
(1998) 09 DEL CK 0033
In the Delhi High Court
Case No : CW.No.1143 of 1984

Harminder Kumar (Cap.)

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-09-1998

Acts Referred:

Citation : (1998) 6 AD 368 : (1998) 75 DLT 597

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. G.D. Gupta and Mr. Pramod Gupta, for the Appellant; Mr. Sanjiv Sachdeva, for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner has challenged in the writ petition the show-cause notice dated 28.2.1984 issued under Army Rule 14 read with Section 19 of the Army Act, 1950.

2. The case of the petitioner is that having come to the conclusion that the proceeding with court martial against the petitioner had become time barred, no notice under Rule 14 for administrative action could be issued.

3. The petitioner is alleged to have committed offences on the 10th of March, 1979 and the 22nd of March, 1979. The nature of offence is not relevant for the purpose of this case to be adverted to. In December 1980, summary of evidence was recorded. In February, 1981, fresh summary evidence was recorded. On the 5th of August, 1981, the general court martial was ordered to be convened on the 18th of August, 1981. On the 14th of August, 1981, the petitioner moved the Supreme Court and obtained orders of stay of court martial proceedings. The grounds stated in the writ petition before the Supreme Court are not relevant in this case. On the 18th of August, 1981, the Supreme Court stayed the court martial proceedings. On the 26th of November, 1982, the Supreme Court dismissed the writ petition. Consequent upon the dismissal, the respondents were at liberty to proceed with GCM.

4. On the 7th of February, 1983, the petitioner was informed that the tentative date of GCM against the petitioner had been fixed to be convened on the 28th of February, 1983. On the 22nd of February, 1983, an order was passed to this effect. No reasons have been given as to why GCM could not be proceeded against the petitioner and it is common ground that no further steps were taken to continue the GCM against the petitioner. In the counter-affidavit it is mentioned that the respondents sought legal opinion, wherein the respondents were given the opinion that the GCM had become time barred and, Therefore, it could not be continued.

5. As I had mentioned above, the show-cause notice had been issued on the 8th of February, 1984. It is stated in paragraph 2 of the show-cause notice:

"The orders of stay of the Supreme Court remained operative till 26th of November, 1982 when the Hon"ble Court dismissed the writ petition. This has resulted in your trial by court martial having been rendered time barred by virtue of Army Act Section 122."

6. The learned counsel for the petitioner Mr.G.D.Gupta, relying upon the judgment of the Supreme Court in "Major Radha Krishan Vs. Union of India & Others", (1996) 3 S 507, submitted that once the court martial proceedings have become time barred, the respondents cannot have recourse to Rule 14 to take administrative action against the petitioner. The Supreme Court noted the argument on behalf of the appellant before it in the following terms:-

"The other contention of Mr.Ramachandran was that the satisfaction with regard to inexpediency or impracticability of a trial by court-martial must be only on a consideration of the reports of misconduct. According to Mr.Ramachandran if on a perusal of the reports the authorities found that the nature of misconduct or the context in which it had been committed were such that it was impracticable or inexpedient to hold the court-martial, the procedure under Rule 14 might be resorted to. In other words, Mr.Ramachandran submitted, the satisfaction regarding the inexpediency or impracticability to hold a court-martial must flow from the nature and the context of the misconduct itself and not from any extraneous factor which in the instant case was that the court-martial proceedings would be time barred. This contention of Mr.Ramachandran is also, in our view, indefensible."

7. Referring to the scope of Rule 14(2), the Supreme Court observed:-

"As noticed earlier, Rule 14(2) opens with the words "when after considering the reports on an officer"s misconduct, the Central Government, or the Chief of the Army Staff is satisfied..." It is evident, Therefore, that the satisfaction about the inexpediency or impracticability of the trial has to be obtained on consideration of the reports on the officer"s misconduct. That necessarily means, that the misconduct and other attending circumstances relating thereto have to be the sole basis for obtaining such a satisfaction."

