H.C. Dhingra vs Union Of India And Anr. on 13 October, 1988

Equivalent citations: ILR1988DELHI33, 1989RLR101

JUDGMENT

Apun B. Saharya, J.

(1) By this writ petition under Article 226 of the Constitution of India, the petitioner has sought a writ of certiorari to quash a notice dated 8th April, 1988, issued under the directions and on behalf of the F Chief of Army Staff, calling upon the petitioner to show cause why his services should not be terminated under section 19 of the Army Act, 1950 read with Army Rule 14.

(2) The writ petition was filed on 25th April 1983. By an interim order made on 27th April 198" the respondents were restrained from proceeding further with the show cause notice. That order was, confirmed on 27th May, 198.8 and, in view of retirement of the petitioner from service due on 31st May, 1988, it was clarified that the rights of the respondents to proceed in pursuance of the show cause notice and the petitioner's entitlement to retrial benefits will be subject to the decision in the writ petition.

(3) In the impugned show cause notice, it is stated that while the petitioner was employed as a Staff Officer in the Office of the Chief Engineer, Jaipur Zone during 20th September 1979 to 04th June 1983, a Board of Officers, convened by Chief Engineer, Southern Command, was held in 1983 to investigate the financial irregularities in the local purchases of steel and re- rolling of billets in the said Office. It is further stated that the proceedings of the said Board of Officers were placed before the Chief of Army Staff, who after due consideration had observed certain lapses on the part of the petitioner. The alleged lapses are set out in para 3 of the said notice. These allegations are not being reproduced here as the same are irrelevant for the present purpose. We are concerned with the reasons for issuing the show cause notice, stated in paragraph 4 of the notice, which are reproduced below :- "4.And whereas the Chief of the Army Staff is satisfied that your trial by a General Court Martial for the aforesaid misconduct is impracticable having become time barred, and you are not inclined to waive the time limit, he is of "the opinion that your further retention in service is undesirable. He has accordingly directed that you should be informed and called upon to submit in writing your explanation in defense, if any."

(4) The petitioner has challenged the show cause notice on the ground that the Chief of Army Staff has no jurisdiction to proceed against him, under section 19 of the Army Act read with Army Rule 14, in respect of allegations of misconduct constituting an offence, as section 122 of the Army Act prohibits a trial by court martial after the expiration of period of three years from the date of such offence. It has been urged by Mr. P. P. Rao, learned counsel for the petitioner, that the proposed action against the petitoner, based upon satisfaction of the Chief of Army Staff that the petitioner's trial by a General Court Martial for the alleged misconduct "is impracticable having become time barred and you are not inclined to waive the time- limit" is arbitrary and cannot be sustained.

(5) Mr. Satpal, learned Standing Counsel for the Union of India, has submitted that the writ petition is premature, it is not maintainable at this stage, as the petitioner has been required only to show cause against the proposed action; that the lapse of time prescribed for trial was due to bona fide erroneous impression that the case was being dealt with by the C. B. I., and, so no disciplinary action could be simultaneously taken against the petitioner; and that the impugned action is justified for the reasons set out in para 4 of the said show cause notice.

(6) In order to properly appreciate rival contentions of parties, as also the decisions cited at the Bar, it is necessary to read sections 19, 121, 122, 153, 154 & 160 of the Army Act and Rules 14 and 71 of the Army Rules. Relevant extracts of those provisions are set out below :

> Army Act :
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> "L9,Termination of service by Central Government Subject to the provisions of this Act and the rules and regulations made there under, the Central Government may dismiss or remove from the service any person subject to this Act."
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> "121.Prohibition of second trial-When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84, and 85, he shall not be liable to be tried again for the same offence by a court martial or dealt with under the said sections."

(SECTIONS 80, 83, 84 and 85 are not relevant for purposes of the discussion in this case).

