
(1995) 10 DEL CK 0001

In the Delhi High Court

Case No : Civil Writ Appeal No. 771 of 1991

Jagga Singh

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 10-10-1995

Acts Referred:

Army Act, 1950 — Section 19
Army Rules, 1954 — Rule 14

Citation : (1996) 61 DLT 24

Hon'ble Judges : Usha Mehra, J

Bench : Single Bench

Advocate : Jyoti Singh, for the Appellant;

Judgement

Usha Mehra, J.

(1) This writ petition raises a very short point as to whether Army authorities could dismiss the petitioner summarily after having initiated disciplinary proceedings against him under Sections 63 & 64-A of the India Army Act. (in short the "Act") i.e. after leaving taken formal cognizance of the offence by recording summary of evidence. In order to answer this question the admitted facts are that the petitioner then Major was officiating as Officer Commanding from 6th August, 1983 to 6th September, 1983 in place of permanent incumbent having gone on annual leave. On 2nd September, 1983 a theft of 14,000.00 took place. This amount was the undisbursed pay of unit personnel held with the Battery Havaldar Major. Theft was alleged to have been committed by Gunner Udai Singh along with Ex. Gunner Gian Singh Kubawat. On 5th September, 1983, Gunner Udai Singh after being tortured with third degree method confessed to have committed the theft and produced the cash hidden by him. He also furnished the names of his accomplice. On 12th September, 1983, Gunner Udai Singh was admitted in hospital on complaint of injuries having received by him at the hands of unit personnel. Gunner Udai Singh died in the Hospital on 18th September, 1983. Record of the general Hospital reveals cause of death of Udai

Singh as cardiac arrest due to or on account of acute renal failure or as a consequence of multiple injuries.

(2) A court of enquiry to investigate into the circumstances was held from 28th October, 1983 and an additional court of enquiry was held on 27th January, 1984. On the basis of preliminary investigation a tentative charge sheet dated 27th April, 1984 was issued to the petitioner, on the basis of which the petitioner was held blame worthy by the officer commanding of 25th Infantry Division for:-
(a) For giving an unlawful command to IC-39774 Y Capt. N. V. Saxena for use of criminal force against No. 13457713 Ex. Gunner Udai. Singh and No. 14355346 Gunner Gian Singh to extract confession for theft. (b) For altering certain words in the Summary of Evidence of Ex. Gunner Gian Singh to tally with the statement in the Staff Court of Inquiry. (c) For tampering/influencing of tampering of the in/out register entries showing his time of arrival in the Unit on 5th September, 1983. (d) For failure to stop the use of criminal force on late Gunner Udai Singh and Ex. Gunner Gain Singh. (e) For knowingly making a false statement initially before the Staff Court of Inquiry on 3rd November, 1983 till corrected-later on 11th November, 1983. (f) For failure to inform the Co of the use of criminal force against late Gunner Udai Singh: and Ex Gunner Gian Singh. (g) For suppressing evidence in as much as he did not produce the document purporting to the investigation carried out by Capt. D. Banerjee on 6th September, 1983.

(3) Thereafter, no further action was taken on the said charge sheet and the matter remained dormant. However, a year after on 19th April, 1985 another tentative charge sheet was issued almost on the same grounds on which earlier charge sheet was issued. The case was thereafter remanded for recording summary of evidence which was recorded from 19th April, 1985 to 22nd July, 1985. Petitioner declined to make any statement at the time of recording of summary of evidence. Thereafter, no action was taken by the Army authorities for almost a year. On 31st May, 1986, the Headquarters of 24 Infantry issued a notice to the petitioner calling upon him to show cause as to why administrative action be not taken against him. To this the petitioner replied on 1st June, 1986 thereby controverting all the allegations leveled against him. Thereafter authorities remained silent. On 21st November, 1986 Headquarters of 24th Infantry Division issued another letter indicating that the case against petitioner and others had become time barred. The same could continue by convening a General Court "Martial for which the consent of the petitioner was required, otherwise the case could be handed over to the police for trial by a Civil Court. It was further suggested that additional summary of evidence be recorded against other accused persons. Petitioner did not give his consent for General Court Martial but consented that his case be handed over to civil police for trial by the Civil Court. No further action thereafter was taken. On 15th May, 1989, respondent No. 2 issued a notice to the petitioner calling upon him to show cause why he be not dismissed from service u/s 19 read with Army Rule 14, for the acts of omission and commission committed by him in criminal case on the basis of "offence mentioned in the tentative charge sheets. This the petitioner replied