8. Further amplifying the object of Rule 14, the Supreme Court posited:-

"The purport of the above Rule can be best understood by way of an illustration. The Chief of the Army Staff receives a report which reveals that an Army Officer has treacherously communicated intelligence to the enemy an offence punishable u/s 34 of the Act. He however finds that to successfully prosecute the officer it will be necessary to examine some witnesses, ensuring presence of whom will not be feasible and exhibit some documents, disclosure of which will not be advisable in the interest of the security of the State. In such an eventuality he may legitimately invoke the Rule to dispense with the trial on the grounds that it would be impracticable and/or inexpedient. But to dispense with a trial on a satisfaction dehors the misconduct like the bar of limitation in the present case will be wholly alien to Rule 4(2)."

9. On these, Mr.G.D.Gupta, the learned counsel for the petitioner, submitted that whatever be the reason behind the view taken by the respondents, the fact remained that on the 8th of February, 1984 the show-cause notice was issued and that was issued without any justification owing to the bar u/s 122 of the Army Act, 1950. The respondents had admitted that court martial proceedings had become time barred u/s 122 of the Army Act, 1950. Therefore, according to the learned counsel for the petitioner, Mr.G.D.Gupta, the case of the petitioner is covered by the judgment of the Supreme Court, and Therefore, the show-cause notice is liable to be quashed.

10. Mr.Sanjeev Sachdeva, the learned counsel for the respondents, submitted that the respondents had acted on legal opinion. The learned counsel for the respondents referred to the judgment of this Court in Dhir Singh Chhima Vs. Union of India and Others, : Military Law Journal 1996 Delhi 70. The learned counsel for respondents, Mr.Sanjeev Sachdeva, contended that the reason that the respondents could not go ahead with the court martial was the order of stay of the Supreme Court, at the instance of the petitioner, and, Therefore, the petitioner cannot say that there was any act attributable to the respondents in delaying the court martial proceedings.

11. The facts before the Division Bench, as noticed by the Division Bench, are:-

"Facts in brief are that the petitioner, on being commissioned as 2nd Lt. on 3rd May, 1964 remained posted at various places. He was transferred to Military Farm Meerut on 8th March, 1969 and on 6th December, 1982 was promoted to the rank of Lt.Col. From 15th July, 1988 to 15th January, 1992, the petitioner remained posted as Officer-in-Charge at Military Farm Meerut. According to the petitioner, his primary duty was to supervise the works pertaining to production and supply of milk and dairy products to the troops located and dependent upon the said Military Farm, Meerut. On the directions of the Headquarters Central Command (Farms); Military Farm Meerut was required to supply milk to various units located at Roorkee since Military Farm Roorkee had been closed down and only a skeleton staff was retained there. It is alleged that the Manager,

R.K.Gupta had been diverting milk, dispatched by the Meerut Farm to Roorkee to Military Farm, Dehradun and was engaged in local purchases, in violation of the instructions on the subject. It is also alleged that correspondence was exchanged in this regard since June 1990 between the petitioner, Dehradun Military Farm and Headquarters Central Command Lucknow."

