
(1967) 02 DEL CK 0019
In the Delhi High Court

S.K. Rao

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 23-02-1967

Acts Referred:

Citation : (1967) 02 DEL CK 0019

Hon'ble Judges : K.S. Hedge, J; Jagjit Singh, J

Bench : Division Bench

Judgement

K.S. Hegde and Jagjit Singh, JJ.

(1) On April 9, 1959, the Central Government directed the removal from service of Captain S.K.. Rao under rule 14 of the Army Rules, 1954. A petition under article 226 of the Constitution was filed by Captain Rao for quashing the order of his removal from services on the ground that rule 14 is ultra virus the Army Act, 1953, and Therefore, action taken there under is without the authority of law.

(2) The petitioner was a commissioned officer in the Indian Army Ordnance Corps Training Centre, Secundarabad. It was alleged that on April 4, 1958, the petitioner committed acts of gross-misconduct. The allegations against him were as follows :-

(I) Knowing her as the daughter of Capt. Raghbir Singh, he (Capt S.K. Rao) assisted Kumari Prakash in going away from her parents' protection and planning to run away with an Ob, by (aa) receiving her in his house in the early hours of 4th April 1958, and taking her in his scooter to 511 GR. Lines, (bb) arranging her meeting with 9402844 Rfn Jai Prashai Lamb"J of 5/11 GX. at the unit lines and, (cc) acquiescing in the girl being met by the Ob latter at teashop nearby to receive a present of a sari and a blouse from him in his presence. The Officer thus actively abetted in the attempt of brother officer's daughter to elope with an OB. (ii) He took Kumari Prakash to a hotel "Saidiya Lodge" in Hyderabad and got a room to themselves by impersonating and giving a false identity as "Mr. and Mrs. Prakash." (3) An enquiry into the matter was made by Court of

Inquiry. The Chief of the Army Staff, after going through the proceedings of the Court of Inquiry, Considered that the conduct of Captain Rao was most unbecoming an officer and as he was of opinion that trial of the officer by a General Court Martial was inexpedient, he ordered administrative action to be taken under rule 14.B, memorandum Tbib, 6914/88 No. 13802/15/ Tb, dated September 4, 1958, the petitioner was called upon to submit his Explanation and defense regarding the allegations against him. The Explanation of the petitioner, on being submitted, was placed before the Central Government, who found it unsatisfactory and an order (dated April 9, 1989) was passed removing the petitioner from service.

(4) In the petition a some what different version was given of what had happened. According to the petitioner, he did not in any way assist Kumari Prakash, daughter of Captain Raghbir Singh, to go away from her parents' house. It was stated by him that with the help of Major A.C. Gupta he had taken Kumari Prakash from a hotel to her parents' house.

(5) For purpose of this petition, it is, however, not necessary to consider as to which of the two versions is correct. That was a matter for the competent authority to determine. The only point which has to be considered is the validity of rule 14 of the Army Rules, 1954 (hereinafter referred to as "the Rules"). If rule 14 is in turn valid under the Army Act, 1950 (hereinafter referred to as "the Act"), the petitioner has no case.

(6) Admittedly the petitioner was subject to the Act. The Rules, including rule 14, purported to have been made by the Central Government under the rule-making powers given by section 191 of the Act. Rule 14 reads: -

14(1) When after considering the reports on "an officer's misconduct, the Central Government is satisfied or the C-in-C is of the opinion, that the trial of the officer by a Court-martial is inexpedient or impracticable but considers the further retention of the said officer in the service as undesirable, that C-in-C shall communicate the view of the Central Government or his views, as the case may be, to the officer together with all reports adverse to him and he shall be called upon to submit his Explanation and defense. (2) In the event of the Explanation of the officer being considered unsatisfactory by the C-in-C, 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 C-in-C as to whether the officer should be--- (a) dismissed from the service; or (b) removed from the service; or (c) called upon to retire; or (d) called upon to resign. (3) The Central Government, after due consideration of the reports the officer's defense, if any, and the recommendation of the C-in-C, may dismiss or remove the officer with or without pension or call upon him to retire or resign, on his refusing to do so the officer may be retired from or gazetted out of the service ...gratuity if any admissible to him." (7) Thus under rule 14 action can be taken for misconduct against an officer, whose further retention in service is considered undesirable, without the officer being tried by a General Court

Martial. But before doing so, the officer must be called upon to submit his Explanation and defense. If the Explanation is found unsatisfactory, the Central Government has the power to dismiss or remove the officer.

