

(2001) 07 DEL CK 0109
In the Delhi High Court
Case No : C.W.P. 638 of 1998

R.K. Gogna

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 20-07-2001

Acts Referred:

Army Act, 1950 — Section 121, 122, 153, 160, 17
Army Rules, 1954 — Rule 14
Penal Code, 1860 (IPC) — Section 379

Citation : (2001) 60 DRJ 505

Hon'ble Judges : Dr. M.K. Sharma, J

Bench : Single Bench

Advocate : Shyamla Pappu and M.R. Krishnamurthy, for the Appellant; Neeraj Kaul, for the Respondent

Final Decision : Dismissed

Judgement

Mukundakam Sharma, J.—Trial by General Court Martial was ordered against the petitioner by the respondents. In the said General Court Martial the petitioner was tried on a total of eight charges, six of which were u/s 63 of the Army Act for acts prejudicial to good order and military discipline whereas one of the charges was u/s 45 of the Army Act for behaving in a manner unbecoming of his position and the character expected of his and one u/s 69 of the Army Act for committing civil offence i.e. of abetting an offence specified in Section 379 of the Indian Penal Code. The Court returned a verdict of "not guilty" on all the eight charges. Thereupon the General Officer Commanding 21 Corps, who had ordered the General Court Martial, ordered a Revision General Court Martial, ordered a Revision General Court Martial, after which the court again returned a verdict of "not guilty" on all the charges. The findings of the General Court Martial were confirmed in respect of the first and third charges and not confirmed on the other charges namely Charges No. 2, 4, 6, 7 & 8 as according to the Confirming Authority the findings on the remaining six charges are not supported by the evidence on record. By a communication dated 6.6.1996, the respondents issued

a show cause notice to the petitioner purportedly u/s 19 of the Army Act read with Army Rule 14 intimating the petitioner that the Chief of Army Staff who is the Competent Authority to confirm the findings of the General Court Martial had confirmed the said findings only in respect of the first and third charges but had not confirmed the same in respect of charges No. 2, 4 and 5 to 8 being against the evidence. It was also intimated that in view of the aforesaid position it was found by the Competent Authority that further retention of services of the petitioner was undesirable and against the interest of the organisation. The petitioner was accordingly directed to show cause as to why his services should not be terminated in terms of the provisions of Section 19 of the Army Act read with Rule 14 of the Army Rules.

2. The petitioner submitted a reply to the aforesaid show cause notice. However, in the meantime another show cause notice was issued to the petitioner dated 21.8.1997 whereby the petitioner was informed that from the records of the Court of Enquiry it was revealed that a vehicle - Shaktiman from the Brigade Headquarters of the petitioner was used for removal of wood from the Government Forest. It was also alleged that the petitioner knowing or having reason to believe that an offence had been committed with an intention of screening the offenders from legal punishment, caused suppression of the evidence in this respect and Therefore, the facts and circumstances as brought out in the said Court of Inquiry when viewed in totality would go to show that the conduct of the petitioner had been unbecoming of an officer. The petitioner was, Therefore, informed that the Chief of Army Staff, the Competent Authority had directed the petitioner to show cause as to why his misconduct should not be suitably censured.

3. The petitioner submitted a reply to the aforesaid show cause notice also. It transpired from the records that both the aforesaid replies were considered by the Chief of the Army Staff and found that his replies to the statements contained in the aforesaid two show cause notices were not satisfactory. after considering the entire matter the Chief of the Army Staff conveyed to the petitioner severe displeasure holding that while evaluating the over all conduct of the officer in this episode the acts of commission and omission in so far as the "cover up" operation as also in instigating the subordinates to give false evidence had been established beyond doubt. The said communication was dated 31.12.1997. The present writ petition was filed in this court on 2.2.1998. In the aforesaid writ petition the petitioner challenged the legality of the show cause notices dated 6.6.1996 u/s 19 of the Army Act read with Rule 14 of the Army Rules and also the second show cause notice dated 21.8.1997 which was issued in respect of the censure proceedings.