12. The Court observed:-

"Both petitions are under contest by respondents. In Civil Writ No.3768/94, the respondents' case is that the orders conveyed through letters Annexure-P.24 dated 31st August, 1994 were passed by the Commandant, 510 Army Base Workshop in his capacity as Commanding Officer. The Army Headquarter letter dated 9th August, 1994 referred to in Annexure-P.24 is the order of attachment for the purpose of initiation of disciplinary action against the petitioner, issued under the provisions of Army Instruction 30/86. Respondents have also in the reply stated their version as regards supply of milk from Meerut Military Farm. It is stated that orders for the closure of Military Farm Depot Roorkee were issued in January, 1991 with the directions that Military Farm Meerut will undertake supply of milk directly to Units at Roorkee and accounted by Military Farm Meerut. As a sequel to postponement of closure of Military Farm Depot Roorkee would start functioning with effect from 21st October, 1991. Military Farm Meerut was told to stop despatches of milk ex-Military Farm Meerut to Roorkee. Clear directions were again issued to stop local purchase of milk at Military Farm Meerut and to meet full requirement of Meerut station out of own Farm produced milk. It is stated that the action of the Manager, Military Farm Depot Roorkee to dispatch 1200 litres of milk to Military Farm Dehradun to meet their requirement was in line with the directions of appropriate superior authorities. The delay of about 11 hours in despatching milk by Military Farm Depot Roorkee to Military Farm DEhradun, on receipt from Military Farm Meerut, resulting into curdling of milk was because of non-adherence timings to dispatch initially by the petitioner from Meerut, in violation of orders from superior authorities. The milk was not fit for troops consumption, for which it was dispatched, when it reached Military Farm Dehradun, irrespective of whether it was home produced or locally purchased at Meerut. Out of 2000 litres of milk received at Roorkee, 800 litres were promptly consumed, not exposing the milk so as to bacterial activity leading to development of acidity conducive to curdling of milk. It is stated that had the petitioner dispatched the milk to reach Roorkee at about 1500 hours, as intimated by Military Farm Depot Roorkee, the complete quantity of milk would have been consumed promptly.

Respondents allege that the petitioner has not correctly narrated the facts that he was not cooperated with Court of Inquiry proceedings till 22nd January, 1993. It is alleged that Court of Inquiry commenced its proceedings on 13th October, 1992. The presence of the petitioner was requested w.e.f. 1st week of October, 1992 when he was serving in Army Headquarter. He did not turn up. The Court of Inquiry examined as many as 12 witnesses. The petitioner thereafter was called

as a witness, but before that a questionnaire was sent to him through letter dated 8th January, 1993. Examination of witnesses by Court of Inquiry was in a chronological order and the petitioner was examined accordingly. The questionnaire sent to the petitioner was in consonance with the procedure prescribed in law. It is stated that in order to be fair to the petitioner, provision of Army Rule 180 was invoked. The petitioner appeared before the Court of Inquiry and availed his rights under Army Rule, 180. The petitioner did cross examine many witnesses including Shri R.K.Gupta, Mr.M.P.Konhur and Shri Jit Ram. Respondents have denied that the petitioner was asked or allowed to cross examine only two witnesses. It is stated that the Court of Inquiry on examining 12 witnesses and perusing numerous documentary evidence came to the conclusion that the petitioner had committed numerous irregularities and was blameworthy. It is alleged that hearing of charge under Army Rule 22 was held by an officer discharging the duties of Commanding Officer on 26th August, 1994. Initially, an attachment order was issued by Army Headquarter on 9th May, 1994. Disciplinary proceedings commenced only after receipt of fresh attachment order dated 9th August, 1994, as per alleged that hearing of charge under Army Rule 22 was held by an officer discharging the duties of Commanding Officer on 26th August, 1994. Initially, an attachment order was issued by Army Headquarters on 9th May, 1994. Disciplinary proceedings commenced only after receipt of fresh attachment order dated 9th August, 1994, as per observations made by the Calcutta High Court in its order. The respondents have also assigned the reasons in rejecting his application for grant of leave. It is stated that the petitioner was away from his Unit. His leave application was returned. Medical Release Board completed its proceedings before the date of retirement as per existing rules and regulations. Before the petitioner could retire, Section 123 was invoked to continue his subjectivity to Army Act, in order to finalise the disciplinary action. The request of the petitioner to grant leave was forwarded to the Competent Authority, who did not recommend the same. The respondents have stated that the petitioner asked for an interview, which was granted on 9th August, 1994. The petitioner reported at 510 Army Base Workshop on 27th June, 1994. Since then he was given no duty. He was required to be present in office during working hours. All facilities were provided to the petitioner. It is stated that the hearing of charges was correctly held as per Army Rule 22 only after receipt of fresh attachment order. The respondents have denied that there is any violation therein."

