



**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**LPA No.24 of 2018**  
**Reserved on : 30.05.2026**  
**Pronounced on:19.06.2026**  
**Uploaded on: 19.06.2026**

Ashwani Kumar

...Appellant

Versus

Union of India and Ors.

...Respondents.

*Coram*

***Hon'ble Mr. Justice G.S. Sandhawalia, Chief Justice.***

***Hon'ble Mr. Justice Bipin Chander Negi, Judge.***

*Whether approved for reporting?<sup>1</sup>*

For the appellant : Mr. Vinod Kumar Sharma, Advocate.

For the respondents : Mr. Balram Sharma, Deputy Solicitor  
General of India, for respondents  
No.1 to 4-Union of India.

Names of respondents No.5 and 6 stand  
deleted vide order dated 22.08.2019.

***Bipin Chander Negi, Judge***

The present appeal has been preferred against the impugned judgment dated 29.06.2018, passed in ***CWP No.1355 of 2012***, titled ***Ashwani Kumar Vs. Union of India and Ors.***, whereby removal of the petitioner from the service, vide order dated 29.06.2010 (Annexure P-12) and rejection of appeal preferred there against dated 28.07.2011 (Annexure P-16), have been upheld.

<sup>1</sup>*Whether the reporters of the local papers may be allowed to see the judgment?*

2. The petitioner was appointed in the ITBP as a Constable on 10.4.1999. On 27.8.2006, the petitioner was posted at Leh, where he remained till 27.1.2009 (Annexure R-8 of the writ paper book, page 181 thereof). Thereafter, the petitioner was transferred to Reckong-Peo, where he joined on 06.02.2009. For the purpose of the present appeal, we are concerned with the period, when the appellant was posted as a Security Assistant to Assistant Commandant-Avinash Singh at Leh.

3. The Assistant Commandant-Avinash Singh had got married on 24.11.2007. Post marriage, his wife had come to Leh on 4.08.2008. Wife of Assistant Commandant-Avinash Singh remained at Leh during August/September and from November to January 2009. It is during the aforesaid period that illicit sexual relations developed *inter se* the petitioner and the wife of the Assistant Commandant-Avinash Singh. Assistant Commandant-Avinash Singh was transferred from Leh on 11.02.2009. Immediately thereafter, Assistant Commandant-Avinash Singh filed a divorce petition against his wife on 16.02.2009.

4. Subsequent thereto on 05.03.2009, wife of the Assistant Commandant had filed a complaint against the petitioner and her husband with the D.G ITBP on account of

sexual, mental, physical harassment and recording of sexual act with the petitioner on a CD. Hence, for violation of Section 43, which deals with violation of good order and discipline of the Indo Tibetan Border Police Act (herein after for purpose of brevity referred to as the "Act") the petitioner was tried by a Summary Force Court. Charges framed against the petitioner before the Summary Force Court is at page No.165 of the writ paper book. The same reads as follows;

"RULE-45 & RULE-55(2)

Following charges have imposed on the Accused No.. 990160017 CT/GD Ashwani Kumar "B" coy, ITBP.

**Charge No. -1**

**Section-49:- Civil Offence (U/S-50 Rape with Civil Person)**

Personnel has established/made illicit relation with Smt. \_\_\_\_\_, w/o Sh. Avinash Singh, AC during the year 2008 when he was deployed as Security Assistant of AC/GD Avinash Singh and also made porn video against her will, which is an offence u/s-375 IPC.

**Charge No. 2**

**"Section-43 -Violation of Good Order and Discipline**

Personnel was motivated by Asstt. Commandant Avinash Singh to make illicit relation with Smt. \_\_\_\_\_, w/o Sh. Avinash Singh, AC and made porn C.D. Being member of the disciplined force CT/GD Ashwani Kumar did not bring this to the notice of higher Officials and violated the Good Order & Discipline of the force.

-Sd-  
Commandant  
17<sup>th</sup> Bn ITBP"

5. During enquiry, based on the fact that the petitioner admitted illicit sexual relations with the complainant i.e wife of the Assistant Commandant and the fact that the petitioner did not report the matter to any Senior Officer, the petitioner was held guilty of the charge framed for illicit relationship under Section 49. For the grave mis-conduct, petitioner was awarded a sentence of removal from service w.e.f 29.06.2010.