4. A counter affidavit was filed in the writ petition contending inter alias that the respondents were not taking any action for terminating the services of the petitioner u/s 19 of the Army Act read with Rule 14 of the Army Rules had become hence prayer (a) of the petitioner regarding issuing of writ of certiorari

quashing the show cause notice dated 6.1.1996 u/s 19 of the Army Act and Rule 14 of the Army Rules is infructuous. It was also contended that after the aforesaid show cause notice was issued to the petitioner on 21.8.1997 and after the petitioner filed his reply thereto the Chief of the Army Staff had passed the order dated 31.12.1997. It was also stated in the counter affidavit that as against the aforesaid order passed by the Chief of Army Staff an alternative remedy by way of filing statutory complaint is provided for u/s 17 of the Army Act, 1950.

5. The court considered the averments made in the writ petition as also in the counter affidavit. In support of the stand taken by the respondents in the counter affidavit to the effect that the respondents are not taking any action for terminating the services of the petitioner it was held in the aforesaid order that the issue regarding the validity of the show cause notice dated 6.6.1996 need not be gone into. In respect of the show cause notice issued on 21.8.1997 and the order passed there upon on 31.12.1997 this court held that since an alternative efficacious remedy is available to the petitioner an opportunity should be granted to the petitioner to make such a statutory complaint to the concerned Authorities and directed the authorities concerned to deal with the statutory complaint in accordance with law. The writ petition was however, kept pending. Pursuant to the aforesaid order passed by the court, the petitioner filed a statutory complaint before the Competent Authority which was considered and was rejected. Accordingly, an application being C.M. No. 422/1999 was filed in this court whereby the petitioner challenged the outcome of the statutory complaint. By order dated 3.5.2000 this court ordered that the said application would be heard and decided Along with the main writ petition.

6. In view of the aforesaid position what survives for my consideration and was also urged by the counsel appearing for the petitioner in this writ petition is the legality of the show cause notice dated 21.8.1996 and the order dated 31.12.1997 passed by the Chief of the Army Staff and also the order passed by the Appellate Authority rejecting the statutory complaint filed by the petitioner. It was submitted by Ms. Shyamla Pappu appearing for the petitioner that the impugned show cause notice dated 21.8.1997 and the impugned order passed thereon dated 31.12.1997 are illegal and without jurisdiction and they are required to be set aside and quashed. It was submitted that the order of censure is also a punishment which was awarded to the petitioner. It was submitted that after the verdict of "not guilty" given by the General Court Martial no such punishment could have been awarded by the respondents. It was also submitted that even otherwise and also because the said punishment was awarded beyond three years period from the date of occurrence thus it is hit by the provisions of Section 122 of the Army Act which provides for period of limitation for taking such action. It was also submitted that the aforesaid order of censure is bad in law and is contrary to the provisions of Army Order on the basis of which the aforesaid action was taken. It was submitted by her that the allegations against the petitioner were of serious nature involving moral turpitude and Therefore no

action could have been taken under the aforesaid Army Act which is applicable only in cases where the act, conduct or commission alleged is of a minor nature. The other submission of the counsel appearing for the petitioner was that there is disparity in the contents of the show cause notice and the impugned order of censure. It was submitted that the show cause notice does not make any mention in respect of cover-up and instigating subordinate to make false statement, which are the basis for passing the impugned order.

7. Counsel appearing for the respondents however refuted the aforesaid allegations and submitted that none of the aforesaid grounds on which the show cause notice as also the impugned order of censure are assailed has any merit. It was submitted that the provisions of Section 122 of the Army Act provide for a period of limitation for trial under the Army Act which has no application in respect of the Army Order on the basis of which the impugned show cause notice was issued and impugned order of censure was passed. It was also submitted that when the findings of Court Martial are against the weight of evidence on record and such of the findings are not confirmed, a fresh trial by another Court Martial was Therefore, not permissible and Therefore, in such a case resort could be taken to the provisions of Rule 14 of the Army Rules as also under the provisions of the Army Order.

8. In support of the aforesaid submissions the counsel for the parties have taken me through the records of the case and have relied upon the decisions of the Supreme Court in Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, ; Major Radha Krishan Vs. Union of India and Others, Union of India and Others Vs. Harjeet Singh Sandhu etc., and also an un-reported decision of the Supreme Court in Union of India v. J.S. Sivia, (Civil Appeal No. 1321/1995 disposed of on 25.4.1995).

