the analysis made by the Tribunal in reference to the allegations made against him in the show cause notice and in the order of the competent authority. It is urged that accepting the explanation offered by the respondent, had the effect of condoning the alleged misdemeanour of the respondent regarding furnishing of incorrect information in the guest list of the Army Guest House. Presumably, for that reason, the same does not find place in the opinion formed by the concerned authority whilst awarding censure. Further, it was not a case of intentional or deliberate act of the respondent. The respondent had frankly admitted the acts attributed to him and urged upon the authority, to take a lenient view of the matter
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as a one-time aberration keeping in mind his past impeccable service records. A

19. According to the respondent, the punishment awarded by GOC-in-C, Southern Command was shockingly disproportionate. In any case, even if the authority intended to award censure as per the Censure Policy dated 23rd April, 2007, the authority had at least three options: B

- (a) Severe Displeasure (Recordable)
- (b) Severe Displeasure (Non-Recordable) and
- (c) Displeasure

It is, therefore, urged that the Tribunal was justified in taking the view that even if it was a case of censure, awarding of Severe Displeasure (Recordable) was shockingly disproportionate or excessive. C

20. Furthermore, it is contended that the Tribunal was competent to examine the validity of the order passed by the appropriate or competent authority - both on questions of law and facts - in terms of Section 14 (5) of the Armed Forces Tribunal Act, 2007. In fact, the Tribunal could have itself substituted the punishment to a lesser degree, such as displeasure, in the peculiar facts of the present case; instead of remanding the matter to the competent authority for reconsideration. The Tribunal has thus abdicated its authority by relegating the respondent before the competent authority. According to the respondent, any other punishment of censure than simple displeasure, would be harsh and disproportionate. The respondent submits that the order passed by the Tribunal is unexceptional and if this Court intends to interfere therewith, the respondent be granted liberty to challenge the decision of the Tribunal concerning the grounds on merits of the action taken against him. The respondent has also placed on record the latest policy regarding the award of censure to officers dated 11th August, 2017, which classifies the types of censures that can be awarded and the validity period thereof. D E F

21. We have heard Mr. ANS Nadkarni, learned ASG, counsel for the appellants and Mr. Rahul Kaushik, counsel for the respondent. G

22. It is no more *res integra* that the Tribunal is competent and empowered to interfere with the punishment awarded by the appropriate authority in any departmental action, on the ground that the same is excessive or disproportionate to the misconduct proved against H

- A the delinquent officer. However, exercise of that power is circumscribed. It can be invoked only in exceptional and rare cases, when the punishment awarded by the disciplinary authority shocks the conscience of the Tribunal or is so unreasonable that no reasonable person would have taken such an action. The Tribunal, ordinarily, is not expected to examine the quantum and nature of punishment awarded by the disciplinary authority as a court of appeal and substitute its own view and findings by replacing the subjective satisfaction arrived at by the competent authority in the backdrop of the evidence on record.
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23. Indeed, it is open to the Tribunal to direct the disciplinary authority to reconsider the penalty imposed by it; and in exceptional and rare cases, may itself impose appropriate punishment to shorten the litigation by recording cogent reasons therefor. The reported decisions pressed into service by the appellants have consistently taken this view. In the present case, the Tribunal has adopted the former option, of relegating the respondent before the competent authority for reconsideration of the punishment but, at the same time, hedged by an observation that awarding of censure in the facts of the present case was inevitable.
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24. Let us, therefore, revert to the reasons weighed with the Tribunal, as can be discerned from paragraph No.37 onwards of the impugned judgment in particular, reproduced hitherto. The Tribunal first noted that awarding of Severe Displeasure (Recordable), may have impacted the promotional prospects of the respondent. It then proceeded to enquire, as to whether the punishment is too harsh having regard to the conduct as well as service profile of the respondent - who was considered to be a very efficient and meritorious officer. The Tribunal was impressed by the fact that there was no blemish against the respondent, prior to the issuance of the show cause notice.
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25. Indeed, the past service records of the delinquent officer may be germane for awarding punishment. But in the present case, the same had been duly noticed by the competent authority as also by the authority considering the statutory complaint filed by the respondent. That becomes evident from the decisions of both the authorities. For, the competent authority was very much conscious about the said position, as is reflected from paragraph No.4 of his order dated 10th May, 2013 (reproduced at paragraph No.6 hereinabove). In the same way, the higher authority whilst rejecting the statutory complaint filed by the
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respondent vide order dated 26th February, 2014 took note of this aspect as is clear from the extract reproduced in paragraph No.7 hereinabove. A

