

(2007) 10 GAU CK 0035

In the Gauhati High Court

Case No : Writ Appeal No's. 136 and 137 of 2001

Union of India (UOI) and Others

APPELLANT

Vs

V. Shankaran and Another

RESPONDENT

Date of Decision : 12-10-2007

Acts Referred:

Army Act, 1950 — Section 19, 71
Army Rules, 1954 — Rule 14, 14(2)
Border Security Force Act, 1968 — Section 107, 11, 11(2), 11(3), 113
Border Security Force Rules, 1969 — Rule 150, 151, 153, 159, 160
Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 15(2)

Citation : (2008) 4 GLT 885

Hon'ble Judges : U.B. Saha, J;B.P. Katakey, J

Bench : Division Bench

Advocate : P.K. Biswas, for the Appellant; S. Bhattachatjee, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—By this common judgment and order, both the appeals are being disposed of as agreed to by the learned Counsels for both the parties, as they pose a common question of law.

2. Both the appeals are directed against the judgments and orders dated 03.09.2001 passed by the learned Single Judge in WP (C) No. 223/2001 and WP (C) No. 224/2001 allowing the writ petitions filed by the Petitioners by setting aside the orders of dismissal from service dated 10.04.2001 passed by the Deputy Inspector General (DIG), Border Security Force (BSF), TRA (South).

3. The facts which have given rise to the present appeals are as under:

The writ Petitioners in WP(C) No. 223/01 and WP(C) No. 224/01 while serving as Constables under 130 Bn BSF were tried by the Summary Security Force Court (in short, SSFC) on the charge u/s 31(b) of the Bonier Security Force Act, 1968 (in short, the Act), alleging extortion of a sum of Rs. 50,000/- by them from a civilian, namely Billal Hussain, while they were on OP duty at Kali Mandir on

19.1.98 at about 1800 hours, without proper authority. The said SSFC, after holding the trial vide order dated 30.10.99 recording "not guilty", acquitted them from the normal charge and also released them from open arrest. The proceeding of the SSFC was thereafter forwarded to the concerned DIG, BSF, who vide order dated 18.4.2000, refused to counter sign the proceedings of the SSFC. Thereafter the DIG, BSF on 26.7.2000, issued notices under Rule 22 of the Rules asking the writ Petitioners to show cause as to why they should not be dismissed from service for the misconduct committed by them, as reflected in the said show cause notices, upon recording the satisfaction that it is impracticable to hold a retrial by a SSFC as there is no provision either under the Act or under the Border Security Force Rules, 1969 (in short, the Rules) to remand the finding of the SSFC for revision, even though the record of evidence prepared against them reflects sufficient materials of forcibly snatching a sum of Rs. 50,000/- from a civilian, namely Billal Hussain and forming an opinion that their further retention in service is undesirable. The writ Petitioners on receipt of the said show cause notices, submitted their replies denying the allegations levelled against them and further contending that once they were tried by the SSFC under the Act, no action thereafter can be taken by the authority by invoking the provisions of Rule 22 of the Rules, as, after such trial by SSFC, it cannot be said that the trial of such persons is inexpedient or impracticable, which is the condition precedent for exercising the powers under Rule 22(2) of the Rules. Both the writ Petitioners have also filed additional replies to the show cause notices apart from the earlier ones. The DIG, BSF upon consideration of the show cause replies filed by the writ Petitioners vide order dated 10.04.2001 dismissed them from service without pension, with immediate effect, in exercise of the power conferred by Rule 22 of the Rules for the misconduct committed by them.

