
(1997) 12 MP CK 0004
In the Madhya Pradesh High Court
Case No : W. P. No. 369 of 1987 (I)

Suba Singh Aulakh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 02-12-1997

Acts Referred:

Army Act, 1950 — Section 122

Citation : (1998) 2 MPJR 71

Hon'ble Judges : J. G. Chitre, J

Bench : Single Bench

Advocate : Piyush Mathur, for the Appellant; B. G. Neema, for the Respondent

Final Decision : Allowed

Judgement

J. G. Chitre. J.

This petition speaks of pitfalls of the system in which the petitioner who believed that he was entitled to promotion but was denied it and was required to knock the doors of the Court. He retired before this petition could be decided on account of departmental wrangles. He blames the department for not giving him the promotion at appropriate moment.

As per petitioner's case he was appointed in the Army in the month of September 1963 and, thereafter served in Army in various ranks. When he was leading 16 Guards at Jamnagar, some irregularities were alleged to have been committed by him. When he had left Jamnagar and joined his duty at some place in Nagaland, some complaints were received against him alleging misconduct which resulted in Court of Enquiry. It is not necessary to quote those allegations of misconduct in detail because they are mentioned in the return filed by the respondents. The petitioner participated in the Court of Enquiry. A report was submitted to the competent authority by the Court of Enquiry and thereafter some action was taken against petitioner by which disciplinary ban was imposed on his promotion since 25th August 1986 and in view of that, the petitioner was

stagnated on the rank of Lt. Col. (substantive time-scale) till he retired. After gap of sufficient time after Court of Enquiry concluded, the petitioner was asked by the Higher Authorities whether he was opting for the Court-martial. The petitioner did not opt for that. Petitioner was thus never Court-martialed. The petitioner was not promoted in due course to higher ranks. He retired as Lt. Col. (substantive time-scale), on account of that ban on his promotion without his Court-martial.

It is the averment of the petitioner in the petition that he has been put to injustice by not promoting him when he was approved for promotion to the rank of Colonel. It is his grievance that ban on his promotion was imposed illegally and on account of that, his opportunities for promotion were unjustifiably sealed. He averred that thus, he. has been punished without due process of law. The petitioner averred that when he was approved to the rank of Colonel, he should have been posted as such when the vacancy was available but by the said alleged ban on promotion, his claim was unjustifiably throttled and he was not promoted at proper time which would have enabled him to contest for higher promotions like Colonel and Brigadier. He also contended that had he been promoted at right time, he would have been Brigadier in due course, because his record was more than satisfactory on account of which he was presented before the Selection Board and at one time he was considered for the rank of Brigadier also. It has been further contended that the petitioner would have been promoted even earlier which would have given him additional years of service and resultant benefits.

The petitioner further contended that the period of limitation indicated for the purpose of putting him to Court-martial had lapsed on account of default on the part of respondents and, therefore, the alleged complaints which were being used against him for blocking his claim for promotion stood meaningless. He further contended that as he was not put to Court-martial, the respondents did not have a right to put such alleged ban on his promotions. It appears to be his contention that the respondents were not in a position to prove those allegations against him, were unable to prove his misconduct and, therefore, they did not hold Court-martial against him which they could have done in view of provisions of Section 122 of Army Act, 1950 (hereinafter referred as the Act for convenience). Petitioner contended in this context that the Court-martial should have commenced from the date of commission of alleged offence as contemplated by Section 122 of the Act and as it did not commence at proper time, in the result, the period of limitation prescribed by the same provision was over and, therefore, respondents were and are barred from taking of any disciplinary action against him in that context on those complaints.

The petitioner further contended that the disciplinary ban, if at all, was to be imposed on his promotion, it should have been done by Government of India, respondent no. 1 and not by any authority below to it as the petitioner was approved for the rank of Colonel by Government of India.

Countering this, in the return the respondents denied that any injustice has been done to the petitioner. It has been contended by the respondents vide their return that the actions which have been taken against the petitioner for which petitioner is making a grievance in his petition have been taken according to provisions of the Act and the rules framed there under and due process of law has been followed in that context. It has been contended that all the acts amounting to misconduct have been committed by the petitioner during his posting in 16th Guards which was stationed at Jamnagar during the period between 1982 to 1984 and, therefore, the period of taking action against him commenced from 1984 and in view of that the actions which were taken against the petitioner were not barred by provisions of Section 122 of the Act. It has been contended by the respondents that after receiving those complaints 16th Guards left for a place in Nagaland and, therefore, respondents were having no alternative but to take legal action indicated by law which was available. It has been contended that by following due process of law, Court of Enquiry was constituted in which the petitioner participated and, thereafter, a report was submitted to the competent authority in that context and the competent authority took a proper decision in accordance with that and a ban was imposed on the petitioner's promotion and result was that petitioner was not promoted to the ranks he claims.