6. Appeal preferred against the sentence imposed was dismissed vide memorandum dated 08.12.2010 (Annexure R-3 of the writ paper book, page 171 thereof). Subsequent thereto, order dated 29.06.2010, whereby the petitioner had been removed from service by the Summary Force Court and the memorandum dated 08.12.2010, rejecting the appeal of the petitioner were assailed by way of CWP No.876 of 2011. A Co-Ordinate Bench of this Court on appraisal of the Memorandum dated 8.12.2010, found the same to be non-speaking and therefore, ordered a re-consideration of the appeal preferred against the sentence, passed by the Summary Force Court. On re-consideration, the appeal was rejected vide order dated 28.7.2011(Annexure R-7 of the writ paper book, page 175 thereof). In the aforesaid factual matrix, CWP No.1355/2012

preferred by the petitioner, challenging the aforesaid rejection order dated 28.7.2011, has been dismissed vide judgement dated 29.06.2018.

7. Similarly, Assistant Commandant-Avinash Singh in pursuance to the complaint of his wife dated 5.03.2009 was charged on two accounts by the General Force Court namely Section 43, which deals with the violation of good order and discipline in the ITBP Act and Section 26, which deals with unbecoming conduct under the ITBP Act. Under the former (Section 43) the specific charge qua the Assistant Commandant Avinash Singh was that he had forced his wife to have illicit relations with the petitioner. Qua the latter (Section 26) the specific charge was that the Assistant Commandant-Avinash Singh had recorded the sexual act of his wife with the petitioner. Post-conclusion of the inquiry, the Assistant Commandant-Avinash Singh was exonerated of the first charge, but held guilty insofar as the second charge was concerned and was imposed a sentence of forfeiture of two years past service for the purpose of pension.

8. Heard counsel for the parties and perused the record.

9. The sole contention raised is with respect to the quantum of punishment imposed on the present petitioner.

10. There is no statutory offence when adults willingly engage in sexual relations outside the marital setting. The exception being “adultery” as defined under Section 497 IPC. In this respect, reference can be made to the Apex Court judgement in **S. Khushboo v. Kanniammal, (2010) 5 SCC 600**. Relevant extract whereof reads as under;

*“31. While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of “adultery” as defined under Section 497 IPC.”*

However thereafter in **Joseph Shine v. Union of India, (2019) 3 SCC 39** after holding, “adultery undoubtedly is a moral wrong qua the spouse and the family”, Section 497 IPC was struck down as unconstitutional. Subsequently in **Joseph Shine v. Union of India, (2024) 2 SCC 334**, particularly in view of Article 33 of the Constitution of India, the Apex Court held that previously in **Joseph Shine v. Union of India, (2019) 3 SCC 39**, the Court was neither called upon nor has it ventured to pronounce on the effect of Sections 45 and 63 of the 1950 Army Act, as also the corresponding provisions in other Acts or any other provisions of the Acts (corresponding provisions in the case at hand are Sections 26 pertaining to unbecoming conduct and 43 which

deals with violation of good order and discipline of the ITBP Act). Even otherwise, Section 497 IPC, "**Adultery**" was an offence, when the offending acts in the case at hand were committed.

11. Hence, it is true that post **Joseph Shine v. Union of India, (2019) 3 SCC 39**, wherein Section 497 IPC was struck down as unconstitutional, the erring spouses have no remedy against each other within the confines of the present Penal Code, that is to say, they cannot prosecute each other for adultery, each one has a remedy against the other under the civil law for divorce on the ground of adultery. In the case at hand, adultery was an offence, when the offending acts were committed by the petitioner.

12. In **State of Karnataka v. Umesh, (2022) 6 SCC**, the Apex Court restricted interference by the High Court in exercise of judicial review over the findings of the disciplinary authority in the following terms;

*22. In the exercise of judicial review, the Court does not act as an appellate forum over the findings of the disciplinary authority. The court does not reappreciate the evidence on the basis of which the finding of misconduct has been arrived at in the course of a disciplinary enquiry. The Court in the exercise of judicial review must restrict its review to determine whether:*

- (i) the rules of natural justice have been complied with;*
- (ii) the finding of misconduct is based on some evidence;*

(iii) *the statutory rules governing the conduct of the disciplinary enquiry have been observed; and*

(iv) *whether the findings of the disciplinary authority suffer from perversity; and*

(v) *the penalty is disproportionate to the proven misconduct.*

13. From the aforesaid legal position, it is clear that penalty imposed in pursuance to a disciplinary enquiry can be assailed on the ground of being disproportionate to the proven mis-conduct. While imposing a penalty, the disciplinary authority or appellate authority exercise a discretion. In exercise thereof, a host of factors enumerated in ***UT of Dadra & Nagar Haveli v. Gulabhia M. Lad, (2010) 5 SCC 775*** are considered. Relevant extract where of reads as follow;