26. The Tribunal also erroneously assumed that the competent authority opted to resort to administrative action by awarding censure instead of Court Martial, because it had condoned the misconduct of respondent being of a minor nature and not being a case involving moral turpitude, fraud, theft, dishonesty and misappropriation. This basis is plainly misdirected and not in conformity with the applicable policy regarding award of censure to Officers and JCO's circulated vide communication dated 23rd April, 2007. In fact, the Tribunal has extracted the relevant portion of the said policy, which clearly predicates that in cases, which are not of a minor nature and not an act involving moral turpitude, fraud, theft, dishonesty, financial irregularities or misappropriation where trial by a Court Martial is not practicable or is inexpedient due to other reasons, may if found appropriate, be forwarded to Integrated HQ of MoD (Army) (DV Dte) at the discretion of the GOC-in-C for consideration of the award of censure by the COAS/ Government. The case of the respondent would certainly fall within the purview of the said clause. Indubitably, just because the competent authority chose to dispense with the disciplinary action of Court Martial *qua* the respondent, does not make the misconduct and misdemeanour of the respondent any less serious much less to be of a minor nature as assumed by the Tribunal. Notably, the Tribunal has taken such erroneous approach despite having noticed that the respondent had admitted all the allegations made against him in the show cause notice. B
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27. The Tribunal was then impressed by the fact that the respondent had admitted the allegations made against him in the show cause notice. That conduct of the respondent, according to the Tribunal, unravelled the fair and candid intention of the respondent - to not conceal anything from the authority. The Tribunal completely glossed over the seriousness of the allegations articulated in the show cause notice - that the respondent continued to remain in contact with the foreign national for over two years including facilitated her to visit India and then also stayed with her in the official mess at Goa by not disclosing her real identity. If that misconduct of the respondent had not come to the notice of the appropriate authority, the respondent would have continued to indulge in the same manner. Concededly, it is not a case of an aberration or a one time indiscretion of the respondent as pleaded by him. Realising the seriousness of the situation, the respondent was well advised to admit F
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A the allegations and invite a lenient action of awarding of censure only, instead of facing Court Martial. Initiating Staff Court of Inquiry against the respondent, therefore, in no way, tantamount to condoning his lapses by the authority concerned as such. Whereas, it is a just exercise of power in terms of clause 5 of the Censure Policy dated 23rd April, 2007, which reads thus:

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C “5. Cases which are not a minor nature and yet do not involve moral turpitude, fraud, theft or dishonesty and where trial by a Court Martial is not practicable being time barred or is expedient due to other reasons, may if found appropriate, be forwarded to Integrated HQ of MoD (Army) (DV Dte) at the discretion of the GOC-in-C for consideration of the award of censure by the COAS/Govt.”

D 28. The Tribunal also committed a palpable error in opining that the show cause notice does not contain allegation against the respondent, regarding furnishing wrong information in the guest list of the Army Guest House. The show cause notice vividly describes the serious lapses committed by the respondent such as in clause 2(a) (iv), namely, “unauthorisedly” bringing and staying with Ms. Sueli, a foreign national, in the Army premises in Goa from 12th October, 2011 to 15th October, 2011. This allegation was sufficient to include the misdemeanour of the respondent of having furnished wrong information in the guest list of the guest house. This allegation has been admitted by the respondent.

F 29. The Tribunal also got swayed away by the fact that the allegation made in the show cause notice did not mention about “classified” documents on the laptop. It was of the view that only if reference was to be made to “classified” documents, it would have been a case of sensitive nature touching upon the security of the nation. What has been glossed over by the Tribunal, is that, the allegation against the respondent in the show cause notice is about unauthorisedly keeping “official” documents in his laptop including the crucial information regarding his rank, name and unit location, and further the laptop containing such official documents/information was routinely connected to the internet and made easily accessible to a foreign national. This allegation has been admitted by the respondent in his response to the show cause notice. The respondent merely wanted the competent authority to take a lenient view, being momentary loss of indiscretion.

30. The Tribunal then adverted to the fact that the award of A
censure coincided with all the three chances of No.3 Selection Board.
That may be the effect of censure on promotion. As per the Censure
Policy, the intended punishment being permissible and the competent
authority being satisfied that the same is commensurate with the
seriousness of the uncontroverted allegations against the respondent, B
for the reasons recorded in that regard by it, such satisfaction cannot
be lightly brushed aside as being excessive or unjust. Accordingly, even
this reason weighed with the Tribunal is unstatable and tenuous.

31. Having carefully analysed the erroneous basis on which the
Tribunal came to hold that the punishment of Severe Displeasure C
(Recordable) is not commensurate with the lapses of the respondent,
we have no hesitation in concluding that the Tribunal committed manifest
error in interfering with the award of censure of Severe Displeasure
(Recordable), in the facts of this case. In our opinion, the basis on which
the Tribunal chose to interfere being indefensible, the conclusion reached D
by the Tribunal on such edifice must fall to the ground.

32. We are of the considered opinion that in the backdrop of the
incontroverted allegations, as articulated in the show cause notice issued
to the respondent, reproduced in paragraph No.5 hitherto, the same may
warrant a stern action against the respondent; and, thus, the discretion E
exercised by the competent authority in terms of the stated policy to
deal with the respondent administratively cannot be faulted with and
must be upheld, including the award of censure of Severe Displeasure
(Recordable) being commensurate thereto.

33. We are conscious of the argument of the respondent that if F
this Court was to overturn the conclusion of the Tribunal, may permit
the respondent to challenge the decision of the competent authority on
merits. In our opinion, the Tribunal has already dealt with the grounds
on which challenge thereto was founded; and rightly rejected the same,
taking into account the admission of the respondent in his written G
response to the show cause notice. Once, the respondent chose not to
controvert the allegations made against him in the show cause notice
and pursued the matter with the competent authority only for taking a
lenient view, he cannot be permitted to resile from that position. It would
result in allowing the respondent to approbate and reprobate. That cannot H

A be countenanced. Therefore, the prayer of the respondent to permit him to challenge the adverse findings of the Tribunal *qua* him on merits of the admitted allegations, is declined.

34. In view of the above, this appeal must succeed. The impugned judgment and order of the Armed Forces Tribunal is quashed and set aside. Instead, the decision of the Government of India dated 30th April, 2014, rejecting the statutory complaint of the respondent and upholding the order passed by the GOC-in-C dated 10th May, 2013 is restored.

35. Appeal is allowed in the above terms, with no order as to costs. All pending applications are also disposed of in terms of this decision.

Ankit Gyan

Appeal allowed.