vide his letters dated 6th July, 1984 and 12th August, 1989 respectively. On 13th November, 1990, petitioner was dismissed from service u/s 19 of the Act read with Rule 14 of Army Rules.

(4) So far as these facts are concerned these have-not been controverted by the respondents in their counter "affidavits."

(5) The sole question regarding the legality or otherwise of the dismissal hinges around the interpretation to be given to Section 19, 63, 64 and 122 of the Act and Army Rule 14. Sections 63 & 64(a) of the Act fall under Chapter-VI which deal with the case of offences. For the better appreciation of facts of this case, Sections 63 & 64 of the Army Act are reproduced as under:- "63. Violation of good order and discipline- Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, on conviction by court martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned. 64. Miscellaneous Offences- Any person subject to this Act who commits any of the following offences, that is to say,- (a) being in command at any post or on the march, and receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person, or has disturbed any fair or market, or committed any riot or trespass, fails to have due reparation made to the injured person or to report the case to the proper authority; or (b) by defiling any place of worship, or otherwise, intentionally in suites the religion or wounds the religious feelings of any person; or (c) attempts to commit suicide, and in such attempt does any act towards the commission of such offence; or (d) bring below the rank of warrant officer, when off duty, appears, without any proper authority, in or about, camps or cantonments or in or about, going to or returning from any town or bazar, carrying rifle, sword or other offensive weapon; or (e) directly or indirectly accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any gratification as a motive or reward for procuring the enrolment of any person, or leave of absence, promotion or any other advantage or indulgence to any person in the service; or (f) commits any offence against the property or person of any inhabitant of, or resident in the country in which he is serving shall on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to seven years or such less punishment as is in this Act mentioned."

(6) Reading of Section 63 of the Act shows that charges leveled against the petitioner regarding his conduct were prejudicial to the good order and the military discipline and on conviction by General Court martial, he would have suffered imprisonment for a term which may extend to seven years. The offence alleged to have been committed by the petitioner is covered u/s 64(a) i.e. which he was commanding the unit during September, 1983, his unit man was beaten at his instance. This led to the death of Gunner Udai Singh, If found guilty by the General court martial he would have suffered the sentence of seven years or less

whichever the case may be. Therefore, having started the disciplinary proceedings u/s 63 & 64, the logical conclusion was to hold General Court Martial and then inflict the punishment as provided under the Act.

(7) Section 122 of the Act prescribed period of limitation for Trial. Relevant provisions of Section 122 are reproduced as under:- "122. Period of limitation for trial- (i) Except as provided by sub-section (2) no trial by court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years from the date of such offence. (2) The provisions of sub-section (1), shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 37. (3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person, as a prisoner of war or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded. (4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army."

(8) Reading of this provision shows that trial by Court Martial ought to have started within three years from the date of offence. The offence in this case is alleged to be of September, 1983, Therefore, the period of three years has to be counted from 5th September, 1983 i.e. the date Gunner Udai Singh confessed the guilt or at best it could be counted from the date Udai Singh died i.e. 18th September, 1983. But from the facts narrated above it is clear that no Court Martial commenced either within, three years or thereafter. The military authorities admitted vide letter dated 21st November, 1986 that the case of the petitioner had become time barred. To circumvent this legal hurdle and lawful procedure, the respondent adopted a short cut by relying on Section 19 of the Act read with Rule 14 framed then under.