4. The writ Petitioners have challenged the said orders of dismissal from service dated 10.04.2001 by filing the aforesaid writ petitions, on the same ground as taken in the show cause replies. The learned Single Judge by the separate judgments and orders both dated 03.09.01 allowed the writ petitions by setting aside the orders of dismissal from service dated 10.04.2001 passed by the DIG, BSF, holding that the DIG, BSF has no power under the Act or under the Rules to exercise the powers of review or revision of the order of "not guilty" recorded by the SSFC and there being no provision akin to Rule 15(2) of the CCS (Control, Classification and Appeal) Rules, 1965, the order passed by him, dehors of any provision available in the Act and the Rules and hence cannot be sustained in law. The learned Single Judge however, in allowing the writ petitions and in setting aside the orders of dismissal dated 10.04.2001 did not consider the provisions of Section 11 of the Act as well as of Rule 22 of the Rules and the question as to whether once the writ Petitioners having been tried by a SSFC where the finding of "not guilty" of the charges levelled against them was recorded, could be proceeded against by the competent authority under Rule 22 of the Rules and dismissed them from service.

5. We have heard Mr. P.K. Biswas, learned Asstt. SGI appearing on behalf of the Appellants as well as Mr. S. Bhattachaijee, learned Counsel appearing on behalf of both the Respondents.

6. Referring to various provisions of the Act and the Rules, Mr. Biswas has submitted that the power of punishment by the SSFC for the offences committed under the Act and power of the competent authority to terminate or dismiss the officer or the enrolled person under the Act and the Rules are different and distinct and can be exercised at any time of the proceeding pending before SSFC, hence an enrolled person can be terminated or dismissed from service in exercise of the power conferred by Section 11 of the Act read with Rule 22 of the Rules even where such person is convicted or acquitted of the charges by the SSFC. It has been contended that under the Act and the Rules, applicable for SSFC, there is no provision for remitting the matter to the SSFC by the competent authority for a fresh trial and therefore the trial being impracticable, power under Rule 22 of the Rules, in any case, can be invoked by the competent authority, provided it forms an opinion that further retention of such person in service is undesirable for the misconduct committed by him. Referring to Rule 22 of the Rules, it has been submitted that in the instant cases, as there is no provision for remitting the matter to the SSFC for retrial by the DIG under the Rules and hence, it is impracticable for holding the trial, even though there are sufficient materials on record and the DIG having formed the opinion that the further retention of the writ Petitioners in service is undesirable, because of the misconduct committed by them, the show cause notices were issued and thereafter the orders of dismissal from service were passed in full compliance of the provisions of the Act and the Rules framed thereunder. It has further been submitted that the learned Single Judge while allowing the writ petitions by setting aside the orders of dismissal from service did not take into consideration the power conferred on the DIG to terminate or dismiss or remove the writ Petitioners from service, by Section 11 of the Act read with Rule 22 of the Rules. In support of his contention, Mr. Biswas has placed reliance on the decisions of the Apex Court in Chief of Army Staff and Others Vs. Major Dharam Pal Kukrety, and in Gouranga Chakraborty Vs. State of Tripura and Another,

7. Mr. S. Bhattachaijee, learned Counsel for the Respondent, per contra, supporting the judgments and orders passed by the learned Single Judge has submitted that if an enrolled person commits any misconduct, two options are open to the competent authority to proceed against him; one being to try by the Security Force Court (SFC) and the other to proceed under Rule 22 of the Rules. Referring to the orders of the SSFC, Mr. Bhattachaijee has submitted that the writ Petitioners Respondents having found to be "not guilty" and as such, acquitted of the charges levelled against them and released from open arrest and there being no provision either to approve or to confirm or to countersign the proceedings of SSFC, before giving effect to such order, the orders of the SSFC attain finality as soon as they are pronounced under Rule 150, therefore, the competent authority cannot invoke the power u/s 11 of the Act read with Rule 22

of the Rules and dismiss the writ Petitioners-Respondents from service. It has been contended that the provisions of Rule 160 as well as Rule 161 of the Rules are also not applicable in the instant cases as the proceedings of SSFC, where sentence is imposed, are only required to be sent to the DIG immediately on promulgation and such promulgation under Rule 159 is required when a sentence is passed by SSFC. In the instant cases, the writ Petitioners-Respondents having been acquitted of the charges levelled against them by recording the finding "not guilty", there is no question of promulgation of sentence and hence, there is also no question of setting aside the proceedings of the Court or reduction of sentence or to commute the punishment and also to countersign the proceedings under Rule 161 of the Rules.