It has been contended by the respondents that petitioner received adverse ACR during the period between 1983-84 and 1985-86 and those adverse remarks were communicated to the petitioner and those adverse remarks have been considered while considering the claim of petitioner for promotion. It has been further contended by the respondents that petitioner deliberately allowed the time to run and took the advantage of that and is now contending that the respondents could not have taken any action against him denying him promotion.

It is the contention of respondents that various factors are to be considered while promoting an army officer to higher rank and seniority is not the only criteria, xt. Comparative merit has to be considered and in that context the ACR, shape of the officer and his over-all performance needs to be considered. It has been contended that after doing that the petitioner was not found fit for promotion to the rank he claims.

It has been further contended by the respondents that a show-cause notice was issued to the petitioner and thereby he was given the opportunity of putting his say and in fact he submitted his say answering to that show cause notice therefore, now he cannot make a grievance that he was not heard while dealing with his claim of promotion. It has been also contended by the respondents that the petitioner allowed the time to run and, thereafter, filed this petition and by obtaining interim orders in the matter of present petition put to respondents to such a situation that they were prevented from taking appropriate action against him which they could have taken in accordance with the provisions of Act and rules made there under and in view of that there was no alternative left with

respondents but to go for administrative action against the petitioner and for that purpose he was asked whether he was opting for Court-martial by waiving bar of limitation.

These are the things which needed to be mentioned because around these points mainly arguments were advanced by the learned counsel appearing for the parties. The other contentions raised by the parties find place in the pleadings.

During the course of arguments, learned counsel Shri Piyush Mathur placed reliance on following judgments (i) Union of India Vs. K.V. Jankiraman, etc. etc., ; (ii) Major Radha Krishan Vs. Union of India and Others, (iii) Lt. Col. (TS) H. C. Dhingra v. Union of India & anr- 1988 (II) Daily Law (DB) 109.

Shri B. G. Neema appearing for the respondents placed reliance on the judgments on the matter of (1) State of Mysore Vs. C.R. Sheshadri and Others, ; (2) Shri Parvez Qadir Vs. Union of India (UOI), and Lt. Colonel K.D. Gupta Vs. Union of India (UOI) and Others, .

Section 122 of the Act reads "(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 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 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.

In this context provisions of Section 37 will have to be considered. Section 37 deals with "Mutiny" which is not relevant to this case. Sub-section (2) of Section 122 is also not relevant because it deals with desertion or fraudulent enrolment, the aspect which is not touched by the facts and circumstances of the present case. Therefore, so far as the present matter is concerned, the only relevant point which would be inviting consideration would be the expiration of period of "three years from the date of such offence".

It has been argued by Shri Piyush Mathur, learned counsel for the petitioner that any action which respondents were empowered to take against the petitioner should have been taken against him in view of provisions of section 122 of the Act, may be by holding the "Court-martial". He argued that nothing prevented the respondents from taking such action within the period of limitation which has been provided by provisions of Section 122. It is his submission that though the Court of Enquiry was completed against the petitioner, the report which was dispatched to the higher authority was not provided to the petitioner which

resulted in prejudice to him. He argued that when the respondents failed to take the action which they could have taken in view of provisions of section 122 of the Act, by a deceitful way respondents asked the petitioner whether he was willing to waive the period of limitation indicated by provisions of Section 122 to which petitioner was not obliged to succumb. It is the argument of Shri Mathur that as respondents did not take appropriate action which they could have taken in view of provisions of the Act, they were barred from taking any action against the petitioner administratively in view of Rule 14 of Army Rules.

Shri Neema submitted that when show cause notice was served on the petitioner on or after 29.4.1987, the certified copies of order sheet and the proceedings of Court of Enquiry were supplied to the petitioner and, therefore, now it cannot lie in his mouth to make a grievance that in-justice has been done with him by not following the appropriate procedure by which it was the duty of respondents to act in view of provisions of the Act and the Rules. At this juncture it is pertinent to note that Shri Piyush Mathur by producing carbon copy of the request letter demonstrated that the petitioner had applied for the certified copies of the findings and proceedings of Court of Enquiry and the opinion on payment of necessary charges on 19.8.1986 but for the reasons best known to the respondents he was not supplied with those documents. He further submitted that by not supplying him such copies at proper time prejudice has been caused and it is the legal right of the petitioner to vent out the grievances at proper time. I do not find any substance in this grievance as the record shows.