(9) Section 19 of the Act provides that the Central Government can dismiss or remove from service any person subject to the provisions of this Act and the rules & regulations made thereunder. Rule 14(2) of the Rule is reproduced as under :- "14. Termination of Service by the Central Government on account of misconduct- (1) x x x x x (2) When after considering the reports on an officer's misconduct, the Central Government or the Chief of Army Staff is satisfied that the trial of the Officer by a Court martial is the inexpedient or impracticable but is of the opinion, that further retention of the said officer in the service is undesirable, the Chief of the Army Staff shall so inform the officer together with all reports adverse to him and he shall be called upon to submit in writing, his Explanation and defense. Provided that the Chief of the Army Staff may withhold from disclosure any such report or portion thereof if, in his opinion, its disclosure is not in the public interest of the Security of the State. In the event of the Explanation of the Officer being considered unsatisfactory by the Chief of the

Army Staff, or when so directed by the Central Government the case shall be submitted to the Central Government with the officer's defense and the recommendation of the Chief Of the Army Staff as to the termination of the officers service in the manner specified in sub Rule (4)."

(10) Rule 14C2) provides that the Central Government or the Chief of Army Staff on the basis of the report of the officer's misconduct has to form an opinion thereby satisfying themselves that the trial by Court Martial is not expedient or it is impracticable and further retention of the officer is undesirable. To attract the provisions of this Rule. the respondent was to establish that the retention of the petitioner in service was undesirable and that the Competent Authority came to the conclusion that holding of Court Martial was inexpedient or impracticable. To arrive at this conclusion there had to be material on record. But it is respondent's own case that since General Court Martial was not possible being time barred, Therefore, the authorities basing on the tentative charges already issued and on the basis of summary of evidence came to the conclusion that retention of the petitioner in service was undesirable or that the court martial was inexpedient or impracticable because the respondent could not initiate trial by Court Martial within the time prescribed u/s 122(1) of the Act. The "inexpedient" or "impracticable" words are used in Rule 14 for a specific reason and not to circumvent the proper procedure prescribed u/s 63 and 64 of the Act. The respondent cannot be allowed to take advantage of its own wrongs. In its counter affidavit it has been unequivocally admitted by the respondent that "the processing of this case got delayed due to involvement of different formations in collecting relevant documents of this case." Thus when the respondent found that trial by General Court Martial was not permissible, it gave a go bye to the legal procedure which had to be followed after having initiated the disciplinary proceedings u/s 63 & 64(a) of the Act. Respondent could not adopt a short cut by applying the provision of Rule 14. The drafter of Rule 14 never could have visualised that the words "inexpedient or impracticable" would be interpreted by the authorities to mean that if the disciplinary proceeding could not be concluded being time barred then authorities would take shelter-under Rule 14. As already explained above the words "inexpedient" or "impracticable" were used with a specific purpose. To arrive at this conclusion one has only to have a glance at proviso to Rule 14(2).

(11) Proviso to Rule 14(2) envisages that if the security of the State or public interest are involved then the Chief of the Army Staff may not feel it expedient or practicable to hold the trial by Court Martial. But not when holding of such an enquiry has become time barred. If the intention of the rule making authority was to permit the Competent Authority to involve this rule in any manner and at any time then there was no necessity to provide in the proviso that the discretion by the authority can be exercised only when the security of the State was involved. The proviso and the Rule 2 has to be read harmoniously. Reading of the same would lead to only one conclusion that holding of the Court Martial be called "inexpedient" and "impracticable" when security of the State is