8. Referring to the provisions of Chapter-VII of the Rules, it has been submitted that prior to constitution of the SFC for trial of the charge framed, there has to be an investigation and if it is found that the person concerned is required to be tried by SFC, an application for constitution of the SFC is required to be made by the Commandant under Rule 52 of the Rules and the DIG, therefore, while considering whether the retention of a person subject to the Act, in service is desirable or not, can only take into consideration such report of the investigation and not the evidence recorded during the trial before the SFC as has been done in the instant cases, as the competent authority at that stage only i.e. before constitution and commencement of trial by the SFC, has to decide which course of action it will adopt, whether trial by SFC or action under Rule 22 of the Rules. Referring to the decision of the Apex Court in *Union of India and Others Vs. Harjeet Singh Sandhu etc.*, Mr. Bhattachajee has submitted that once the SSFC acquitted the writ Petitioners-Respondents of the charges by recording the finding "not guilty", the authority cannot proceed against and dismiss them from service by invoking the powers conferred by Section 11 of the Act read with Rule 22 of the Rules as, such a course would be violative of the principle of double jeopardy and would also be subversive of the efficiency of the Court Martial Proceedings. It has been submitted that as in the Act and in the Rules there is no provision akin to provision of Rule 15(2) of the CCS (CCA) Rules, 1965, the authority cannot proceed against the writ Petitioners-Respondents under Rule 22 and dismiss them from service on the same facts on which they were acquitted of the charges, levelled against them, by SSFC.

9. We have considered the submissions of the learned Counsel for both the parties and also perused the pleadings as well as the judgments and orders passed by the learned Single Judge.

10. As observed above, the learned Single Judge, while allowing the writ petitions by setting aside the orders of dismissal from service, did not deal with the power of the DIG to dismiss or remove an enrolled person from service conferred by Section 11(2) of the Act read with Rule 22 of the Rules, vis-avis the exercisibility of such power after such person is acquitted by the SFC, by recording the finding "not guilty", though the orders of dismissal were passed in

exercise of power conferred by Rule 22 of the Rules. Since it is an intra-Court appeal, instead of remitting the case to the learned Single Judge for giving a fresh decision, we have decided to hear both the parties in that regard and accordingly the learned Counsel for the parties were heard.

11. The question as to whether the DIG is competent to issue the notices under Rule 22 of the Rules and dismiss the writ Petitioners-Respondents from service, after they were acquitted from the charges levelled against them by recording the finding "not guilty" by the SSFC depends on the relevant provisions of the Act and the Rules.

12. Section 11 of the Act confers power on the Director General or any Inspector General to dismiss or remove from the service or reduce to a lower grade or rank or the ranks, any person subject to the Act other than an officer, Sub-section (2) of Section 11 empowers the DIG or any prescribed officer to dismiss or remove from service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed. Sub-section (3) of Section 11 empowers an officer not below the rank of DIG or any prescribed officer mentioned in Sub-section (2) to reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer. For better appreciation, Section 11 of the Act is quoted below:

11. Dismissal, removal or reduction by the Director-General and by other officers-

(1) The Director-General or any Inspector-General may dismiss or remove from the service or reduce to a lower grade or rank or the ranks any person subject to this Act other than an officer.

(2) An officer not below the rank of Deputy Inspector-General or any prescribed officer may dismiss or remove from the service any person under his command other than an officer or a subordinate officer of such rank or ranks as may be prescribed.

(3) Any such officer as is mentioned in Sub-section (2) may reduce to a lower grade or rank or the ranks any person under his command except an officer or a subordinate officer.

(4) The exercise of any power under this section shall be subject to the provisions of this Act and rules.