Rule 14 of the Army Rules need to be reproduced as it is relevant for deciding this petition. Rule 14 provides that :-

(1) When it is proposed to terminate the service of an officer under 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.

In this context it is also necessary to quote Rule 180 which is relevant to the present matter. Rule 180 provides :-

Save in the case of a prisoner of war who is till absent, whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses

in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives notice of any fully understands his rights, under this rule.

It is connected with Rule 177 of Army Rules which speaks of Court of Enquiry. It provides :-

- (1) A Court of Enquiry is an assembly of officers or of officers and junior commissioned officers or warrant officers or non-commissioned officers directed to collect evidence, and, if so required, to report with regard to any matter which may be referred to them;
- (2) the Court may consist of any number of officers of any rank, or of one or more officers together with one or more junior commissioned officers or warrant officers or non-commissioned officers. The members of Court may belong to any branch or department of the service, according to the nature of the investigation;
- (3) a Court of Enquiry may be assembled by the officer in command of any body or troops, whether belonging to one or more corps.

Thus, reading rule 177 and 180 together, it was necessary for the respondents and concerned officers to constitute the Court of Enquiry for the purpose of assessing the strength of the complaints which were alleged to have been made against petitioner and for that purpose. As record of this matter shows, the Court of Enquiry was established and the petitioner was afforded opportunity of participating in it. In fact the record shows, that petitioner had participated in it. As depicted by the record, the Court of Enquiry was over and thereafter the findings and opinion of Court of Enquiry were forwarded to competent authority for the purpose of taking necessary action copies of opinion were also furnished to petitioner and it also appears from the record that in view of the said report some action was taken against the petitioner. It has been submitted on behalf of the respondents by Shri Neema that the ban which was imposed on promotion of the petitioner was in the light of that report. That seems to be so. Shri Piyush Mathur has attacked this action of respondent by submitting that there is no legal provision to allow the concerned authority of the respondents to impose such ban on the promotion of the petitioner and, therefore, the said ban was ab initio illegal.

Shri Neema in order to justify the said ban had submitted that when the respondents and competent authority decided to hold Court of Enquiry against the petitioner for ascertaining the veracity of said complaints made against the petitioner, it became necessary for the respondents to impose ban on the promotion of the petitioner. With the assistance of Lt. Col. Sachdeva, Shri Neema read out the letter of the department bearing no. A -56728-AG-PS-1 dated 17th March 1978. He submitted that the department followed the instructions embodied in the said letter and, therefore, the said ban was imposed when the department decided to establish the Court of Enquiry for the purpose of

ascertaining the veracity of the complaints made against petitioner. Shri Marhur submitted that said justification is not proper because the said ban imposed was earlier to that and earlier to that the petitioner was informed that he was approved for the promotion to the rank of Colonel. Shri Mathur further submitted that even the doctrine of "Sealed Cover" has not been followed by the department because in the present case the petitioner was informed that he has been approved by the Government of India for promotion to the post of Colonel and by virtue of that letter dated 12.4.1986 (Annexure P-1) the petitioner was only to wait for the availability of vacancy. He further submitted that such ban was totally illegal ab initio. The said letter firstly cannot take the place of rule or enactment by which the conduct of the petitioner, his discipline and promotions were controlled. "Sealed Cover" doctrine has not been also followed in this case. The petitioner was already informed that he has been approved for the promotion to the post of Col. by letter Annexure P-1. It seems that the authorities noticed possibility of embarrassment and, therefore, decided to act in their defence in the midst of Court of Inquiry.

The provision of Act and Rules had empowered the concerned authorities of respondents to take appropriate action against the petitioner if they had found that there was substance in the said complaints made against him. The authority could have resorted to power conferred on it in view of Rule 14 if it had found that it was necessary to do so. Disciplinary action could have been taken against the petitioner immediately after 16th Guards shifted from Jamnagar to some place in Nagaland. In that case the Court of Inquiry could have been constituted quite earlier and the proceedings of Court of Inquiry would have been over quite earlier and report consisting the opinion of Court of Inquiry could have been available to the competent authority earlier. In that case, the authority could have taken a decision earlier for that purpose of necessary and appropriate disciplinary action against the petitioner which would have been consistent with provisions of Act and Rules. In that case, the matter would not have lingered to such a long period which has been revealed by the record of the present matter.