involved and otherwise. The power given to the Chief of the Army Staff to withhold the disclosure of the report can only be exercised in order to ensure the safety of the State so that it could not be standardised by disclosure. Therefore, when we read sub-rule (2) of Rule 14 we have that the Chief of the Army Staff has to be satisfied on the basis of the report submitted to him and he had formed the opinion on the basis of that report that court martial was not practicable nor inexpedient because disclosure of the report would not be in State's interest. The report must be relating to a matter where public interest or the security of the State are involved. It is only in such like circumstance that the general court martial may not be possible and hence inexpedient or impracticable. But not in a case like the present case. The question of court martial becoming inexpedient or impracticable in the facts of this case did not arise. Moreover, no material has been shown or placed on record to indicate that Chief of the Army Staff received any report the disclosure of which would have prejudiced the interest of the State, rather from the defense set up by the respondent it is apparent that the present course of action had been adopted after the respondent failed to hold General Court Martial in the normal circumstances because the case became time barred. This by no stretch of imagination can be said to mean that General Court Martial became "inexpedient" or "impracticable" nor by the same yardstick it can be called that the retention of the petitioner became undesirable. The retention of the petitioner in service depended on two factors -(i) the report was such that he had to go (ii) he was found guilty of the charges by General Court Martial. But in the case in hand neither the report depicted any such circumstance nor General Court Martial held him guilty. Then the question arises what was the material before the authority to arrive at the opinion that retention of the petitioner in service was undesirable. The answer to this question can be given by saying that the respondent have failed to justify the dismissal of the petitioner. There is nothing on the record from which it could be inferred that the Chief of Army Staff formed his opinion on the basis of "some material other than the charge sheet. The Competent Authority was legally bound to record reasons as to why he found it inexpedient or impracticable to hold trial by court martial. but nothing of this sort was done nor justified from any record except saying that the Competent Authority relied on the charges and formed the opinion. which act beside being illegal is violative of principle of natural justice.

(12) In fact in view of the disputed question of facts involved in this case trial by a court martial was a must Respondent could not unilaterally and arbitrarily invoke the provisions of Rule 14 and has violated the mandatory procedure prescribed under the Act I am in full agreement with the contention of the counsel for the petitioner that the statutory provisions cannot be negated by administrative action. Nor the power laid down u/s 122(1) of the Act could be over-ridden by invoking rule 14. This court in the case of Union of India v. Ex. Capt. Ram Paul Singh Dahiya 1993 (1) Sct 301 dealt with almost identical facts and held that action was illegal. In that case complaint was made against one

Capt. Dahiya. Staff court enquiry was ordered. During the enquiry certain allegations of misconduct were made against one Major Bhagirath singh. The Officer Commanding was indicted. Proceedings were initiated against other three officers. Against Major Bhagirath Staff was removed from the service by the Central Government Bhagirath Singh on the recommendation of the Chief of the Army Staff was removed from the service by the Central Government without holding any court martial or trial. He challenged his dismissal by way of writ petition on the ground that the action was arbitrary and that no reasons were assigned for dispensing the court martial and denying opportunity to prove his innocence. The Court while setting aside the order of the Central Government opined that although the order, need not mention reasons, but it was the duty of the authority to provide reasons to court. Since, none was provided to the court hence impugned order was quashed. In the case in hand also neither in the counter affidavit nor by any document any reasons have been provided for removing the petitioner from service under Rule 14. Similar case came up before the Allahabad High Court of Birendra Rao Paul v. Union of India, 1994(2). In that case the facts were identical as in this case. In that case on the basis of the statement recorded to the court of enquiry constituted against another personnel some allegations were leveled against the petitioner. The Army authorities inflicted the punishment on the petitioner on the basis of statement recorded in the Court of Enquiry against other official. No separate court of enquiry was conducted against the petitioner nor any departmental enquiry was conducted against him. On the basis of that statement he was reduced in rank. The Court quashed that order because neither the trial was held against the petitioner nor and departmental enquiry was ordered enquiring into the alleged lapses stated to have been recorded by the court of enquiry constituted against another person. The action was considered to be illegal as it deprived the petitioner reasonable opportunity to defend himself. In the instant case also court of enquiry was directed to investigate into the circumstances resulting into the death of Gunner Udai Singh. Number of witnesses were recorded including Capt. V. N. Saxena. He appearing as witness No. 22 out blame on the petitioner for giving the command of using criminal force against the deceased. On the basis of this statement of Capt. V. N. Saxena, the petitioner was charge sheeted. No separate enquiry has been conducted nor the petitioner had been afforded any opportunity to defend himself before a court martial. On the basis of the said charge sheet he has been removed from service. This action of the respondent amounts to violation of principle of natural justice and is against law. In fact the Competent Authority whose satisfaction was a pre-requisite to arrive at the decision that retention of petitioner in service was undesirable has not been produced nor shown to title Court, From this it can be inferred that there was complete non-application of mind by the Competent Authority. To my mind the Competent Authority relying on the allegations contained in the tentative charge sheets came to the conclusion that he was not fit to be retained in service. This act of the Competent Authority is against the very basis of Rule 14. By invoking Rule 14, the Authority deprived the petitioner an opportunity to explain his part of the case. Since the