9. In Harjeet Singh Sandhu's case (supra) one of the questions that fell for consideration before the Supreme Court was whether the Army authorities could invoke Section 19 of the Army Act since the Court Martial proceedings had become time barred u/s 122 as they were held after a period of 3 years. In the said case Harjeet Singh Sandhu was court martial led and a sentence of forfeiture of 3 years of service for the purposes of promotion and severe reprimand was awarded to him. The Confirming Authority formed an opinion that the sentence was lenient and the matter was sent back for revision. On revision the punishment was enhanced. The Chief of the Army Staff annulled the Court Martial proceedings and directed for issuance of show cause notice to the respondent u/s 19 read with Rule 14 calling upon Shri Sandhu to submit a show cause as to why his services should not be terminated. Pursuant to the said notice the services of the petitioner stood terminated. In the said context it was held by the Supreme Court that the expiry of the period of limitation u/s 122 of the Army Act does not ipso facto take away the exercise of power u/s 19 read with Rule 14 and that the said power is available to be exercised though in the facts and circumstances of an individual case it might be inexpedient to exercise

such power or the exercise of such power might stand vitiated if it is shown to have been exercised in a manner which may be called colourable exercise of power or an abuse of power. It was held that a broad proposition that power u/s 19 read with Rule 14 cannot be exercised solely on the ground of court martial proceedings having not commenced within the period of limitation prescribed by Section 122 of the Act, cannot be accepted. By the aforesaid judgment the decision of Maj. Radha Krishna (supra) was over-ruled by the Supreme Court and the ratio of the decision in Maj. Dharam Pal Kukreti was held to be good law.

10. In Maj. Dharam Pal Kukreti's case it was held by a Bench of three Hon'ble Judges of the Supreme Court that where the finding of a court martial even on revision is perverse or against the weight of evidence on record and the finding is not confirmed a fresh trial by another court martial was not permissible and Therefore, in such a case the Central Government or the Chief of Army Staff can resort to Rule 14 of the Rules and issuance of notice by him is neither without jurisdiction nor unwarranted in law. In the said decision the Supreme Court considered the various provisions of the Army Act and the Rules and after noticing the said provisions in paragraph 13 it was held thus:-

"It is pertinent to note that u/s 160 the confirming authority has the power to direct a revision of the finding of a court-martial only once. There is no power in the confirming authority, if it does not agree with the finding on revision, to direct a second revision of such finding. In the absence of any such confirmation, whether of the original finding or of the finding on revision, by reason of the provisions of Section 153 the finding is not valid. Therefore, in the case of the respondent the finding of the general court-martial on revision not having been confirmed was not valid. Could he, Therefore, be tried again by another court-martial on the same charges? u/s 121, a person subject to the Army Act, who has been acquitted or convicted of an offence by a court-martial or by a criminal court, is not liable to be tried again for the same offence by a court-martial. It can well be argued that by reason of the provisions of Section 153 under which no finding or sentence of a general, district or summary general court-martial is valid except in so far as it is confirmed as provided by the Army Act a person cannot be said to have been acquitted or convicted by a court-martial until the finding of "guilty" or "not guilty" in his case has been confirmed by the confirming Authority. There is, however, no express provision in the Army Act which empowers the holding of a fresh court-martial when the finding of a court-martial on revision is not confirmed."

The Supreme Court then noticed three High Court decisions and thereafter held thus in paragraph 15:-

"This being the position, what then is the course open to the Central Government or the Chief of the Army Staff when the finding of a court-martial even on revision is perverse or against the weight of evidence on record? The High Court in its judgment under appeal has also held that in such a case a fresh trial by another court-martial is not permissible. The crucial question, Therefore, is

whether the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army Rules. Though it is open to the Central Government or the Chief of the Army Staff to have recourse to that Rule in the first instance without directing trial by a court-martial of the concerned officer, there is no provision in the Army Act or in Rule 14 or any of the other rules of the Army Rules which prohibits the Central Government or the Chief of the Army Staff from resorting in such a case to Rule 14. Can it, however, be said that in such a case a trial by a court-martial is inexpedient or impracticable? The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic." The same dictionary defines "expedient" inter alia as meaning "advantageous, fit, proper, or suitable to the circumstances of the case." Webster's Third New International Dictionary also defines the term "expedient" inter alia as meaning "characterized by suitability, practicality, and efficiency in achieving a particular end; fit, proper, or advantageous under the circumstances."

provisions of the Army Act, Rules and the Regulations made there under as also the Army Order Having held thus, the Supreme Court observed that 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 definite pronouncement of the Supreme Court. It was further observed that 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, and Therefore, the said action of the Chief of the Army Staff in issuing the impugned notice was neither without jurisdiction nor un-warranted in law.