In the above context Shri Neema submitted that the petitioner was himself playing delaying tactics and was responsible for such late action to be taken against him. The petitioner filed writ petition for the challenging constitution of the Court of Inquiry and made prayer for temporary relief by moving some interlocutory applications. Shri Neema made reference to order dated 2.4.1987 by which I. A. No. 1095/87 was considered and interim order was passed. The said order was confirmed by further order of this Court on 29.8.1988. The order dated 2.4.1987 shows that the respondents were directed to maintain status quo about the petitioner's rank as it was on that date. Notices were issued to the respondents of that order immediately on 15.4.1987. By order dated 29.8.1988 the Court observed that it was of the view that there was already an order for maintaining status quo made in favour of the petitioner passed on 2.4.1987. Therefore, there was no justification in granting any further ad-interim writ in that regard to the petitioner. The Court further observed that I. A. No. 2830/88

submitted by the petitioner was appearing to be misconceived. Said application was rejected by that order. It has been further ordered by the Court vide that order that it was clarified that rejection of petitioners application bearing I. A. No. 2830/88 was subject to the observations made therein by the Court. This argument has been carried forward by Shri Neema for justifying the belated show cause notice which was issued to petitioner seeking option from him whether he was willing to waive the running of the period of limitation in his favour so far as holding of Court-martial against him was concerned. It was taken further to justify as to why the Court-martial was not started against the petitioner earlier. Shri Mathur submitted, countering to that that none prevented the respondents for getting relief from the Court for the purpose of getting permission to hold Court-martial against the petitioner and take necessary disciplinary action against him as provided by provisions of the Act and Rules.

I do not find that the respondents or concerned authority of the respondents had been prevented by a cause which was beyond their control, for the purpose of taking steps to take disciplinary action against the petitioner provided by the provisions of the Act and Rules earlier than which has been surfaced in this matter. There is no substance in the argument which has been advanced on behalf of respondents for justifying the delay in taking action against the petitioner in context with Court of Enquiry, said ban on promotion and delay in holding Court-martial against the petitioner. The interim orders which have been passed by the Court in this petition as mentioned above, did not restrict the right of the respondents to proceed against petitioner in view of the provisions of the Act and Rules. If they were apprehending that by their acts in that context they were likely to invite contempt of Court action, nothing prevented them from appealing the Court for seeking appropriate directions in that context. There was nothing which could have made them to mis-interpret the orders of the Court and to mis-interpret the situation. For the delay the respondents have to blame themselves.

When the law confers a power on the employer to take appropriate disciplinary action against the employee, the employer has to act consistent with the legal provisions by interpreting the law and the situation properly. If such employer commits the folly, then he has to thank himself. In the present matter, when the complaints were received by the authority, and authority decided to constitute a court of inquiry for ascertaining the veracity and strength of those complaints, it could have expedited the proceedings as earlier as possible. In fact, the Court of Enquiry should have been started earlier than one, which has been indicated by the record, because the "date when, the offence is committed" is material. Court of Enquiry is for the purpose of enabling the authority to take a proper decision whether such person should be dealt with by putting him to Court-martial or should be dealt with in view of provisions of Rule 14. It is for the authority to consider whether in view of the situation, it is necessary to put such a person to Court-martial and to make the proceedings and things known to all the person, who can remain present in such Court-martial or to adopt secrecy. In appropriate

case the authority may think that it is not desirable in the interest of Army and Nation that such things should not be leaked out. In such cases, authority may resort to provisions of Rule 14 and take appropriate action within the time framed by the law. In this case also time limit is important and the person concerned has to be "heard".

The powers provided by Rule 14 are to be used in special cases. I may quote the examples for the purpose of illustrating as I gather the meaning of Rule 14. There may be cases in which the Court-martial proceedings may touch the army secrets, there may be cases which would be likely to expose to enemies, sundries the tactical devices invested for Army or used by Army. There may be cases which may be likely to expose to enemies, sundries the national policy secrets. In those cases the authority may think of taking appropriate action against such defaulting Army officers in view of provisions of Rule 14. There may be cases in which senior Army officer has been charged for committing such acts which may not be proper for the Army authorities to be discussed publicly for maintaining the decency and discipline in the Army. There may be some cases in which the Army authorities may find legitimately being embarrassed so far as secrecy of office system is concerned. But all that is to be for the purpose of benevolent goal and that is to be done within time limit provided and with opportunity of "being heard" to delinquent by speaking order / orders.