(8) As stated above, the Rules were made u/s 191 of the Act. Sub section (1) of section 191 give p3wer to the Central Government to make rules for the purposes of carrying into effect the provisions of the Act. Sub-section (2) mentions specific matters about which rules may be made, but this power is "without prejudice to the generality of the power conferred by sub-section (1)". Clause (a) of sub-section (2) refers to the removal, retirement, release or discharge from service of persons subject to the Act.

(9) So far as the impugned rule (rule 14) is concerned. its validity depends upon the fact as to whether it enables to carry in to effect any provision of the Act. In order to be valid, the rule must net be inconsistent with the provisions of the Act. In the State of U.P. v Babu Ram". it was observed by their Lordships of the Supreme Court that one of the principles fundamental to the rules of construction was that the rules should be consistent with the provisions of the Act.

(10) Some provisions of the Act may appropriately be mentioned here. Section 18 provides that every person subject to the Act shall hold office during the pleasure of the President. Section 19 is to the effect that subject to the provisions of the Act and the rules and regulations made there under, the Central Government may dismiss or remove from service any person subject to the Act. Chapter Vi, containing sections 34 to 70, deals with offences that may be committed by persons subject to the Act. Section 45 is important for purposes of this case and is reproduced below:-

"45.Any officer, junior commissioned officer or warrant officer who behave in a manner unbecoming his position and the character expected of him shall, on conviction by court-martial, if he is an officer, be liable to be cashiered or to suffer such less punishment as is in this Act mentioned; and, if he is a junior commissioned officer or a warrant officer be liable to be dismissed or to suffer such less punishment as is in this Act mentioned". (11) Shri S S. Chadha, learned counsel for the petitioner, contended that as the services of the petitioner were not terminated by the President, section 18, which provides that every person subject to the Act shall hold office during the pleasure of the President, has no application to the facts of the present case. Elaborating his argument, he seated that a distinction has been made in Sections 18, and 19 between the power of the President and the Central Government. While the President could terminate the services of the petitioner at his pleasure, the Central Government u/s 19, could only act "subject to the provisions of the Act and the rules and regulations made there under". It was urged that as the Act contained specific provisions for punishing "unbecoming conduct", a rule could not have been validly made in derogation of section 46 to give power to the Central Government to remove an officer without being tried and convicted by

court-martial. Rule 14 was, Therefore, stated to be ultra vires.

(12) On a plain reading of section 19, there can be no doubt that the power of the Central Government to dismiss or remove from service any person subject to the Act can be exercised only subject to the provisions of the Act and the rules and regulations made there under. As already stated, rules can be made u/s 191 of the Act for the purpose of carrying into effect the provisions of the Act. Regulations can be made u/s 192, but we are not concerned with them, as rule 14 forms part of the Rules which were made u/s 191 of the Act. In the return submitted on behalf of the respondent the Union of India, the stand taken was that rule 14 had been made u/s 191(2)(a) of the Act and that for removal from service u/s 19, read with rule 14 a court-martial was not necessary.

(13) Shri S.N. Shankar, learned counsel for the Union of India, did not dispute the proposition that act made a distinction between the powers of "the President" and "the Central Government". He, however, contended that the power given to the Central Government by section 19 was not fettered by the provisions of section 45 of the Act. According to him, section 19 was independent of section 45 and consequently rule 14 could not be regarded as inconsistent with the provisions of section 45 of the Act. In this connection, a reference was also made by him to a recent judgment of Kapur, J. in the case of *Om Parkash Bhardwaj v. The Union of India*".

(14) Under Article 310 of the Constitution, every person, who is a member of the defense service, holds office during the pleasure of the President. In the case of civil servants the Pleasure doctrine in subject to certain restrictions provided in Article 311, but that has no application to members of the defense service. Section 18 embodies the rule enunciated in Article 310 of the Constitution so far as persons subject to the Act are concerned. The removal of the petitioner having been made by the Central Government, u/s 19 of the Act, and not by the President, the pleasure doctrine cannot be invoked. The Act, as already stated, makes a distinction between the power of the President and the Central Government. the power of the Central Government to dismiss or remove a person subject to the Act was specifically made subject to the provisions of the Act and the rules and regulations, made there under such rules and regulations, in order to be valid, should not be inconsistent with the provisions of the Act. Under the Act, "unbecoming conduct" of an officer can be punished only u/s 45.

(15) It follows that except where action is taken by the President, u/s 18 of the Act, any officer, junior commissioned officer or warrant officer subject to the Act can only be punished u/s 45 of the Act for behaving in a manner unbecoming the position and character expected of him.