14. *The legal position is fairly well settled that while exercising the power of judicial review, the High Court or a Tribunal cannot interfere with the discretion exercised by the disciplinary authority, and/or on appeal the appellate authority with regard to the imposition of punishment unless such discretion suffers from illegality or material procedural irregularity or that would shock the conscience of the court/tribunal. The exercise of discretion in imposition of punishment by the disciplinary authority or appellate authority is dependent on host of factors such as gravity of misconduct, past conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquent holds, previous penalty, if any, and the discipline required to be maintained in the department or establishment he works. Ordinarily the court or a tribunal*

*would not substitute its opinion on reappraisal of facts.*

14. In the matter of imposition of sentence, the scope for interference by the Court is very limited and restricted to exceptional cases e.g. punishment awarded is “shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards” i.e. is disproportionate to the gravity of the misconduct (doctrine of *proportionality*). While examining the issue of proportionality, the Court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner, though he had not intended to do so. The Court may further examine the effect, if the order is to be set aside or substituted by some other penalty. In order to shorten the litigation, in exceptional and rare cases, the Court itself can impose appropriate punishment by recording cogent reasons in support thereof. In this respect reference can be made to ***S.R. Tewari v. Union of India, (2013) 6 SCC 602.***

Relevant extract is as under;

*24. The question of interference on the quantum of punishment has been considered by this Court in a catena of judgments and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary, and thus, would violate the mandate of Article 14 of the Constitution. In Ranjit*

*Thakur v. Union of India*<sup>15</sup>, this Court observed as under :  
(SCC pp. 620-21, paras 25 & 27)

*“25. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence, as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction.”*

*27. In the present case the punishment is so strikingly disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review.”*

*(emphasis supplied)*

*(See also Union of India v. G. Ganayutham, State of U.P. v. J.P. Saraswat, Chandra Kumar Chopra v. Union of India and High Court of Patna v. Pandey Gajendra Prasad.)*

*25. In B.C. Chaturvedi v. Union of India, this Court after examining its various earlier decisions observed that in exercise of the power of judicial review, the court cannot “normally” substitute its own conclusion or penalty. However, if the penalty imposed by an authority “shocks the conscience” of the court, it would appropriately mould the relief either directing the authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, the court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing*

circumstances might have forced the accused to act in a certain manner though he had not intended to do so. The court may further examine the effect, if the order is set aside or substituted by some other penalty. However, it is only in very rare cases that the court might, to shorten the litigation, think of substituting its own view as to the quantum of punishment in place of punishment awarded by the competent authority.

26. In *V. Ramana v. A.P. SRTC*, this Court considered the scope of judicial review as to the quantum of punishment is permissible only if it is found that it is not commensurate with the gravity of the charges and if the Court comes to the conclusion that the scope of judicial review as to the quantum of punishment is permissible only if it is found to be "shocking to the conscience of the court, in the sense that it was in defiance of logic or moral standards." In a normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the disciplinary authority to reconsider the penalty imposed. However, in order to shorten the litigation, in exceptional and rare cases, the court itself can impose appropriate punishment by recording cogent reasons in support thereof.

27. In *State of Meghalaya v. Mecken Singh N. Marak* this Court observed that : (SCC p. 584, paras 13-14)

"13. ... A court or a tribunal while dealing with the quantum of punishment has to record reasons as to why it felt that the punishment is not commensurate with the proved charges.

14. In the matter of imposition of sentence, the scope for interference is very limited and restricted to exceptional cases. ... The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court,

*cannot be subjected to judicial review.”(See also A.P. SRTC v. P. Jayaram Reddy.)*

28. *The role of the court in the matter of departmental proceedings is very limited and the court cannot substitute its own views or findings by replacing the findings arrived at by the authority on detailed appreciation of the evidence on record. In the matter of imposition of sentence, the scope for interference by the court is very limited and restricted to exceptional cases. The punishment imposed by the disciplinary authority or the appellate authority unless shocking to the conscience of the court, cannot be subjected to judicial review. The court has to record reasons as to why the punishment is disproportionate. Failure to give reasons amounts to denial of justice. The mere statement that it is disproportionate would not suffice. (Vide Union of India v. Bodupalli Gopalaswami and Sanjay Kumar Singh v. Union of India.)*