When a defaulting Army officer is to be taken to the task for his misconduct, prompt actions are to be taken, as it is the habit of army, and it is expected also of the army, which is a finely systematized and disciplined unit. Keeping in view that spirit, screening of imputations and allegations made against the army officer are to be screened by early date and thereafter the authorities are to take early and quick decision for deciding whether such person should be put to Court-martial or not. In that context, the Court of Enquiry has to be constituted by earliest moment and proceedings of Court of Enquiry have to be completed as early as possible. Thereafter the Court-martial has to be adopted as normal course for finding out the truth after detailed probe in the interest of trial. While doing so, the army authorities may follow "sealed cover" procedure for the purpose of protecting the right of such person in respect of promotion, if practicable and permitted by the rules. The advantages which are annexed to such system have to be adopted whenever permissible in army also, of course, by remaining within four corners of Army Act and Rules, Regulations which have the force of law.

It is pertinent to note that to get a promotion at appropriate time is the finest thing which an employee can aspire for. That keeps him alert, energetic and enthusiastic. Belated promotions put such person under stress and strain and deprive him of the pleasure of life. It is likely to cause dereliction in duty and sluggishness in performance. It increases the danger of making active, efficient officer sluggish and shirker. To get a thing at proper time has its own importance and to get a thing belatedly has its own sting. Human experience knows all these

things.

This takes me to another important aspect of the matter and that is so far as the said ban on promotion of petitioner is concerned. Shri Mathur has argued that on account of said ban, the petitioner could not get the promotion which he should have got at proper time when he was informed that he was approved to be a Colonel. Shri Neema has tried his best to justify the said ban by taking the help of the circular of the department mentioned above. But that circular cannot take the place of law and, therefore, by itself that cannot be a justification. Besides that, the said action of putting ban on promotion of the petitioner and preventing him from being promoted has no basis when the said ban was imposed on him, as the record shows when there was nothing with the authority to come to the conclusion that the petitioner was significantly guilty of the charges which were leveled against him. Had that been so, the respondents would have definitely expedited the Court of Enquiry and would have Court-martialed the petitioner at earliest moment because the Army does not allowed in disciplined persons to remain in service and it is also keen to wipe out indiscipline behaviour amongst its officers and Jawans. Therefore, I find that the said ban was void of any legal ground and, therefore, the respondents had committed error in putting that ban on the promotion of the petitioner prematurely when already he was informed that he was approved to be Colonel whenever vacancy was available as indicated by Annexure P-1.

Shri Neema argued that the petitioner was himself blamable for causing the delay in Court-martial against him and, therefore, he cannot be permitted to make the capital of that delay in putting him to Court-martial. He argued that petitioner by filing present writ petition put an obstruction to his Court-martial and wanted to take advantage of that for seeing that the limitation period gets over and he gets free without being put to Court-martial.

I do not find any substance in it, because the starting point of Court-martialing him is always the "date of offence". Whenever a person is put to disciplinary action, the employer is obliged to give him details of his alleged misdeeds or misconduct and in that event the employer is obliged to put the imputations clearly date-wise in detail by making the period when the alleged offence or misconduct has been committed. After Court-martial results in acquittal or verdict of guilty, the person who has been involved in it should know about it within time. In the present matter the respondents were not clear about the date of the alleged offence or misconduct on the part of the petitioner though such material could have been available to them because there were complaints according to them and those complaints must have been indicating some dates. Thus, after Court of Enquiry was over, the petitioner should have been put to Court-martial. Therefore, taking into consideration that, at best the petitioner could have been Court-martialed within reasonable time and in that case there would not have been delay as depicted by the present case. In the present case respondents permitted the time of limitation to run against them and thereafter

though it proper to take some action against the petitioner. The way which they followed was issuing show cause notice to petitioner asking him whether he was waiving the said advantage of loss of period of limitation which was a favorable point to him. The employer is not permitted to allure the employee to surrender the advantage which he gets by failure in diligence on the part of employer. Some employers may use such devices mischievously for taking the advantage against such employees who always happens to be weaker than the employer. Why a person who has to face trial or the disciplinary action or a court-martial like the case before this Court should surrender his advantage which he has gained by default on the part of the employer ? A prudent person would not do so. Rightly in the present case the petitioner did not surrender to such alluring show cause notice issued by the respondents. A prudent person may not succumb to such allurement. But there may be persons who may be allured by impression in the mind of gaining some advantage or good treatment. Such persons are likely to be victim of such alluring devices. In democracy such devices are to be deprecated, when the employer is mightier and employee is weak entity in the system. Unfortunately respondents have adopted such a way in the present case.