> "122.(Period of Limitation for trial-(1) Except as provided by sub-section (2), no trial court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years from the date of such offence.
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> (2)The provisions of sub-section (1) shall not apply to a trial for an offence or desertion or fraudulent enrolment or for any of the offences mentioned in section 37. (We are not concerned with these offences).
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> "153.Finding and sentence not valid, unless confirmed - No finding or sentence of general, district or summary general, court martial shall be valid except so far as it may be confirmed as provided by this Act."
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> "154.Power to conform finding and sentence of general court-martial-The findings and sentences of general court-mart may be confirmed by the Central Government, or by any officer empowered in this behalf by warrant of the Central Government."
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> "160.Revision of finding or sentence-(1) Any finding or sentence of a court-martial which requires confirmation may be once revised by order of the confirming authority and as such revision, the court, if so directed by the confirming authority,

may take additional evidence.

Army Rules :

"14.Termination of service by the Central Government on account of misconduct-(1) When it is proposed to terminate the service of an officer under section 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 :

(2)When after considering the reports of an officer's misconduct, the Central Government or the Chief of the Army Staff is satisfied that the trial of the officer by court-martial is inexpedient or. impracticable, but is of the opinion that the further retention of the said officer in the service is undesirable, the Chief of the Army Staff shall so inform the officer together with ell reports adverse to him and he shall be called upon to submit, in writing, his explanation and defense : IN the event of the explanation of the officer being considered unsatisfactory by the Chief of the Army Staff, or when so directed by the Central Government, the case shall be submitted to the Central Government with the officer's defense and the recommendations of the Chief of the Army Staff as to the termination of the officer's service in the manner specified in sub-role (4).

(4)When submitting a case to the Central Government under the provisions of sub-rule (2) or sub-rule (3), the Chief of the Army Staff shall make his recommendation whether the officer's service should be terminated, and if so, 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.

(5)The Central Government after considering the reports and the officer's defense, if any, or the judgment of the criminal court, as the case may be. and the recommendation of the Chief of the Army Staff, may dismiss or remove the officer with or without pension or call upon him to retire or resign, and on his refusing to do so, the officer may be compulsorily retired or removed from the service on pension or gratuity, if any, admissible to him."

"71.Promulgation-The charge, finding, and sentence, any recommendation to mercy, shall, together with the confirmation or non-confirmation of the proceedings, be promulgated in such manner as the confirming authority may direct ; and if no direction is given, according to the custom of the service Until promulgation has been effected, confirmation is not complete and the finding and sentence that not be held to have been confirmed until they have been promulgated."

(7) At the outset. Mr. Rao relied upon the Judgment of a learned single judge of this court in Harbhajan Singh v. Ministry of defense, 1982 (2) Slr 782. (1) In that case, the petitioner, who was a major in the Army, was dismissed from service on 14th January. 1975 on the basis of a show cause notice served on him on 2nd January. 1974 on the alleged misconduct and satisfaction of the Chief of Army Staff that a court-martial was impracticable and that his further retention in service was undesirable. The allege misconduct related to a period during November 1968 to November 1969. In reply to the show cause notice, Major Harbhajan Singh denied the charge and questioned the validity of Court of Inquiry proceedings held earlier. He submitted that he should be tried by a court-martial and that the authorities should not dispense with the holding of a court- martial. He also submitted his explanation on merits of the allegations made against him in the show cause notice. His representation was rejected and he was dismissed from service. Wad, J., who hard and decided that case, found that no reasons were stated in the show cause notice why it was 'impracticable' to hold a court-martial against the petitioner. At the time of hearing, the respondents were permitted to produce the original files relating to court of inquiry and also the file showing the decision to dispense with the court-martial. Examination of the files revealed that the only reason why it was 'impracticable' to hold a court-martial as, stated in the file, was that the court martial had become barred by limitation under section 122 of the Act as three years period for trial had already expired. Thus, it is clear that the real reason why the authorities were of the opinion in that case, that it was 'impracticable' to hold a court martial, as in the present case, was that the three years period prescribed under section 122 of the Act for holding trial by a General Court Martial had expired. After noticing various decisions of different High Courts, as also the relevant provisions of the Act, and the Rules, Wad, K. arrived at the following conclusions:-

> "(1)The word impracticable in R. 14 cannot be interpreted so as to destroy the express provision of the principal Act under which the Rules are framed.
>
> "(2)That the Chief of Army staff and the Central Government did not exercise discretion properly and legally as it was based on irrelevant and misconceived grounds".

