

(1992) 12 MP CK 0011

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 4549 of 1989

Jitendra Singh Sahi (Lt. Col.)

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 17-12-1992

Acts Referred:

Army Act, 1950 — Section 122, 19, 52, 55
Army Rules, 1954 — Rule 14, 14(2)

Citation : (1993) 1 MPJR 225 : (1993) 38 MPLJ 951 : (1993) MPLJ 951

Hon'ble Judges : Shacheendra Dwivedi, J; D.M. Dharmadhikari, J

Bench : Division Bench

Advocate : V.K. Tanka, for the Appellant; Indira Nair, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

The petitioner is an Army officer, holding presently the rank of Lt. Col. Under this petition under Article 226 of the Constitution of India, he challenges and seeks quashing of the impugned show cause notice, proposing his termination from service issued on 19-7-1989 (Annexure A 4), by Chief of Army Staff and conveyed by Director General, Discipline and Vigilance (for Adjutant General), in purported exercise of powers u/s 19 of the Army Act, 1950, read with Rule 14 of the Army Rules, 1954 (hereinafter referred to as "the Act" and "the Rules").

The learned counsel appearing for the petitioner has assailed the impugned show cause notice, on more than one grounds, but in our opinion the main question regarding competence of the Chief of the Army Staff, to take recourse to the procedure of termination of services under Rule 14 of the Rules, when the Court Martial of the petitioner for the alleged misconduct amounting to offence, was barred by limitation needs to be considered and decided first. The other grounds urged against the impugned show cause notice, would require answer only if the petitioner fails on his principal submission alleging want of jurisdiction and

competence of the COAS under Rule 14 of the Rules.

Before we take up for decision the legal question involved requiring interpretation of the provisions of Section 19 of the Act and Rule 14 of the Rules, read with other relevant provisions of law, we may state a few facts necessary for decision of the case. In January 1980 in No. 3 sub-depot of 223 ABOD, it was noticed first by Major Kundanlal, while taking over charge from Capt. S. S. Lalli that quantity of copper wire in the stores was deficit approximately to the tune of 3.5 tons. The departmental Court of enquiry was ordered by the Commandant, 223 ABOD. Since the Headquarters Western Command did not agree with the findings of the departmental Courts of enquiry, Staff Court of Enquiry was held. That enquiry was completed in May 1987. The incident of loss of the alleged quantity of copper wire from the stores, as mentioned above was of January 1980. As stated in the return submitted by the respondents, for the first time, it was identified after finalisation of enquiry proceedings on 15-5-1987 that to make up the loss of the aforesaid quantity of copper wire, steel wire coated with copper was substituted. To find out how this substitution took place supplementary Court of enquiry was set up. That supplementary Court of enquiry could not pinpoint the responsibility. Therefore, all the persons involved in the case were summoned by the Court as witnesses. The petitioner was also summoned as a witness before the Court of Enquiry and it is alleged that seven civilian labourers deposed against the petitioner that they loaded fifteen bundles of wire wrapped in gunny in a military vehicle on the orders of the petitioner. Those bundles were brought to the security area of No. 3 subdepot and the petitioner was accompanying the vehicle. The said bundles were unloaded from the vehicle by the labourers. It is alleged that later, on 5-5-1980 these bundles were mixed with the existing store. The aforesaid act of misconduct on the part of the petitioner also amounted to an offence for which he could be tried by Court Martial.

The defence of the petitioner before us in this petition is that the discrepancy in the stores was during incumbency of Capt. Lalli and as admitted by the respondents in their return, in reply to paragraphs 18 and 19, the petitioner came in charge of the stores as officer after so many officers in between had taken charge of the stores. During the relevant period when the loss was detected, the petitioner was not in charge of the stores. In the supplementary Court of enquiry, he was merely summoned as a witness. He was taken unawares when some labourers, in that enquiry, deposed against him. At this stage he was asked to cross-examine them and he did put a few questions to some of them, but he was totally unprepared for the eventuality and because of time lag and want of necessary records, could not effectively cross examine them. The petitioner, therefore, submits that being deprived of opportunity of defence in a duly constituted Court Martial, he could not be condemned and proceeded against for the alleged misconduct. The petitioner's grievance is that in the summary procedure under Rule 14, he will have no effective opportunity to defend himself because he can merely submit his reply to the notice and state

his defence in writing. He can get no opportunity to establish his innocence as he would have got had a Court martial been convened against him and trial was held.