13. Section 64 of the Act provides that there shall be three kinds of SFCs, namely General Security Force Courts; Petty Security Force Courts; and Summary Security Force Courts. Section 74(1) provides that subject to the provisions of Sub-section (2), SSFC may try any offence punishable under this Act. The offences punishable under the Act are stipulated in Section 14 to Section 46 of Chapter-III. Section 75(1) imposes bar for conducting a trial against a person subject to the Act by an SFC or a criminal Court when such person has been acquitted or convicted of an offence or has been dealt with u/s 53 or Section 55 of the Act. Sub-section (2) of Section 75 provides that when

any person subject to the Act has been acquitted or convicted of an offence by an SFC or has been dealt with under Sections 53 or 55, he shall not be liable to be tried against by a criminal Court for the same offence or on the same facts. Section 80 empowers the authority to choose between the criminal Court and security force Court for trial of a person in respect of an offence under the Act when a criminal Court and an SFC have each jurisdiction in respect of the said offence. Section 107 of the Act provides that no finding or sentence of General Security Force Court or a Petty Security Force Court shall be valid except so far as it may be confirmed as provided by the Act. Section 113 stipulates that any finding or sentence of an SFC which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the confirming authority, may take additional evidence. Sub-section (1) of Section 114 provides that save as otherwise provided in Sub-section (2) the finding and sentence of a SSFC shall not require to be confirmed, but may be carried out forthwith, however, Sub-section (2) requires that where the trial in SSFC was held by an officer of the rank of Superintendent of Police or of a rank declared under Clause (a) of Sub-section (5) of Section 74 as equivalent thereto or of a lower rank has held such rank for less than five years, he shall not, except on active duty, carry into effect any sentence, until it has received the approval of an officer not below the rank of Deputy Inspector General. Section 115 also requires transmission of the proceedings of every SSFC to the officer not below the rank of DIG within whose command the trial was held, or to the prescribed officer, and such officer, or the DIG or any officer empowered by him in this behalf may, for reasons based on the merits of the case, but not on merely technical grounds, set aside the proceedings, or reduce the sentence to any other sentence which the Court might have passed. Section 118 confers power on the Central Government, the DIG or any prescribed officer to annul the proceedings of any SFC on the ground that they are illegal or unjust. Section 141 empowers the Central Government to frame rules for the purpose of carrying into effect the provisions of the Act.

14. The requirement of approving the proceedings of the SSFC u/s 114 of the Act is not applicable in the instant cases as Sub-section (2) of Section 114 clearly stipulates the circumstances under which the effect of any sentence cannot be carried out until it has received the approval of an officer not below the rank of DIG, as no sentence has been awarded by the SSFC and on the other hand, the finding of "not guilty" was recorded. Sub-section (1) of Section 114 clearly provides that except in the circumstances stipulated in Sub-section (2), finding and sentence of a SSFC shall not require to be confirmed and has to be carried out forthwith.

15. It is evident from Section 115 of the Act that though the proceedings of the SSFC are required to be forwarded to the officer not below the rank of DIG within whose command the trial was held or to other officers as stipulated in the said provision, such officer has no power to send the proceeding back to the SSFC for retrial, though it can set aside the proceedings or reduce the sentence to any

other sentence which the Court might have passed.

16. Rule 22(1) of the Rules, which is relevant for the purpose of the present appeals deals with the power of the authority, procedure to be adopted by the competent authority in dismissing or removing a person subject to the Act, other than an officer, on account of misconduct, subject to the conditions laid down in Sub-rule (2). For better appreciation, Rule 22 of the Rules is quoted below:

22. Dismissal or removal or persons other than officer on account of misconduct-

(1) When it is proposed to terminate the service of a person subject to the Act other than an officer, he shall be given an opportunity by the authority competent to dismiss or remove him, 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 a Security Force Court; or.

(b) Where the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

(2) When after considering the reports on the misconduct of the person concerned, the competent authority is satisfied that the trial of such a person is inexpedient or impracticable, but, is of the opinion that his further retention in the service is undesirable, it shall so inform him together with all reports adverse to him and he shall be called upon to submit, in writing, his explanation and defence.

Provided that the competent authority may withhold from disclosure any such report or portion thereof, if, in his opinion, its disclosure is not in the public interest.