11. In the decision of the Supreme Court in Brig. J.S. Sivia the same Army Order in accordance with which the order of censure of the present nature in the form of severe displeasure fell for consideration before the Supreme Court considered various provisions of the Army Act, Rules and the Regulations made there under as also the Army Order which recognises the award of censure as "custom of the service" and upon such consideration it was held by the Supreme Court that the award of censure is being regulated by the customs of the service which is a binding rule of the Army service and Therefore, the award of censure has the binding force. In the said decision the Supreme Court held that the Army authorities have jurisdiction to award censure either in the form of "displeasure" or "severe displeasure". Paragraphs 2, 5 & 6 of the aforesaid Army Order having relevance in view of the submission of the counsel appearing for the parties are extracted herein below:-

"2. The award of censure to an officer or a JCO is an administrative action, in accordance with the custom of the service. It takes the form of "Severe

Displeasure" (either recordable or otherwise) or "displeasure" of the officer awarding the censure, as specified in succeeding paragraphs.

5. Censure is awardable where the act, conduct or omission is of a minor nature, both in the Army Act will not be disposed of by award of a censure but will be dealt with by initiating a disciplinary action. Attention, in particular, is invited to para 432 of the Regulations for the Army, 1962, which stipulates that "persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a court martial or prosecuted in a civil court. Such cases will not be disposed of summarily or by administrative action". In view of the foregoing, there should be no occasion for offence involving moral turpitude, misappropriation, financial or other offences of serious nature being dealt with by award of censure when disciplinary action is possible/feasible. If for some reason, a case of this nature has come across, where trial is inexpedient or impracticable, administrative action for termination of service of the delinquent persons should be initiated.

6. Cases which are not of minor nature and which do not involve moral turpitude, fraud, theft and dishonesty and where trial by GCM is either not practicable being time barred or is not expedient due to other reasons, may in appropriate cases at the discretion of the GOC-in-C be forwarded to Army Headquarters (D&V Dtd.) for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Section 19 read with Army Rule 14."

12. The petitioner was tried by General Court Martial on 8 charges. The General Court Martial found the petitioner not guilty in all the eight charges. The Competent Authority, namely - the Chief of the Army Staff as the Confirming Authority while confirming the findings on the first and third charge did not confirm the findings on the remaining six charges for, in his view the evidence on record did not support the findings of not guilty. As laid down in Section 153 of the Army Act, where the finding is not confirmed by the Competent Authority it remains invalid in law. Effect thereof came up for consideration in Dharam Pal Kukreti's case (supra). In the said decision it was held that it could well be argued that by reason of the provisions of Section 153 under which no finding or sentence of a General, District or Summary Court Martial would be valid except so far it is confirmed as provided by the Army Act. Therefore, a person cannot be said to have been acquitted or convicted by a court-martial until the finding of "guilty" or "not guilty" in his case is confirmed by the confirming authority. In the said decision however, it was noticed that there is however, no express provision in the Army Act which empowers the holding of a fresh court-martial when the finding of a court-martial on revision is not confirmed. By referring to the three High Court decisions the Supreme Court then posed a question as to what then is the course open to the Central Government or the Chief of the Army Staff when the finding of a court-martial even on revision is perverse or against

the weight of evidence on record. In the said decisions the High Courts have held that in such a case a fresh trial by another court-martial is not permissible. The Supreme Court, after recording the said findings of the High Court observed that the crucial question Therefore, is whether the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army Rules. It was held that it could be so done. In the decision of Harjeet Singh Sandhu (supra) the Supreme Court has held that the provisions of the Limitation Act would not stand on the way of the Central Government or the Chief of the Army Staff resorting to Rule 14 of the Army Rules.