29. *In Union of India v. R.K. Sharma, this Court explained the observations made in Ranjit Thakur observing that if the charge was ridiculous, the punishment was harsh or strikingly disproportionate it would warrant interference. However, the said observations in Ranjit Thakur are not to be taken to mean that a court can, while exercising the power of judicial review, interfere with the punishment merely because it considers the punishment to be disproportionate. It was held that only in extreme cases, which on their face, show perversity or irrationality, there could be judicial review and courts should not interfere merely on compassionate grounds.*

30. *The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is “against the weight*

*of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn., Kuldeep Singh v. Commr. of Police, Gamini Bala Koteswara Rao v. State of A.P. and Babu v. State of Kerala.)*

15. Discipline and character are the backbone of the Indo Tibetan Border Police and all serving the force are expected to act and behave in a manner befitting their respective positions. Besides everyone serving the force are also at all times responsible for ensuring that good order and discipline in the services is maintained. As a member of the disciplined force, the petitioner was expected to have control over his mind and passion. The petitioner has given an indecent burial to self-control, diligence and strength of will power. Moreover, it is generally understood that acts, whether in personal or professional life, if they involve the possibility of domestic dis-cord, they have the potential to adversely impact operational efficacy given that mental/psychological stability is the key. If an act of an employee reflects upon his character and integrity, the

employer can legitimately raise a plea of losing confidence in the employee, warranting his non-continuance in the employment.

16. As has been stated supra, the exercise of discretion in imposition of punishment by the disciplinary authority or appellate authority is dependent on host of factors such as gravity of misconduct, past conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquent holds, previous penalty, if any, and the discipline required to be maintained in the department. From the impugned appellate order dated 28.07.2011 (Annexure P-16 Page 141 of the writ paper book) affirming the penalty imposed, it is evident that while considering the sentence in the case at hand, the fact that in terms of the act for the offence committed by the petitioner dismissal as a punishment could have been imposed, but keeping in view the past record of the petitioner, his age and mitigation made by him, a lesser penalty of removal from service was ordered by the Summary Court and up-held in appeal.

17. Hence in the imposition of penalty in the case at hand, conspicuous by absence, was a consideration of the nature of duties assigned to the delinquent, responsibility of

the position that the delinquent held. In view of the binding precedents of the Apex Court cited supra, this court while examining the issue of proportionality, can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced the accused to act in a certain manner though he had not intended to do so.

18. Admittedly in the case at hand the petitioner was a Constable placed under the command of Avinash Kumar (Assistant Commandant). The petitioner was assigned to work at the official residence of the Assistant Commandant, where the wife of the Assistant Commandant and the petitioner developed consensual illicit relations. The same came to light, when Avinash Kumar (Assistant Commandant) filed a divorce proceeding against his wife on 16.02.2010 and thereafter, when the wife lodged a complaint with the DG(ITBP) on 05.03.2010.

19. One cannot lose sight of the fact that according to the petitioner, the consensual illicit relation *inter se* the petitioner and the wife of the Assistant Commandant was entered into at the behest of the latter. Besides the wife of the Assistant Commandant knowingly maintained physical relations for a considerable period. Attempts made by the

petitioner to resist were shunned with the dire threat of penal action.

20. In ***M.M. Malhotra v. Union of India, (2005) 8 SCC 351***, the appellant, was a Squadron Leader holding a very responsible position in the Indian Air Force, was staying with one Roopa, who was not his wife but they were living as husband and wife. The Apex Court held that in view of the subsisting marriage of Ruby Basu @ Roopa Malhotra, marriage with Ms. Anna Suja John was not a case of plural marriage. However, the Apex Court considered the moral conduct of the appellant in living as husband and wife with some other spouse during subsistence of Ruby Basu @ Roopa Malhotra's marriage. Besides the Court noticed that the appellant was treating Roopa Malhotra with cruelty and torturing her. An act unbecoming of an officer. In the aforesaid factual legal matrix, the decision to order compulsory retirement for acts involving moral turpitude was up-held by the Apex Court.