(3) The competent authority after considering his explanation and defence if any may dismiss or remove him from service with or without pension;

Provided that a Deputy Inspector-General shall not dismiss or remove from service, a Subordinate Officer of and above the rank of a Subedar.

(4) All cases of dismissal or removal under this rule, shall be reported to be Director-General.

17. Chapter-VII of the Rules deals with the investigation and summary disposal of the charge. Rule 43 provides that where it is alleged that a person subject to the Act other than an officer or a subordinate officer committed an offence punishable thereunder, the allegations shall be reduced to writing in the form set out in Appendix-IV. Sub-rule (1) of Rule 45 of the Rules provides that the charge shall be heard by the Commandant of the accused and the charge as well as the statement of witnesses, if recorded, shall be read over to the accused. It also

requires the Commandant that if written statements of witnesses are not available, he shall here as many witnesses as he may consider essential to enable him to determine the issue and also to give an opportunity to the accused to cross-examine the witnesses and to make statement in his defence. Sub-rule (2) of Rule 45 empower the Commandant, after hearing the charge under Sub-rule (1), either to (i) award any punishment, which he is empowered to award, or (ii) dismiss the charge, or (iii) remand the accused for preparing a record of evidence or for preparation of an abstract of evidence against him, or (iv) remand him for trial by a SSFC. The Commandant, however, in case of awarding more than 7 days imprisonment or detention, is required to record the substance of evidence and the defence of the accused. The Commandant is also required to dismiss the charge subject to the conditions laid down in the second proviso to Sub-rule (2) and is to take a record of evidence in case of all offences punishable with death. Rule 22 of the said Rules provides that an application for a Court shall be made by the Commandant in the form set out in Appendix-V to the Rules and shall be accompanied by five copies of the record or abstract of evidence and charge sheet and such other documents as are mentioned in that application form.

18. It is therefore, evident from the different provisions contained in Chapter-VII that those relates to the summary disposal of the charges by the Commandant who can remand the person concerned for trial by SSFC and in that case only, application as required by Rule 52 is to be made for constitution of the SSFC.

19. Chapter-XI of the Rules lays down the procedure to be adopted by SSFC in conducting trial. Rule 149 of the Rules requires the SSFC to record finding on every charge upon which the accused is arraigned, simply of "Guilty" or of "Not Guilty", except as mentioned in the Rules. Rule 150 requires the SSFC to affix its signature and date on the proceedings and pronounce the findings when it is "not guilty", in open Court and to release the accused if he is under arrest. Rule 151 to 153 relates to the procedure to be adopted by SSFC when finding in any charge is "guilty". Rule 159 of the Rules provides that the sentence of a SSFC shall be promulgated, in the manner usual in the service, at the earliest opportunity after it has been pronounced and shall, subject to the provisions of the Act be carried out without delay after promulgation. Rule 160 of the Rules requires that the proceedings of a SSFC shall, immediately on promulgation be forwarded through the Chief Law Officer, or a Law Officer to the DIG under whom the accused may have been serving. Rule 161 empowers the DIG, to whom the proceedings of a SSFC have been forwarded under Rule 160, if he is satisfied that injustice has been done to the accused by reason of any grave irregularity in the proceedings or otherwise, to set aside the proceedings of the Court; or to reduce the sentence or commute the punishment awarded to one lower in the scale of punishment given in Section 48 and return it to the unit of the accused for promulgation. In the event no action under Sub-rule (1) has been taken, the DIG is required to countersign the proceedings; and the proceedings shall, after its promulgation under Sub-rule (1) or countersignature under Sub-rule (2) is to

be forwarded to the Chief Law Officer for custody.