In the aforesaid factual background, we proceed to consider the legal objection to the maintainability of the proceeding, proposing to terminate the services of the petitioner on the alleged misconduct. A few provisions of the Army Act and the Rules which are relevant for the decision of the legal question before us may now be examined. Chapter-VI of the Act contains description of various offences for which any person subject to Act may be tried in Court martial. Offences in respect of property are mentioned in Sections 52 and 55 of the Act. The misconduct attributed to the petitioner of having substituted the quantity of copper wire in the stores by steel coated wire also amounts to an offence under the aforesaid sections of the Act. The Court martial is to be held for the offences in accordance with the provisions contained in Chapter X. Section 122 of the Act prescribes the period of limitation for holding a trial in court martial and there is a bar that no trial shall commence after the expiration of period of three years from the date of commission of the offence. Section 122(1)(2) reads as under:--

"122. Period of limitation for trial. -- (1) 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."

Chapter IV of the Act contains provisions regarding conditions of service of persons subject to the Army Act. Section 19, which is relevant for our purpose permits dismissal or removal from service of an army officer by the procedure contained in and subject to the provisions of the Act, Rules and the Regulations framed thereunder. Section 19 of the Act reads as under:--

"19. Termination of service by Central Government. --Subject to the provisions of this Act and the rules and regulations made thereunder the Central Government may dismiss, or remove from the service, any person subject to this Act."

Rule 14 of the Rules on the basis of which the impugned show cause notice has been issued reads as under :-

"14. Termination of service by the Central Government on account of misconduct. -- (1) When it is proposed to terminate the service of an officer u/s 19 on account of misconduct, he shall be given an opportunity to show cause in the manner specified in Sub-rule (2) against such action:

Provided that this sub-rule shall not apply :--

(a) where the service is terminated on the ground of conduct which has led to his

conviction by a criminal Court; or

(b) where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give to the officer an opportunity of showing cause.

(2) When after considering the reports on an officer's misconduct, the Central Government or the Chief of the Army Staff is satisfied that the trial of the officer by a court martial is inexpedient or impracticable, but is of the opinion, that the 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 defence:

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 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 defence and the recommendation of the Chief of the Army Staff as to the termination of the officer's service in the manner specified in Sub-rule (4)."

Having thus examined the scheme of the Act and the relevant provisions, what is to be noticed is that in a case where court martial is found to be "inexpedient" or "impracticable" in terms of Sub-rule 2 of Rule 14, the officer can be proceeded against for the alleged misconduct administratively by calling upon him to submit his explanation or defence in writing.

Admittedly in this case, as conceded by the learned counsel appearing for the respondents, the Court martial proceedings could not be taken up against the petitioner because of the bar of limitation contained in Section 122(1) of the Act. The argument repeatedly advanced and reiterated on behalf of the respondents by the learned counsel representing the Army authorities, is that action under Sub-rule (2) of Rule 14, can be taken for the alleged misconduct against any Army officer even where holding of court martial had already been rendered barred by limitation. The argument is that the words "inexpedient" or "impracticable" include a situation where the court martial proceedings are barred by time and hence cannot be held.

The main question, therefore, before us is about the true and correct interpretation of the expressions "inexpedient" or "impracticable" used in Sub-rule (2) of Rule 14. Before considering the aforesaid expressions, one has to keep in mind the scheme of the Act and the Rules that the normal procedure for finding out the guilt or misconduct of an army officer or a person subject to the Army Act is to hold a court martial against him, where he gets full opportunity to meet the charges and prove his innocence. Rule 14 permits the Army authorities to take an administrative action without holding court martial for an alleged