13. It is thus crystal clear that the proceedings under Rule 14 read with Section 19 of the Army Act as also the proceedings in the Army Order are independent of the General Court Martial proceedings. In a case where the General Court Martial acquits an accused of all the charges but the said findings are not confirmed by the Competent Authority in such a case resort could be taken by the Army authorities to the provisions of Rule 14 read with Section 199 of the Army Act and the rules framed there under. The decision in Dharam Pal Kukreti (supra) is the authority on the issue. On the same analogy where the findings of a court martial even on revision are against the weight of the evidence on record and the said findings are not confirmed and where a fresh trial by another court martial is not permissible in such a case the Chief of the Army Staff could also take resort to the provisions of the Army Order.

14. As was held in Brig. J.S. Sivia's case (supra) the scheme of the Army Act, Rules and Regulations and the various Army orders issued from time to time make it crystal clear beyond doubt that the award of censure is a part of the custom in the Army and Therefore, it has a binding force. Therefore, in an appropriate case the nature of which is outlined in a recent decision in Union of India v. Harjeet Singh Sandhu (supra) the Competent Authority could take resort to the provisions of the Army Order or Rule 14 of the Army Rules and resort to such exercise of power cannot be said to be unreasonable, illegal or without jurisdiction.

15. So far as the question of limitation as raised by the counsel appearing for the petitioner is concerned, the said issue is no longer rest integra in view of the decision of the Supreme Court in Harjeet Singh Sandhu's case (supra) wherein the Supreme Court has held that to a case of this nature i.e. under Army Rule 14 the provisions of the Limitation Act would not be applicable. In the same analogy the said provisions would not be applicable to a case where the provisions of Army Order are attracted. Besides a bare perusal of the provisions of Section 122 which provide for limitation under the Army Act would clearly indicate that the said provisions are applicable in a case of trial and cannot be made applicable to a proceeding under the Army Order.

16. So far the proceedings initiated under the provisions of Rule 14 and Army orders are concerned they cannot be said to be strictly in the nature of trial and Therefore, in my considered opinion the said provisions of Section 122 would

have no application to the case in hand. Since a fresh trial by another court-martial in respect of the said charges was not permissible, Therefore, the proceedings initiated under the provisions of the Army order were legal and within jurisdiction, for, the petitioner could not be said to have been acquitted or convicted by a court-martial unless and until the findings of "not guilty" in the case of the petitioner in respect of the six other charges have not been confirmed by the Confirming Authority. The contentions of the counsel appearing for the petitioner are Therefore, without merit.

17. Having reached the aforesaid conclusions, I now proceed to deal with another contention of the counsel appearing for the petitioner that there is disparity between the allegations made in the show cause and the final order passed. A bare reading of the said show cause as also the final order passed would indicate that there is no disparity at all. The allegations made in the said show cause notice also relate to screening offenders from legal punishment and causing suppression of evidence in that regard. It was also alleged that his overall conduct in the entire matter had been unbecoming of an officer. A comparative reading of the said allegations made in the show cause and the final order passed would indicate that there is no disparity in the allegations and the final order passed. The final order was also passed on the basis of the same "cover up operation". Therefore, the said contention is also without any merit. It was also submitted on behalf of the petitioner that the allegations made in the show cause notice is not of minor nature, both in gravity and nature and the same involve moral turpitude. The action taken under the Army Order in the present case is an administrative action, in accordance with the custom of the service. This is also so stated in paragraph 2 of the Army Order. In the present case as enumerated above, no disciplinary action is also possible under the Army Act. The trial as stated in the preceding paragraphs is inexpedient or impracticable. Therefore, action taken in the present case for the involvement of the petitioner in the cover up operation cannot be said to be barred or prohibited. This contention of the petitioner is also devoid of any merit.

18. It is also necessary to mention at this stage that although proceedings under the provisions of Section 19 read with Army Rule 14 were initiated against the petitioner and a show cause notice was issued to him in respect of the said proceedings as against which a reply was filed, the respondents took a lenient view of the matter and decided to pass an order of censure on the petitioner, which is indicated by the actions of the respondents in not passing an order under Rule 14 of the Army Rules. The only order passed by the respondents was in accordance with and in terms of the Army Order and it was stated clearly before this court that the respondents would not pass any order as terminating his services. In my considered opinion, the respondents have shown leniency towards the petitioner by only issuing a censure order and not issuing any order of termination.

19. In this view of the matter, I find no merit in the writ petition and the same is

dismissed. However, there will be no order as to costs.