This Court does not condemn the respondents for it, because after all the Army is also a system which is not free from defects of bureaucracy in office business. The democracy functions through bureaucracy as its implementing fingers. The mischief of bureaucracy is that the persons constituting the various stages of bureaucratic system and chain are apt and alert in protecting their interest as natural instinct of bureaucracy. The Army cannot be free from that. May be somebody from the officer while processing the case might have thought that it is proper and wiser to issue said notice when it was noticed that the time period provided by Section 122 of the Act was over and they were falling in default of limitation period, so far as court-martialing the petitioner was concerned. Shri Neema by taking assistance of Lt. Col. Sachdeva who happens to be officer-in-charge of the case, submitted that the said action of issuing show cause notice was in the spirit of the judgment of Delhi High Court in the case of Maj. Harbhajan Singh v. Union of India (1982 A. I. S. L. J. 125) and a circular issued in that context. It has been submitted on behalf of the petitioner that even assuming that the said show cause notice was issued to the petitioner in view of the said circular and in view of the spirit of the judgment of Delhi High Court in Maj. Harbhajan Singh's case, that does not close the issue.

Shri Mathur has placed reliance on the judgment of the Supreme Court in the matter of Maj. Radhakrishna v. Union of India (supra) wherein the Supreme Court held that the word "impracticable" presupposes that the action is possible but owing to certain practical difficulties or other reasons it is incapable of being performed. The same principle will equally apply to satisfy the test of "inexpedient" as it means not expedient; disadvantageous in the circumstances, inadvisable, impolitic. The Supreme Court further held that so long as an officer can be legally tried by a court-martial the authorities concerned may, on the

ground that such a trial is not impracticable or inexpedient, invoke Rule 14 (2). In other words once the period of limitation of such a trial is over the authorities cannot take action under Rule 14 (2)." In the said judgment the Supreme Court has considered the case of Lt. Col (TS) H. C. Dhingra v. Union of India (1988 (2) Del. law 109) and has approved its ratio. In the case of Lt. Col (TS) Dhingra (supra) the case of Maj. Harbhajan Singh (supra) has been considered. The ratio of Lt. Col. Dhingra's case is that the period of limitation of trial indicated by Section 122 (1) of the Act is an absolute statutory bar. Its operation does not depend upon the volition, will or consent of any one. In the case of Lt. Col Dhingra show cause notice was issued to him and the period of limitation was over so far as court-martial was concerned. The show cause notice was issued to him in view of provisions of Section 19 read with Rule 14 and the said show cause notice was quashed.

In Lt. Col. Dhingra's case (supra) the case of Maj. Harbhajan Singh (supra) has been considered and that has been approved by the Supreme Court in recent judgment in Maj. Radhakrishna's case (supra). Therefore, the respondents cannot take the advantage of said circular which was the source of or the basis of issuing the said show cause notice to the petitioner.

The net result is that the respondents could not have saved themselves from the consequential effect of the loss of their power to court-martial the petitioner in view of provisions of Section 122. They could not have repaired the situation by issuing such notice to the petitioner and asking him to opt for being Court-martialed. Shri Neema argued that the said show cause notice was a fair act on the part of respondents to allow the petitioner to face court-martial and to get himself exonerated from those allegations embodied in those complaints. According to my view it was not so because at that time the period of limitation was over, the vested right in respondents to punish the petitioner for the alleged misconduct was lost and lost for ever. The result of that was that the respondents had been debarred from punishing the petitioner on said counts. When that was so, that act of issuing notice was exhibiting nothing but malice, at least impliedly. It maligned the entire further process causing disadvantage to the petitioner.

In context of that, the argument which has been advanced by respondents with regard to ACRs has to be considered. Shri Neema with the assistance of Lt. Col Sachdeva read out the ACRs pertaining to years 1983-84 and 1985-86. These ACRs were read in the interest of justice entirely for the purpose of assessing the cause from all angles. The majority portion of the said ACRs reveal that the performance of the petitioner was good and above level of satisfaction except that he was found blamable on two counts; (i) that the petitioner was having the tendency of living beyond his means; (ii) during the period of review he was under stress due to his personal problems and his contribution of RCL group has been average.