20. Rule 150 requires the accused to be released immediately when the SSFC recorded the finding of "not guilty" against the charge levelled and also requires to announce such finding in open Court. Chapter-XII which lays down the procedure to be adopted by SSFC does not contain any provision for confirmation of the proceedings of the SSFC by any authority, when the finding of "not guilty" is recorded. The requirement of promulgation under Rule 159 is applicable only when the sentence is imposed by SSFC and therefore, the power of review of the proceeding under Rule 160 would be applicable in case of imposing sentence by a SSFC as it requires forwarding of the proceedings by SSFC on promulgation. Similarly, the power conferred upon the DIG under Rule 161 can be invoked only in respect of such proceedings which are required to be forwarded under Rule 160 i.e. when a sentence is imposed by the SSFC, which is required to be promulgated under Rule 159 and not otherwise. Hence, there is no requirement under the Act and the Rules to countersign the proceedings of SSFC when the finding of "not guilty" is recorded, as is the case in the present proceedings.

21. Having held that the proceedings of the SSFC, in case of recording the finding of "not guilty", are neither required to be approved nor confirmed or countersigned, under the provisions of the Act and the Rules and also the authority has no power to remit the matter for fresh trial by SSFC, the question which requires consideration is whether in the event of there being materials available on record to hold that it is not desirable to keep the person in service because of the misconduct committed by him, who has been found "not guilty" by the SSFC, he can be dismissed from service by invoking the power conferred by Section 11 of the Act read with Rule 22 of the Rules.

22. As discussed above Section 11 of the Act empowers the authorities mentioned therein to dismiss or remove any person subject to the Act from service or to reduce to a lower grade or rank. Rule 22 of the Rules empowers the competent authority to terminate the services of a person subject to the Act, other than an officer, after giving an opportunity to show cause in writing and informing him together with all reports adverse to him, provided the competent authority after considering the reports on the misconduct of the person concerned is satisfied that trial of such person is inexpedient or impracticable and is of the opinion that his further retention in service is undesirable. The competent authority, however, may withhold from disclosure any such report or portion of it, if, in his opinion, the disclosure is not in public interest. Sub-rule (1) of Rule 22 of the Rules provides that the requirement of giving an opportunity and following of the manner prescribed in Sub-rule (2), is not applicable where (a) the service is terminated on the ground of conduct which has led to his conviction by a criminal Court or by an SFC; or (b) the competent authority is satisfied that, for reasons to be recorded in writing, it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause.

23. In the instant cases, we are not concerned with a situation where person concerned has been convicted by any criminal Court or SFC or the competent authority is satisfied that it is not expedient or reasonably practicable to give the person concerned an opportunity of showing cause, as the writ Petitioners were acquitted by the SSFC and show cause notices were issued under Rule 22 to the writ Petitioners by the DIG recording his opinion that their further retention in service is undesirable because of the misconduct committed by them as narrated in such notices and also recording his satisfaction that trial of such person is impracticable because the said authority has no power to remit the proceedings of SSFC for retrial, even though there are materials available on record constituting misconduct.

24. The term "impracticable" has not been defined in the Act or the Rules. Impracticability is a concept different from that of impossibility, while impossibility is absolute, the impracticability introduces at all events some degree of reasons and involves some regard for practice (Stroud's Judicial Dictionary, Fourth Edition). The word "practicable", according to Black's Law Dictionary, means, which may be done, practiced or accomplished, which is performable, feasible, possible. So, "impracticable" means which is not feasible or performable.

25. "Misconduct" is also not defined in the Act or in the Rules. According to Black's Law Dictionary (7th Edition), "misconduct" means dereliction of duty, unlawful or improper behaviour, intentional wrong behaviour. "Official misconduct" defines in Black's Law Dictionary (7th Edition) as a public officer's corrupt violation of assigned duties by malfeasance; misfeasance; or nonfeasance, which is also termed as misconduct in office; misbehaviour in office; malconduct in office; misdemeanour in office; corruption in office and official corruption.

26. In the context in which the term "misconduct" has been used in Rule 22 of the Rules, as observed by the Apex Court in Harjeet Singh Sandhu (supra), it is to be given a wider meaning and any wrongful act or any act of delinquency which may or may not involve moral turpitude, would be misconduct and certainly so, if it is subversive of Army Act, discipline of high tradition of Army and /or renders a person unworthy of being retained in service. The act committed by the writ Petitioners which is punishable u/s 31 (b) of the Act would, therefore, definitely amount to misconduct.