Consequently, the decision of the Central Government and of the Chief of the Army Staff as also the show cause notice, in that case, were set aside. We agree with and approve of the first conclusion of the learned single Judge as a correct proposition of law.

(8) Mr. Satpal urged that the judgment in the case of Major Harbhaian Singh is distinguishable: as the Government could not give any cogent explanation for the lapse of time prescribed for trial in that case, while in the present case, according to him, the Government has explained the delay; as Major Harbhajan Singh was willing to face a trial by a court martial, but the petitioner in the present case was not inclined to waive the time limit for that purpose; and further, as Major Harbhajan Singh challenged the final order of his dismissal from service, whereas, in the present case, the petitioner has rushed to court at the stage of show cause notice without giving to the authorities any explanation regarding the misconduct alleged against him. To explain the lapse of time prescribed for trial by a general court martial, Mr. Satpal relied upon the averments made in the affidavit of Mr. B. P. Singh. Deputy Assistant Adjutant General (Discipline and Vigilance Directorate), Ag Branch,

Army Headquarters, New Delhi. filed on behalf of the respondents. In this affidavit, it is stated that on receipt of anonymous complaint in December, 1982 alleging irregularities in local purchase of steel and re-rolling of Billets for various steel sections and a press report to the similar effect, Chief Engineer, Southern Command, convened a Board of Officers to investigate the alleged irregularities during the period 1982-83. The Board found conduct of the petitioner, and two others, including one civilian, to be blameworthy. The Board forwarded its report to the Engineer-in- Chief Branch on 24th September, 1983 for consideration of disciplinary action against the concerned officers. While disciplinary action was taken against the civilian officer, the southern command was under a bona fide erroneous impression that the case of the petitioner and of the other Army officer was being taken up with the Cbi for further action and no parallel investigation could be held against them, and, therefore. the southern command did not initiate any disciplinary proceedings against the petitioner. The Army Headquarters got this information from the Southern Command in January 1987. Since the case had become time barred in terms of section 122 of the Army Act. a letter dated 25th February. 1987, was issued to the petitioner calling upon him to give his consent to waive the time limit prescribed by section 122 of the Army Act and face trial by a general court martial or to face administrative action. After staling this background. it has been averred in the affidavit : "Though the petitioner submitted reply dated 24th November. 1987 (which is Annexure B to the writ petition), to the letter dated 25th February1987 but he did not express his consent to waive the time limit under the provisions of Army Act Section 122 read with Army Headquarters letter dated 3-12-1986 and to face trial by a G.C.M. for the lapse mentioned in the letter dated 25-2-1987. It was in these circumstances that Chief of the Army Staff was satisfied that the trial of the petitioner by Court Martial has become impracticable and accordingly a show cause notice dated 8th April, 1988 (which is annexure-C to the writ petition) was issued to the petitioner."

(9) Mr. Satpal is right , the extent that Wad.. J. expressed his concern in the case of Major Harbhajan Singh at neither the counter-affidavit nor the relevant files disclosing "what attempt was made to prosecute the matter in time and whether due diligence and precaution was taken to see that the matter does not get barred by limitation". It is also true that Major Harbhajan Singh had submitted in his reply to the show cause notice ".....that he should be tried by Court Martial and that the authorities should not dispense with the holding the Court Martial". However, these observations of the learned Judge and the difference in the position regarding willingness to face trial by General Court Martial taken by Major Harbhajan Singh and the petitioner in the present case, in our view, are of no avail to the respondents.