(16) The implication of the words "subject to the provisions of this Act", occurring in section 19, is that power of the Central Government to dismiss or remove from service any person subject to the Act cannot be exercised contrary to the provisions of the Act or in other words in derogation of the provisions of

section 45. If the intention of the legislature had been to empower the Central Government to exercise those powers being restricted by the provisions of the Act, then the use of the words "subject to the provisions of this Act" was unnecessary. That the legislature did not intend to give unfettered powers to the Central Government for purpose of dismissing or removing from service persons subject to the Act finds further support from the use of the words "subject to the rules and regulations made there under". Rules and regulations can be made for the purpose of carrying into effect the provisions of the Act, which means that a rule or regulation cannot be made which is outside the scope of any of the provisions of the Act. The contention of the learned counsel for the Union of India that section 19 of the Act is independent of section 45 or that section 19 gives independent power to the Central Government for dismissing or removing persons subject to the Act is, in our opinion, not tenable. Any such interpretation will amount to ignoring in section 19 the words "subject to the provisions of this Act and the rules and regulations made there under".

(17) The contention of Shri Shanker that the impugned rule was made with a view to facilitate the proper exercise of the power given to the Central Government u/s 19 overlooks in that section the crucial words "subject to the provisions of this Act". The effect of these words is that if a person subject to the Act is liable under any of the provisions of the Act to be dismissed or removed from service as a punishment for an offence, then without complying with the requirements of these provisions action cannot be taken by the Central Government by purporting to act u/s 19 of the Act.

(18) Rule 14 of the Rules clearly goes beyond the scope of sections 19, 45 and 191 of the Act and is inconsistent with those provisions. The power of the Central Government to dismiss or remove from service being subject to the provisions of the Act has to be exercised in conformity with section 46 of the Act. The rule, as it exists, has the effect of abrogating the provisions of both sections 19 and 45. It appears that at the time of making this rule the opening words of section 19 "subject to the provisions of this Act" were lost sight of.

(19) The case of *Om Parkash Bhardwaj*", cited by the learned counsel for the Union of India, related to dismissal of a Wing Commander on the ground of "moral turpitude", u/s 19 of the Air Force Act, 1950, section 19 of the Act, 1950, corresponds to section 19 of the Act. while dealing with section 19 of the Air Force Act, 1950 in that case, the learned Judge made the following observations :-

"SECTION 19 of the said Act provides the tenure of service to be during the pleasure of the President. Section 19 gives an absolute power to the Central Government to dismiss or remove from service" any person-subject to this Act". It is abundantly recognised that Persons who enter the military service and take the State's pay, and who are content to act under the President's commission, although they do not cease to be citizens in respect of responsibility yet they do, by a compact which is intelligible, and which requires only the statement of it to

the consideration of any one of common sense become subject to military rule and military discipline. In case of civil servants certain special safeguards have been provided by Article 311 of the constitution. Those safeguards admittedly do not extend to the army personnel. Admittedly, no rules have been framed in this behalf and there is, Therefore, no question of any violation thereof. If any rules had been framed and violated, possibly different considerations may have arisen. As the law however stands at present it seems to recognise that employment in Army is not a right but only a privilege by the sovereign at will and efficient management demands that power to appoint should necessarily include the power to dismiss. In Army matters the legislature has conferred on the Government the same proprietary, rights as provided to employers to hire and fire without restrictions....." With great respect, we are unable to agree with this view. It appears that distinction between sections 18 and 19 of the Air Force Act, 1950, was not urged before his Lordship and the effect of the words "subject to the provisions of this Act" occurring in section 19 of that Act, was not taken into consideration

(20) The rule of pleasure as laid down in Article 310 of the Constitution has been embodied in section 18 of the Act. When the services of a person subject to the Act are terminated by an authority other than the President, then it is incumbent on that authority to proceed in accordance with the provisions of the Act. No rule can be validly made u/s 91 of the Act which may authorise the Central Government or any other authority to exercise the power of dismissal or removal in a manner inconsistent with any provision of the Act

(21) In conclusion, we hold that rule 14 of the Rules is ultra vires the provisions of sections 19, 45 and 191 of the Act. The removal of the petitioner under rule 14 cannot be sustained as the order of removal suffers from lack of jurisdiction. The petition is, Therefore, accepted and the order, dated April 9, 1959 whereby the Petitioner was removed from service, is quashed. In the circumstances of the case, there will be no costs.