27. The Apex Court in the aforesaid case, while dealing with the provisions of Section 19 of the Army Act and Rule 14 of the Army Rules, has also observed that if the initial decision was to have delinquent officer tried by a criminal Court, when offence is triable by a criminal Court or by Court Martial, and if the criminal Court acquit him, no independent disciplinary action can be taken against such officer on the same facts which constituted misconduct amounting to an offence for which he was charged before the criminal Court, but if the initial decision was to have the delinquent officer tried by a Court Martial, then under Rule 14(2) of

the Army Rules it is for the authority prescribed, to arrive at a satisfaction whether trial of an officer by the Court Martial, is inexpedient or impracticable and then Court Martial may not be convened and additionally, subject to formation of the opinion as to undesirability of the officer for further retention in the service, the power u/s 19 of the Army Act read with Rule 14 of the Army Rules may be exercised. It has further been observed that such a decision may be taken either before convening Court Martial or even after it has convened and commenced, subject to satisfaction as to the trial by a Court Martial becoming inexpedient or impracticable at which stage the authority may revert back to Section 19 read with Rule 14 and such decision, it is not that, can be taken only once and that too at the initial stage only and once taken cannot be changed in spite of a change in the fact situation and prevailing circumstances.

28. The Apex Court however, in the said case has also observed that if the finding and sentence of Court Martial if legal and just that have to be ordinarily confirmed but may be annulled on the ground of illegality or unjustness and an obligation is cast on the authority to examine the legality and justness of the proceedings before confirming them. Once the finding and sentence, if any, confirmed, the Court Martial being Special Tribunal dispensing military justice, it would not be permissible to exercise additionally the power conferred by Section 19 read with Rule 14 and to initiate penalty thereunder if the Court Martial has not chosen to inflict the same by way of punishment u/s 71, as to permit such a course would be violative of the principle of double jeopardy and would also be subversive of the efficiency of the Court Martial proceedings, finding and sentence. It has further been observed, if the verdict of "guilty" or "not guilty" has not been confirmed, so as to be effective, power u/s 19 read with Rule 14 can be initiated.

29. The Apex Court in Major Dharam Pal Kukrety (supra) while dealing with the provisions in Army Act and the Army Rules has observed that when the finding of a Court Martial even on revision is perverse or against the weight of evidence on record and where the finding of such Court Martial has not been confirmed and fresh trial by Anr. Court Martial is not permissible, in such a case, the Central Government or the Chief of Army Staff can have the resort to Rule 14 of the Rules which empowers the authority to terminate the service of an officer u/s 19 of the Act on accounted misconduct. It has further been observed in the said case that though it is open to the Central Government or to the Chief of Army Staff to have recourse to the Rule 14 in the first instance without directing the trial by Court Martial of the concerned officer, there is no provision in the Army Act or in the Rules which prohibits the Central Government or the Chief of Army Staff from resorting to Rule 14. In a recent judgment, the Apex Court in Romesh Kumar Sharma Vs. Union of India (UOI) and Others, referring to the decision in Haijeet Singh Sandhu (supra) has observed that even after a Court Martial is held, departmental action is not prohibited. It has further been observed that the term "impracticable" cannot be given a narrow construction.

30. The Apex Court in Sri Gouranga (*supra*) while dealing with the provisions of the present Act and Rules, has observed that the power u/s 11 of the Act empowering the authority to dismiss or remove from service any person under his command other than an officer or a subordinate officer, read with Rule 177 of the Rules, is an independent power which can be validly exercised by the prescribed officer and it has nothing to do with the power of the SSFC for dealing with the offences under the Act. It has further been observed by the Apex Court, in the said case, that the Rule does not signify that the power to dismiss a person from service cannot be exercised unless the SSFC has awarded punishment to that person in accordance with the procedure prescribed by law and the prescribed authority is competent to exercise the power u/s 11 of the Act and to dismiss any person under his command.