(10) The so called exploration of delay in the counter affidavit is vague and really gives no particulars of steps, if any, taken by the respondents for trial of the petitioner by a General Court Martial. The only explanation given is that. the Southern Command laboured under an erroneous impression "that the case was being taken up' with Cbi (SPE) for further action and no Parallel investigation should be held". It is further stated that in January 1987 the Southern Command informed the Army Headquarters about it. The affidavit discloses no particulars to show when, if at all, and by whom, was the case referred to Cbi or to show the progress or fate of that reference, to justify the "impression" that investigation could not be held into the matter by the army authorities. Likewise, the affidavit does not disclose the circumstances in which the Southern Command suddenly informed the Army Headquarters of their "bona fide erroneous impression" in January

1987. Indeed, there is no explanation of steps taken, if at all from 24th September 1983 to January 1987 in respect of investigation or trial of the misconduct alleged against the petitioner. We do not find this explanation to be satisfactory.

(11) In any event, in our view, sub-section (1) of section 122 of the Act is an absolute statutory bar. It spells out legislative policy in clear terms : "no trial by Court Martial of any person subject to this Act for any offence shall be commenced after the expiration of a period o three years from the date o such offence". It is a prohibitory provision. No provision has been made turn extension of the time prescribed by it. The power of the authorities under the Act to try any person for any offence, except as provided by sub-section (2). is restricted by this statutory provision. This provision is not concansual. Its operation does nut depend upon volition, will, or consent of any one. Its operation cannot be waiver. It is impermissible for any of the authorities under the Act to do away with the mandate of this provision, its terms are not negotiable. In this respect, we do not agree with the view expressed by Wad, J. in Major Harbhajan Singh's case.

(12) In purported exercise of administrative power under Rule 14. in respect of allegations of misconduct friable by General Court Martial, the authorities cannot override the statutory bar of sub-section (1) of section 122 of the Act. No administrative act or fiat can discard, destroy or annual a statutory provision. This statutory provision cannot be set at naught or circumvented merely on an administrator's opinion that it is 'impracticable' to hold a trial by a General Court Martial as the accused officer has refused to waive the statutory bar of limitation prescribed for such a trial.

(13) Mr. Satpal contended that the authorities under the Act can resort to the exercise of power under section 19 read with Rule 14 in cases where trial by a General Court Martial is prohibited by provisions such as section 122 us also section 121 of the Act. To support 'this argument, he relied heavily upon decision of the Supreme Court in Chief of Army Staff v. Dharam Pal, In that case a show cause notice dated 12th November 1976, issued under Rule 14 of the Army Rules, was upheld despite the General Court Martial finding the concerned officer not guilty o! charges of misconduct oil which the show cause notice was based. The show cause notice was upheld, according to Mr. Satpal, despite the prohibition of second trial under section 122 which is, in effect, analogous to section 122 of the Act.

(14) It is clear that the provisions of section 121 and section 122 are prohibitory in nature, and, in that sense, have similar effect and consequences in respect of trial for any offence in circumstances envisaged by each of the two provisions. Likewise, there is no doubt that we would be found by the decision in the case of Major Dharam Pal if that were a case to which prohibition envisaged by section 121 was applicable, but that is not so.

(15) Major Dharam Pal was posted in the Army School of Mechanical Transport, Faizabad. Certain, incidents were alleged to have taken place, on the basis of which. be was tried by a General Court Martial on four charges. After trial, the General Court Martial announced its finding "not guilty of all the charges". The confirming authority' did not confirm the verdict and sent back the finding for revision. The General Court Martial, however, adhered to its original view and once again announced the same finding subject of course to confirmation. The confirming authority, this time,