misconduct so as to impose a punishment of termination, removal or dismissal of the officer from the Army. The provisions of Sub-rule (2) of Rule 14, are comparable to the provisions contained in Sub-clause (2) of second proviso to Article 311(2) of the Constitution of India. Under the aforesaid provisions of the Constitution a regular departmental enquiry against the civil servant can be dispensed with where the authority empowered to impose the punishment is satisfied, for reasons to be recorded by him that it is not reasonably practicable to hold such enquiry. It is true that the provisions of Article 311 of the Constitution are not applicable to the members of the defence services and their conditions of service are regulated by the provisions of the Act and the Rules exclusively. The expression "not reasonably practicable to hold such enquiry" in Article 311(2), second proviso, Clause (b) can, however, be compared with the provisions contained in Sub-rule (2) of Rule 14 of the Rules where substantially similar provision has been made for dispensation of a regular court martial. Comparing the two provisions in the Constitution and the Rules, under the Act, we find that for civil servants, the concerned authority is to form an opinion that it is "not reasonably practicable" to hold such enquiry whereas under the rules applicable to the Army Officer, Chief of the Army Staff has to form an opinion or satisfaction that the court martial is "inexpedient" or "impracticable" The word "reasonably" is not used in the rule as to be found in the provisions of the Constitution.

On the basis of the above provision of Sub-rule (2) of Rule 14, we have to decide as to whether the expression "inexpedient" or "impracticable" should mean "impossible" also, so as to justify action under Sub-rule (2) of Rule 14 in a case such as the one before us, where court martial is barred and it cannot be held.

Very strong reliance has been placed by the learned counsel appearing for the Army authorities on the decision of the Supreme Court in the case of Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, where provisions of Rule 13 of the Rules came for consideration and interpretation. Detailed discussion and examination of the aforesaid decision is necessary because we find the same as distinguishable on facts as well as the ratio deduced from it. In the case of Major Dharam Pal Kukrety (supra) the offence alleged against him was alleged to have been committed between 6th and 7th November, 1975 and general court martial was ordered against him on March 13, 1976. The Court martial found him not guilty. The confirming authority, however, by order dated 3-4-1976 did not confirm the verdict and sent back the findings for revision. The Court martial again reassembled and by the verdict passed on 14-4-1976 again returned a finding in favour of the officer that he was not guilty. This was again not confirmed by the confirming authority by order passed on 25-5-1976. Section 160(1) of the Army Act reads as under:--

" 160. Revision of finding or sentence. -- (1) Any finding of sentence of a court martial which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the

confirming authority, may take additional evidence."

When the court martial recorded, for the second time, the verdict of not guilty in favour of Major Dharam Pal, the case could not have been sent back by the confirming authority because a finding or sentence of court martial can only once be "revised" and not successively. The Supreme Court in the case of Major Dharam Pal Kukrety (supra) in paragraph 13 of its report examined the above position and also commented that there is no express provision in the Army Act which empowers holding of fresh court martial when the finding of the court martial on revision is not confirmed. The Supreme Court, therefore, in paragraph 14 of the report considered three judgments of the different High Courts, taking a view that finding and sentence of court martial can only once be revised and thereafter there could not be again a court martial by remand. It is in the aforesaid circumstances that the question before the Supreme Court was whether it was practicable to hold a court martial and if impracticable, whether the authority concerned was justified in taking recourse to the administrative action under Rule 14 of the Rules. The decision of the Supreme Court on the basis of the interpretation of the words used in Rule 14 has to be found in paragraph 16 of the judgment which reads as under:--

"16. In the present case, the Chief of the Army Staff had, on the one hand, the finding of a general court martial which had not been confirmed and the Chief of the Army Staff was of the opinion that the further retention of the respondent in the service was undesirable and, on the other hand, there were the above three High Court decisions and the point was not concluded by a definitive pronouncement of this Court. In such circumstances, to order a fresh trial by a court martial could certainly be said to be both inexpedient and impracticable and the only expedient and practicable course, therefore open to the Chief of the Army Staff would be to take action against the Respondent under Rule 14, which he did. The action of the Chief of the Army Staff in issuing the impugned notice was, therefore, neither without jurisdiction nor unwarranted in law."

Having thus examined the facts of the case and the ratio of the decision in the case of Major Dharam Pal Kukrety (supra), we are of the view that the said decision is distinguishable because in that case before the Chief of the Army Staff, the option to order the third court martial, the maintainability of which was doubtful because of the adverse views expressed by the three High Courts and in the absence of definitive pronouncement of the Supreme Court was held impracticable. The second option to resort to the administrative action available under Rule 14 of the Rules was, therefore, held permissible in that case. That was not a case where court martial was totally barred by limitation prescribed in the case before us.