31. The provision in Section 11 of the Act and the Rule 22 of the Rules being similar to the corresponding provisions in the Army Act and the Rules, the decisions of the Apex Court, as discussed above, are applicable in the cases in hand. We have already recorded our finding that the proceeding of SSFC, when finding is recorded as "not guilty" is not required to either to be confirmed or approved or countersigned by any authority under the Act and the Rules, for becoming effective. However, the DIG u/s 115 of the Act has the power to set such proceeding aside, by recording reasons based on the merits of the case. The DIG in these cases vide order dated 18.4.2000 (Annexure-2 to the writ petitions) has recorded the reason why the findings of the SFC of "not guilty" cannot be accepted. Upon recording such reasons the DIG however refused to countersign the said proceedings, though there is no provision in the Act or in the Rules which requires such countersignature of DIG when the SSFC acquitted the person concerned of the charge by recording finding of "not guilty". The DIG, as discussed above, however, has the power u/s 115 of the Act to set aside such proceeding of SSFC. From the tenor of the order passed on 18.4.2000 by the DIG it is evident that the intention is to set aside the proceedings of the SSFCs for the reasons based on the merits of the cases and hence by such order the proceedings of the SSFCs have in fact been set aside though it has been recorded that he refused to countersign the same and therefore, the proceedings in which the finding "not guilty" has been recorded became inoperative. Such proceedings cannot, thereafter, be remitted to the SSFC for retrial as the DIG has not been conferred with the power to remit the proceedings u/s 115 of the Act, after setting it aside, unlike the power conferred on the appropriate authority u/s 113 of the Act, exercisable where confirmation of finding or sentence of a SFC is required. Moreover, Section 75 of the Act imposes a bar for a second trial where any person subject to the Act has been acquitted or convicted of an offence by a SFC or by a criminal Court. That being the position, the DIG no doubt has the authority to invoke the power u/s 11 of the Act read with Rule 22 of the Rules, as it has become impracticable to hold the trial by SFC, for the aforesaid reason, subject of course to forming an opinion that retention of such person is not desirable for the misconduct committed by him.

32. In the cases in hand, such opinion has been formed by the DIG and the writ Petitioners were asked to show cause, under Rule 22, intimating the materials constituting misconduct. The writ Petitioners have not challenged the orders of dismissal from service on the ground of not issuing proper notice or on the ground of insufficiency of materials. The contention of the learned Counsel for the writ Petitioners that as the orders of acquittal by the SSFC after recording the finding "not guilty", attains finality, no action u/s 11 of the Act read with Rule 22 of the Rules can be taken by the authority, in view of our aforesaid discussions, cannot be accepted.

33. The further contention of the learned Counsel for the writ Petitioners/ Respondents that only the report of the investigation made under Chapter-VII of the Rules can be taken into consideration while forming an opinion by the competent authority about the misconduct committed by them and about the undesirability to keep them in service and competent authority cannot take into consideration of the evidence recorded during the course of the trial of SSFC cannot also be accepted and it deserves to be rejected as there is no bar under the Act and the Rules in taking into account the evidence recorded during the trial before the SSFC and in the event of imposing any such restriction in taking into consideration such evidence, a person who is subject to the Act even if found to have committed misconduct during the course of trial by the SSFC has to be let off, which course of action is not permissible under the Act and the Rules.

34. The finding of the learned Single Judge that there being no provision akin to Rule 15(2) of the CCS (CCA) Rules, 1965 the authority cannot dismiss the writ Petitioners from service after they are acquitted by SSFC by recording the finding of "not guilty" is also contrary to the provision of Section 11 of the Act and Rule 22 of the Rules, hence, cannot be sustained in view of the aforesaid discussion and is therefore, set aside.

35. For the reasons recorded above, we set aside the judgments and orders both dated 03.09.2001 passed by the learned Single Judge in WP(C) No. 223/2001 and WP(C) No. 224/2001.

36. In the result, the appeals stand allowed. No costs.