13. The reasons for the delay in holding proceeds had also been noticed by the Division Bench and the same are as under:-

"The contest by respondents to Civil Writ No.1137/95 is on the ground that the petitioner was subject to Army Act till 31st August, 1994 when he relinquished his commission on superannuation with a liability for being tried up to the period of three years after retirement for any offence committed during his service time, in accordance with the provisions of Section 122 of the Army Act. It is stated that the petitioner was ordered to be attached with 510 Army Base Workshop for

proceeding with his disciplinary case as early as 21st October, 1993, but he actually reported on 24th June, 1994. From 21st October, 1993 till 24th June, 1994, the petitioner took shelter of his ill health and evaded the legal proceedings against him on one pretext or the other. Even on reporting on attachment on 24th June, 1994, the petitioner did not make himself available for proceedings with investigation. He was admitted to hospital for 11 days during July, 1994, 14 days during August, 1994 and from 13th September, 1994 onwards, he was either in hospital or convalescing till he was declared medically fit by the duly constituted Medical Board on 17th July, 1995. The Court has been quite considerate towards his ill health and ordered for providing the best possible treatment till he was declared medically fit to travel and make statement at the summoning of evidence. It was thereafter obligatory on the part of the petitioner to have honoured the directions of the High Court of Delhi and presented himself at Meerut for investigations at least on 18th July, 1995 but with a view to cause further delay, he even appealed against the verdict of the medical Board."

14. The Division Bench had referred to Sections 122 & 123 of the Army Act, 1950, and in particular, Section 122. Dealing with the question of limitation, the Bench observed:-

"Offence in the instant case is stated to have taken place on 13/14th December, 1991 and admittedly period of three years would expire on 13/14th December, 1994. On the interpretation of the term "the date of commencement of the trial", in Major General Madan Lal Yadav's case(supra), the Court held that the trial commences the moment the G.C.M. assembles and examination of the charge is undertaken on the question whether they would proceed with the trial. The preceding preliminary investigation is only a part of the process of investigation to find whether a charge could be framed and placed before the Competent Authority to constitute G.C.M. Admittedly in the instant case on the ratio of the decision in Major General Madan Lal Yadav's case(supra), it has to be held that the trial has not yet commenced."

15. The Division Bench has also referred to the proposition that the act of court cannot prejudice the rights of parties. The Division Bench observed:-

"Had the petitioner not obtained specific order from Calcutta High Court, due to which no proceedings could take place and had the petitioner not obtained further orders against the respondent from this Court not to proceed against him, we are of the firm view that proceedings might have reached a stage when trial, if it was necessary, could have proceeded. The stage when order dated 2nd November, 1993 was passed was that of procedure under Rule 22 of the Army Rules, where after taking out of Summary of Evidence was the stage, which also remained stayed by the orders passed by this Court from time to time on applications moved in that behalf by the petitioner and due to the two orders passed on 8th February, 1995 and 23rd March, 1995. The petitioner did not make himself available because of those orders. Another principle, which may

safely be applied to the facts of the case would be Actus Curiac neminem gravabit _ namely an act of the Court, prejudices none might have reached a stage when trial, if it was necessary, could have proceeded. The stage when order dated 2nd November, 1993 was passed was that of procedure under Rule 22 of the Army Rules, where after taking out of Summary of Evidence was the stage, which also remained stayed by the orders passed by this Court from time to time on applications moved in that behalf by the petitioner and due to the two orders passed on 8th February, 1995 and 23rd March, 1995. The petitioner did not make himself available because of those orders. Another principle, which may safely be applied to the facts of the case would be Actus Curiac neminem gravabit _ namely an act of the Court, prejudices none."

16. On the basis of this reason, the Division Bench dismissed the writ petition, wherein the petitioner sought the relief of quashing the order of respondents invoking Section 123 of the Army Act, 1950. This is not the case where administrative action was contemplated under Rule 14 of the Army Act, 1950 and the Rules.