The expression "expedient" in Shorter Oxford English Dictionary is defined as under:--

"Expedient:-- Advantageous, fit, proper or suitable to the circumstances of the

case, useful etc."

"Inexpedient", therefore, should mean opposite to "expedient" i.e. not advantageous, not fit, not proper or suitable to circumstances of the case. The expression "impracticable" is defined in the same dictionary as -- "not practicable, that cannot be carried out of done; practically impossible. That cannot be put to use or practically dealt with; unmanageable, intractable; unserviceable". Not a bare literal but a legal meaning has to be assigned to the words used in Sub-rule 2 of Rule 14. Such interpretation has to be placed on those words and in a manner so as to best effectuate the intention of the legislature and to achieve the aim and object for which it is intended.

The word "impracticable" is antonym to the word practicable. That which is not practicable is "impracticable". For the purpose of legal meaning, in the "Words and Phrases Permanent Edition 33" the word "practicable" has also been explained thus -- "An act is "practicable" if conditions and circumstances are such as to permit its performance or to render it feasible." "Reasonably possible" would mean substantially the same as "practicable". "Practicable" mean "feasible, fair and convenient and is not synonym to "possible". The word "possible" is frequently used as synonym to "practicable", though the use of one as a substitute for other has been condemned. The word "practicable" does not necessarily mean "possible of execution". An act is practicable if conditions or circumstances permit its performance. It is practicable, if, under all the circumstances, it is feasible; if it can be done lawfully with reasonable convenience. A thing practicable must necessarily be possible, but a thing may be possible that is not practicable.

If the scheme of the Act and the Rules is examined it would be seen that if administrative action, under Rule 14 is taken against an Army officer for misconduct, he is deprived of full opportunity to defend himself as can be avoidable in a fulfilled court martial. Since the resort to Rule 14 deprives the officer of fulfilled trial, in our opinion, the words used in Rule 14, should receive strict construction meaning that resort to summary procedure of termination in accordance with Rule 14 should be allowed only if a normal trial, for some extraordinary circumstances, is not found feasible. It is, therefore, necessary that at the time of formation of opinion or satisfaction by the concerned authority to initiate action on the administrative side against the officer, under Rule 14, the authority should have before it two options open and he may resort to one of them more prejudicial to the delinquent officer only if circumstances or events warrant dispensation of less prejudicial procedure.

In our considered opinion, therefore, where there is no option available for resorting to one of the two procedures i.e. of administrative action and the court martial, Rule 14 cannot be invoked. In the present case, on the date the Chief of the Army Staff formed the opinion to issue notice under Rule 14, he had only one option of proceeding under the said rule and the other option of directing a court martial was not available as the same had already got barred by limitation. In a

case where the court martial is barred because of the lapse of time or bar of limitation, recourse cannot be taken to the administrative action under Rule 14, otherwise the same is liable to be abused and misused for lapses on the part of the army authorities in not taking due action within due time and allowing the court martial to get barred due to their own laches and for no fault on the part of the Army officer.

The expression "inexpedient" or "impracticable" should not, therefore, be construed to mean and include "impossible". Where court martial is impossible being barred by limitation, resort to Rule 14 is impermissible because it can be resorted to only in substitution of the court martial and when it cannot reasonably be held. We take some aid for putting such construction of the rule from a decision in the case *Re. El. Bombrero Ltd.*, 1958 (3) All E.R. 1. In this case before the Chancery Division, the provisions of Section 135(1) of the Companies Act, 1948, in which similar expression "impracticable" was used, came up for consideration, *Wyum Parry, J.* while construing aforesaid provision and expression "impracticable" used therein as under:--

"If for any reason it is impracticable to call a meeting of a company in any manner in which meetings of that company may be called, or to conduct the meeting of the company in manner prescribed by the articles of this Act....."