Shri Neema has also pointed out that while replying to representation made by

the petitioner it was endorsed on his representation that he was unable to provide a lecturer for instructing the juniors when one of the instructor was absent. Shri Mathur submitted that the officer who remarked adversely as mentioned above was the officer who recommended the petitioner for promotion to the rank of Brigadier. He further submitted that those remarks were not communicated to the petitioner and, therefore, his valuable right to challenge those remarks by representation was robbed out. So far as the adverse remarks against the petitioner are concerned, he should have been asked as to how he was managing two ends of his expenditure and income. An explanation should have been sought from him. A person can live a lavish life by remaining within means. That depends on his ability to manage properly his resources towards his needs. A person having less dependency may afford himself to live lavishly. That does not by itself mean that he was having corrupt behavior unless it is so proved. The second remark is showing that the petitioner was under stress and strain on account of these domestic problems and, therefore, his contribution to his group was not as desired. When a person who was facing such a fate and was required to file a writ petition, he was bound to be under stress of such unpleasant atmosphere. A person who was required to fight out for his promotion was bound to be under stress. Besides that, there may be legitimate domestic difficulties being faced by the petitioner at the relevant time as he happens to be a human being and a married person. The remarks should have pointed out as to what was the extent of loss of his service to his group should have been also informative whether it was causing any loss to the total performance of his group. Other remark was in respect of failure of the petitioner to provide instruction to the trainees. The respondents should have asked him the explanation enabling him to show cause. It could have been the case that abruptly the instructor who was to teach might have been remained absent without notice to the petitioner. This, that remark was not sufficient to harm the petitioner in promotion.

As it has been held by the Supreme Court in Maj. Radhakrishna's case (supra), the act of respondents to resort to provisions of Rule 14 and to take action against the petitioner in that context was not falling in category of "impracticable, inadvisable, impolitic and inexpedient". As pointed out by me in my discussion in above paragraphs, the respondents could not have and cannot punish the petitioner for the said allegations of misconduct. Therefore, the petitioner should have been given the promotion and benefits as indicated by Annexure P-1.

Shri Mathur has argued that the petitioner would have secured the promotion to the rank of Brigadier and the respondents have deprived him of that promotion. I do not accept this, because this pertains to domain of uncertainty and as argued by Shri Neema, pertains to his future performance. True, that on account of the delay which has been caused by respondents in putting the petitioner to disciplinary action, the petitioner might have lost his shape, which he was having to the extent of shape-1, at the time of retirement. It is to be noted that had

there been no delay in putting the petitioner to disciplinary action, the petitioner would have appeared before the Selection Board for the purpose of passing out through such examination and he would have retained his shape-1. This aspect cannot be ignored by the respondents. By such delay the petitioner has been put to a disadvantage in his service and career which also cannot be ignored by the respondents.

Thus, on account of non-action on the part of respondents in exercising the powers conferred on them by provisions of Section 122, the petitioner stands exonerated from those allegations which amounted to misconduct as per view of respondents. Therefore, he deserved what he would have normally got as indicated by Annexure P-1.

Now the question arises as to what should be the relief which should be granted to the petitioner in this petition. Shri Neema placed reliance on the judgment of Supreme Court in the matter of *State of Mysore v. C. R. Seshadri & ors.* (supra) and submitted that as held by Supreme Court "power to promote an officer belongs to the Executive and the judicial power may control or review Government action but cannot extend to acting as if it were the Executive." The Supreme Court held that the Court may issue directions but leave it to Executive to carry it out. The judiciary cannot promote or demote officials but may demolish a bad order of Government or order reconsideration on correct principles. If the rule of promotion is one of sheer seniority, it may well be that promotion is a matter of course. On the other hand if seniority-cum-merit is the rule, promotion is problematical. In the absence of positive proof of the relevant service rules, it is hazardous to assume that by efflux of time of petitioner would have spiraled up to Deputy Secretary ship. "The part dealing with this aspect of the order of Mysore High Court was thus, set aside by Supreme Court. Relying on this judgment of Supreme Court Shri Neema argued that the remaining exercise so far as claim of the petitioner for promotion is concerned, should be left to the respondents and they would do the proper thing in view of the Act and the rules and regulations made under it. Repelling it, Shri Mathur argued that the petitioner is not sure that he would be getting his proper rights at the hands of respondents because he was put to such a hardship that he was required to retire without the due promotion one year before. He submitted that had the petitioner been granted promotion at proper time, his span of service would have been extended and that would have enabled him to show good performance for securing better promotions. Shri Mathur further submitted that the writ petition is not for the purpose of getting the relief of promotion but it is for the purpose of enforcing the respondents to grant him the promotion which was communicated to him vide Annexure P-1. He pointed out that Annexure P-1 shows that petitioner was already approved for promotion to the rank of Col. and that would have been given to him on availability of the vacancy, but it was obstructed on account of such illegal ban on his promotion. He further pointed out that on account of that, the juniors to the petitioner were promoted and they get all the pleasure of promotional benefits including the rank and monetary

benefits. Shri Mathur further argued that the petitioner could have been promoted in due course prior to the said ban which was illegal. He further submitted that, therefore, the petitioner is not sure to get due relief at the hands of the respondents and, therefore, this Court should issue proper instructions for granting him true relief.