21. It has also to be noticed that the Assistant Commandant-Avinash Singh was also chargesheeted under Sections 43 and 26 of the ITBP Act, both for violation of good order and discipline in the Force and unbecoming conduct on 08.06.2010 by the Deputy Inspector General (Bareilly) and

was to be tried by the General Force Court. The charge against him reads as under:-

"APPENDIX-V  
[Rules 43 & 55 (2)]

The accused, No. 111109386 AC/GD Avinash Singh of 17<sup>th</sup> Bn attached with SHQ (Bareilly), ITBP is charged with:-

**Charge No. 1**

Section -43  
ITBP Act, 1992

**Violation of Good order and  
Discipline of the Force**

In that he,

While on the strength of 16<sup>th</sup> Bn, HQ, ITBPF at Leh during the period of December 2008-January 2009 forced his wife \_\_\_\_\_ to develop sexual relations with his security Aide No. 990160017 CT/GD Ashwani Kumar, 17<sup>th</sup> Bn (then in 16<sup>th</sup> Bn).

**Charge No. 2**

Section-26  
ITBPF Act, 1992

**Unbecoming Conduct**

In that he,

While on the strength of 16<sup>th</sup> Bn, HQ, ITBPF at Leh in the month of January 2009 recorded on his laptop the sexual act of his wife \_\_\_\_\_ with his security Aide No. 990160017 CT/GD Ashwani Kumar of 17<sup>th</sup> Bn (then in 16<sup>th</sup> Bn).

Place: Bareilly  
Date:08.06.2010

(R.S. Negi)  
Dy. Inspector General (Bareilly)

To be tried by General Force Court."

22. The perusal of the said charges would go on to show that regarding Charge No. 1, there were allegations that the said superior officer has forced his wife to develop sexual relationship with his security Aide No. 990160017

CT/GD, the present appellant. However, the said charge could not be proved, but Charge No. 2 was proved that he had recorded on his laptop the sexual act of his wife with his security Aide and for the same, he was awarded the sentence of forfeiture of past two years service for the purpose of pension. The sentence reads as under:-

**"SENTENCE**

The Court sentence the accused No. 111109386 AC/GD Avinash Singh, 17<sup>th</sup> Bn. Attached with SHQ, Bareilly, ITBPF, "To forfeit two years past service for the purpose of pension".

**ANNOUNCEMENT OF SENTENCE**

The Court being re-opened, the accused is again called before it. The sentence is announced in open Court as being subject to confirmation.

Signed at Sector Headquarters, Bareilly, ITBPF, Bareilly, this 4<sup>th</sup> Day of November 2010."

23. We have also gone through the statements of the wife recorded in both the proceedings, which are exactly similar and in which she has stated that her husband had given her liquor against her consent and forced the appellant as such to perform illicit acts with her and made a film of the same and then threatened her with dire consequences not to reveal the same.

24. It is, thus, apparent that it is on the said basis, the superior officer was found guilty of the second charge of having recorded on his laptop the sexual act of his wife with

his security Aide and sentenced also. It is also to be noticed that the incidents are of November, 2008 in Leh and it is not disputed that the present appellant as such had thereafter accompanied the couple from Leh to Reckong Peo, which is in Himachal Pradesh and, thus, apparently, the superior officer being aware of the said incidents had brought the appellant along. Therefore, it is apparent that his consent as such regarding the illicit relationship *inter se* the present appellant and his wife was well-known to him, rather he was a motivating party as such to the said misdemeanor of which he was duly punished.

25. The specific case in the writ petition of the petitioner is in Ground 'K', that the superior was punished only for stoppage of increment for two years, whereas the appellant had been removed from service, which is discriminatory under service jurisprudence.

26. In such circumstances, we are of the considered opinion that once the superior officer had been held guilty of preparing the CD with the help of his laptop and forcing his junior to enter into the acts of misdemeanor, the present appellant cannot be imposed a grave punishment of removal from service. Therefore, in the given facts and circumstances, we are of the considered opinion that the order of

compulsory retirement would redress the issue as such, keeping in view the manner in which the misconduct which was sordid in nature, has taken place.

27. For the aforesaid reasons, we are of the considered opinion that rather than remanding the matter to the authorities for a fresh consideration on the sentence to be imposed and with a view to shorten the litigation, the present appeal is allowed and the impugned judgment dated 29.06.2018, order of removal dated 29.06.2010 and rejection of appeal dated 28.07.2011, are set-aside to the extent of the penalty imposed. The penalty quashed in the interest of justice is substituted by a penalty of compulsory retirement with all consequential benefits.

Accordingly, the present appeal stands disposed of. Pending applications, if any, also stand disposed of.

**(G.S. Sandhawalia)**  
**Chief Justice**

**(Bipin Chander Negi)**  
**Judge**

**19<sup>th</sup> June, 2026**  
(Gaurav Rawat/Sanjeev)