"It is to be observed that the sub-section opens with the words "If for any reason", and, therefore, it follows that the sub-section is intended to have, and, indeed, has by reason of its language, a necessarily wide scope. The next word being "it is impracticable to call a meeting of a company", the question arises, what is the scope of the word "impracticable"? It is conceded (certainly it was conceded below) that the word "impracticable" is more limited than the word "impossible", and it appears to me that the question necessarily raised by the introduction of the word "impracticable" is merely this : Examine the circumstances of the particular case and answer the question whether, as a practical matter, the desired meeting of the company can be conducted, there being no doubt, of course, that it can be convened and held. On the face of Section 135(1), there is no press limitation which would operate to give those words is "impracticable" any less meaning than that which I have stated, and I can find no good reason, in the arguments which have been addressed to me on behalf of the respondents for qualifying in any way the force of the word "impracticable" or the interpretation which I have placed on it, and, therefore, on that point I am in favour of the applicant."

Our view also gets support from a Single Bench decision of Punjab and Haryana High Court in the case of *Major I. K. Goel v. Union of India* 1991 (3) S.L.R. 371.

Compared with civil servants the members of defence services suffer disadvantage in fully defending themselves, as they have less constitutional protection of fairer procedure against disciplinary action because of the provisions contained in Article 33 of the Constitution of India. See -- *Kulwant*

Singh v. Union of India and Ors. 1991 M.P.L.J. 985 . The members of the defence services, subject to the Army Act have only statutory protection under the Act and the Rules. Even outside the provisions of the Act and the Rules, they cannot bring to aid principles of natural justice. See -- Union of India and another Vs. Ex Constable Amrik Singh, The provisions of the Act, have to be construed strictly and any interpretation which takes away or curtails substantially the right of effective opportunity of defence to an Army Officer should not be readily accepted unless the provision of law by its language plainly warrants the same. The word "impracticable" used in Rule 14, has therefore, to be given a legal meaning to understand it as conveying that "which is possible but not practicable" and not "which is impossible to accomplish." In the present case the court martial was barred by law of limitation and it was impossible to hold it.

During the course of arguments, the learned counsel appearing for the respondents also urged the misconduct or the offence committed by the petitioner was discovered only in the course of supplementary Court of enquiry; hence the period of limitation for the purpose of Section 122 of the Act should be deemed to commence from the date of discovery of commission of such offence. This additional argument advanced need not be answered by us. We have been shown the order of the Chief of the Army Staff in the file which was produced before us. The order shows that the impugned show cause notice was expressly issued under Rule 14, for the reason that by that time the court martial could not be held due to bar of limitation. That the court martial proceedings could be held and were not barred by time, has not been the case of the Army Authorities, and particularly the Chief of the Army Staff, who recommended institution of proceedings and issuance of show cause notice under Rule 14 of the Rules.

For the view that we have taken in constructing the provisions of Rule 14 of the Rules, the action taking thereunder by issuance of the impugned show cause notice of termination of service was a course not permissible in law. In that view the other less important question raised on behalf of the petitioner that there was violation of Rule 180 of the Rules in denying due opportunity of defence to the petitioner in the course of Court of enquiry need not be considered and decided by us.

Lastly a few words be said about the preliminary objection raised by the respondents on the maintainability of the petition as being premature against the show cause notice. Similar preliminary objection in similar circumstances was turned down by the Supreme Court in the case of Major Dharam Pal Kukrety (supra), in the following words:--

"Where the said notice issued without jurisdiction, the Respondent would have then suffered a grave, prejudicial injury by an act which was without jurisdiction. Where the threat of a prejudicial action is wholly without jurisdiction, a person cannot be asked to wait for the injury to be caused to him before seeking the court's protection. If on the other hand, the Chief of the Army Staff had the power in law to issue the said notice, it would not be open to the Respondent to

approach the court under Article 226 of the Constitution at the stage of notice only and in such an event his writ petition should be said to be premature. This was, however, not a contention which could have decided at the threshold until the court had come to a finding with respect to the jurisdiction of the Chief of the Army Staff to issue the impugned notice. Having held that the impugned notice was issued without any jurisdiction, the High Court was right in further holding that the Respondent's writ petition was not premature and was maintainable."

Consequently, the petition succeeds and is hereby allowed. The impugned show cause notice issued under Rule 14 of the Rules (Annexure A4) is hereby quashed and with it all proposed consequential action pursuant to the said notice, which we had allowed by conditional order of stay passed on 5-10-1989 directing that the respondent may proceed with the enquiry, but shall not pass the final order. In the circumstances, we leave the parties to bear their own costs.