Shri Mathur further submitted that the case of C. R. Seshadri (supra) was a case of revenue officer and he was in service but the present petitioner is out of service as he has retired during the pendency of this petition. He further submitted that the ratio of judgment in C. R. Seshadri's case would not be applicable to present case because the system which had been indicated in C. R. Seshadri's case is not known to the Executive of the respondent's department in which the petitioner was serving.

When the employer is conferred with power of taking disciplinary action against the defaulting employee and to punish him but loses on account of inactiveness, it is very difficult to expect fair play from such employer. That may be the fear which may be lingering in the mind of the petitioner. That cannot be said to be unreasonable keeping in view the facts of the present matter. Vide Annexure P-1 petitioner was informed that by following proper procedure to which respondents "department was acquainted with, petitioner was approved to the promotion to the rank of Colonel. If the things would have gone smoothly, without any hindrance and without the said ban on the promotion, the petitioner would have got promotion to the rank of Col. as indicated by Annexure. P-1 quite earlier. But on account of said ban, he was not promoted at proper time and by that, he was put to disadvantageous position. Thereafter the respondents did not hold court-martial at appropriate time against him and allowed to lose the right which was conferred on them by provisions of Section 122. The show cause notice which was issued to the petitioner was quite belated and coupled with malice. The respondents did not seek proper relief from the Court when this petition was pending for the purpose of informing themselves whether they were entitled to court-martial the petitioner. Keeping in view all these things, this Court finds it necessary to think in a different way than which has been indicated by the Supreme Court in C. R. Seshadri's case, in the interest of justice.

As time passes society progresses and law changes. The codified law changes, the law of precedent also changes. The law should always be sufficient to meet the demand of time and sufficient to grant relief to those who need it. If all the exercise is left to the respondents then the petitioner may be again required to wait for a longer period and then perhaps approach this Court after some years. For how long he should wait ? The petitioner filed this petition in the year 1987 and it is being heard and decided in the year 1997. During that period the petitioner has also retired. Now what he can get is the solace to him by getting promotion as it was due to him as indicated by Annexure P-1, at least. He would be also getting monetary benefits in view of Annexure P-1. Something in between has been lost by him and that has been on account of inactiveness of

respondents.

The judgment in C. R. Seshadri's case (supra) pertains to year 1974. Twenty three years have elapsed. The time has changed. The Courts have to apply the law of precedent in view of change in time in context with facts of the case which it has to decide. In view of the facts of this case all exercise cannot be left to executives of the department of respondents.

The result would be that the ban on promotion of the petitioner stands declared null and void and stands retrospectively declared as no impediment in petitioner's promotion which he would have got on his performance as indicated by Annexure P-1. Those ACRs, complaints and endorsement as mentioned above, would not be subject-matter of consideration in this context. The petitioner deserves to be given the rank as he should have been given in view of Annexure P-1. For that, he should be treated as Lt. Col, (substantive) by selection to which he was entitled to. The petitioner be also treated retired as Colonel. The necessary exercise which is to be done for the purpose of taking action in view of Annexure P-1 to be done by the respondents and it's concerned officers by following their legal procedure. In view of peculiar facts of this case and losing of the right of court-martial of the petitioner by respondents, some observations have been made and relief has been granted to the petitioner in context with this case only. This case should not be treated to be a precedent for deciding all cases in which the persons are praying for promotion because this Court would like to maintain the discipline and the smooth working of the respondent's department in the interest of Nation.

Before parting with this matter I find it proper to record note of appreciation for markedly able assistance rendered by Mr. Piyush Mathur, Mrs. Vinita Phaye and Mr. C. P. Singh appearing for petitioner and Shri B. G. Neema appearing for respondents ably assisted by Army officers Col. Yashodharan, Col. I. S. Rana, Lt. Col. Sachdeva and Major Chouhan. It is necessary to mention that concerned authorities of respondents department produced huge record available at the time of hearing.

Thus, in the result the petition is allowed and the petitioner is granted the relief as indicated above. The costs of this petition to be shouldered by the respondents. The petitioner is entitled to get the arrears of monetary benefits along with interest at the rate of 6% per annum. The petitioner has engaged number of counsel during the pendency of this petition and keeping in view that, Advocate fee would Rs. 5000/-.