impugned action was based on surmises and conjectures and taken without affording opportunity to the petitioner, Therefore, the use of power by the Authority cannot be sustained as it was not exercised in good faith. Almost in identical cases -where allegation of misconduct could not be tried by a court martial within time and the authority adopted the easy course by invoking Section 19 read with Rule 14 and dismissed the services of the Officials, the court in the case of Lt. Col. (T.S.) H. C. Dhingra v. Union of India 1988 (2) D L (DB) 109 held that such a show cause notice was liable to be quashed. The Court while quashing the show cause notice observed :-

"IN purported exercise of administrative power under Rule 14, in respect of allegations of misconduct triable by General Court Martial, the authorities cannot override the statutory bar of sub-section (1) of Section 122 of the Act. No administrative act or fiat can discard, destroy or annul a statutory provision. This statutory provision cannot be set at naught or circumvented merely on an administrator's opinion that it is "impracticable" to hold a trial by a General Court Martial as the accused officer has refused to waive the statutory bar of limitation prescribed for such a trial."

Rajasthan High Court in the case of Major Radha Krishna v. Union of India & Ors. 1993 (7) Slr 43(4) held that :-

"TRIAL by court martial and notice for termination of service u/s 19 of the Army Act read with Rule 14 of the Army Rules cannot be invoked unless the Chief of the Army Staff recorded his satisfaction as to the inexpediency or impracticability of the trial of the petitioner by court martial after consideration of the report recording the misconduct of the petitioner. When no reason for arriving at such a decision are given and the delinquency related to the year 1982-83 and thereafter delinquent continued in service without any complaint then in those circumstances notice seems to have been issued only in order to overcome difficulty created by the judgment of the court and is not based on relevant considerations. In such circumstances the opinion of the Chief of Army Staff is based on wholly irrelevant and extraneous considerations. Therefore, show cause notice was liable to be quashed."

(13) In this case also no reason has been assigned for not holding the General Court Martial. Nor any Explanation has been given as to on what report the Chief of the Army Staff satisfied himself to come to the conclusion that the holding of the general court martial was inexpedient or impracticable.

(14) From the counter affidavit it is clear that the respondents have admitted that since the trial by court martial had become time barred, Therefore, the Chief of the Army Staff invoked the provisions of Section 19 of the Act read with Rule 14 of the Army Rules. This is noticing but a fraud on the statutory provisions laid down under the Act. It amounts to circumventing the provisions of law. This cannot be permitted.

(15) To the same effect is the judgment of this Court in the case of Harbhajan

Singh v. Ministry of defense, Govt. of India. & Ors. 1982 (2) Slr 782(5). There the Court observed that "the existence of objective facts showing holding of court martial as inexpedient or impracticable is a condition precedent for the exercise of such a discretion. The period of limitation prescribed in Section 122 is for the benefit of delinquent officer. That cannot be taken away by invoking the provisions of Rule 14". Same is the case in hand where in order to over come the limitation prescribed u/s 122 of the Act, the respondent has invoked the provision of rule 14. This is against all cannon of justice and fair play.

(16) For the reasons stated above show cause notice dated 6th July, 1989, issued u/s 19 of the Act read with Rule 14 of the Army Rules and the impugned order dated 13th November, 1990 are set aside being illegal, unjust and without jurisdiction. Directions are given to the respondent to pay back full wages and all other service benefits to the petitioner from the date he was removed from service illegally till the time he retired on superannuation. Thereafter he be given pensionary benefits or retiral benefits in accordance with law.