17. The learned counsel for respondents, Mr.Sanjeev Sachdeva, referred to the judgment of the Supreme Court in "Union of India & Others Vs. Major General Madan Lal Yadav (Retd.)", (1996) 4 S 127. The facts in that case, as noticed by the Supreme Court, are:-

"On 30-8-1986, action was initiated against the respondent u/s 123 of the Army Act, 1950 (for short `the Act'). He was kept under open arrest from that date onwards and retired from service on 31-8-1986 as Major General. On 22-9-1986, the respondent was issued a charge-sheet and recording of the summary evidence commenced on 25-9-1986. The respondent filed habeas corpus petition in this Court under Article 32 of the Constitution on 26-9-1986 and refused to cross-examine witnesses examined at preliminary enquiry between 20 and 25-10-1986. He sought for, and the proceedings were adjourned to 3-11-1986, on the ground that his lawyer from Delhi was to come to Pune for cross-examination of the witnesses. Due to non-availability of the opportunity given to the respondent to cross-examine the witnesses between 20-11- 1986 and 8-12-1986, the case was closed for prosecution on 20-11-1986. The respondent sought 14 days" time to prepare his case which was duly allowed. However, the respondent did not give the list of his defense witnesses till 30-11-1986. Consequent upon it, on 26-12-1986, the Controller General of defense Accounts directed the Controller, defense Accounts, Southern Command to carry out special audit for the period in question. The respondent had sought permission to go to Delhi in connection with his writ petition which was granted between 16 and 18-12-1986. The writ petition was dismissed by this Court on 18-12-1986 against which he filed special leave petition. On 3-1-1987, the recording of summary evidence against the respondent was concluded. He sought permission to go to Delhi in connection with his SLP which was granted between 12-1-1986 and 5-2-1987. The summary evidence was considered and GOC-in-Chief,

Southern Command submitted his report on 2-2-1987. The SLP came to be dismissed by this Court on 5-2-1987. Pursuant thereto, General Court Martial (for short 'GCM') was ordered on 24-2-1987; the GCM assembled to try the respondent on 25-2-1987. On perusal of the report, it was found that the respondent should be tried for the offence. He was directed to be produced on 26-2-1987 but it transpired that the respondent had escaped lawful military custody on the intervening night of 15 and 16-2-1987. Warrant was issued for his arrest. The respondent voluntarily surrendered on 1-3-1987 and was placed under closed arrest w.e.f. 21.30 hours on the said day. The court-martial assembled on 2-3-1987 but it appears that the respondent had, in the meanwhile, filed writ petition in the Bombay High Court challenging the jurisdiction of the court martial to try him. In WP No.301 of 1987, invoking the provisions of Section 123(2) of the Act, the Division Bench had held that the trial of the accused had not commenced within six months of his ceasing to be subject to the Act. The trial by the court-martial was, Therefore, held to be illegal and accordingly, writ was issued. Calling in question this order, this appeal has been filed."

18. The question before the Supreme Court was: What is the date of commencement of the trial? Here also the question posed by the Supreme Court was not whether under Rule 14 action could be initiated. Therefore, the ratio laid down by the Supreme Court would not apply to the facts of this case.

19. When the Supreme Court dismissed the writ petition on the 26th of November, 1982, the respondents were at liberty to proceed with general court martial. The respondents had admitted that the proceedings had become time barred u/s 122 of the Army Act, 1950 and did not think fit to proceed with general court martial. Once it is admitted that the proceedings had become time barred u/s 122 of the Army Act, 1950, the respondents cannot put the blame on the petitioner and if the respondents had continued to hold the general court martial and if the petitioner had challenged the general court martial, then the effective answer could have been by the respondents, as stated by the Division Bench of this Court in Col.Dhir Singh Chhima's case. That is not the position here.

20. When as I have noticed above that the proceedings had become time barred u/s 122 of the Army Act, 1950, I have to follow the dictum laid down by the Supreme Court in Major Radha Krishan's case. Accordingly, the writ petition is allowed.

21. The show-cause notice dated 8.2.1984 is quashed and the petitioner shall be entitled to all consequential benefits.

22. There shall be no orders as to costs.