reserved confirmation of the finding on revision by a superior authority who did not confirm the findings on revision of the General Court Martial. The charges, the finding and non-confirmation thereof, were promulgated as required by Rule 71 of the Army Rules. Thereafter, the Chief of Army Staff issued the show cause notice dated 12th November, 1976 which was challenged by Major Dharam Pal by a writ petition under Article 226 of the Constitution of India. The Allahabad High Court allowed his writ petition. The Supreme Court reversed the judgment of the Allahabad High Court and after noticing the relevant provisions of the Act and the Rules, and also the decisions of various High Courts, upheld the show cause notice under Rules 14. With regard to the peculiar position which, arose under the Army Act, as also, under para materia provisions under the Air Force Act and the Air Force Rules from non-confirmation of the findings and sentence of the General Court Martial, even on revision. Madon, J. observed in paragraph 15 of the judgment : "IT can well be argued that by reason of the provisions of section 153 under which no finding or sentence of a general, district or summary general court- martial is valid except so far as it is confirmed as provided by the Army Act a person cannot be said to have been acquitted or convicted by a court martial until the finding of "guilty" or "non-guilty" in his case has been confirmed by the confirming authority."

His Lordship also pointed out : "THEREis, however, no express provision in the Army Act which empowers the holding of a fresh court- martial when the finding of a court martial on revision is not confirmed."

IN this context, the Supreme Court had to consider the questions : whether the Central Government or Chief of Army Staff can have resort to Rule 14 of Army Rules; and can it be said that in such a case, a trial by a court-martial is inexpedient or impracticable. The meaning of the word 'inexpedient' and 'impracticable', found from different dictionaries has been explained in paragraph 15 of the judgment as follows :

> "The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient disadvantageous in the circumstances unadvisable, impolitic".
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> "The same dictionary defines "expedient" inter alia as meaning "advantageous, fit, proper, or suitable to the circumstances of the case". Webster's Third New International Dictionary also defines the term "expedient" inter alia as meaning "characterized by suitability, practicality, and efficiency in achieving a particular end; fit, proper, or advantageous under the circumstances."

In these circumstances of the case, in para 16 of the judgment, Madon, J. held : "IN the present case, the Chief of the Army Staff had, on the one hand. the finding of a general court- martial which had not been confirmed and the Chief of the Army Staff was of the opinion that the further retention of the Respondent in the service was undesirable and, on the other hand, there were the above three High Court decisions and the point was not concluded by a definitive pronouncement of this Court. In such circumstances, to order a fresh trial by a court-martial could certainly be said to be both inexpedient and impracticable and the only expedient and practicable course, therefore. open to the

Chief of Army Staff would be to take action against the Respondent under Rule 14. which he did. The action of the Chief of Army Staff in issuing the impugned notice was, therefore. neither without jurisdiction nor unwarranted in law."

(16) Thus, it is clear that Major Dharam Pal's case was decided in view of absence of express provision for holding a fresh court martial in the peculiar circumstances of that case. The prohibition of section 121 of the Act was not attracted to that case as finding of the General Court Martial was not confirmed and it did not become final, as a result of which it could not be said that he was ''acquitted" by the General Court Martial. Therefore, the decision in that case is clearly distinguishable on facts, and, is of no avail to the respondents in the present ease.

(17) Apart from everything else, we feel that the impugned action against the petitioner, based on the opinion "that your further retention in service is undesirable", initiated just a month before he was due to retire from service in normal course, is unjust, and unreasonable, particularly when the. authorities stood by and allowed the period of three years prescribed for his trial by court martial to expire by their own inaction.

(18) The argument of Mr. Satpal that the writ petition is premature as it is directed against only a show cause notice is also not tenable, sustain able. In the case of Major Dharam Pal, in paragraph 5 of the judgment, Madon, J. has explained that such a contention cannot be decided at the threshold until the court had come to a finding with respect, to the jurisdiction of the Chief of Army Staff to issue the impugned notice. His Lordship held (hat "where the threat of a prejudicial action is wholly without jurisdiction a person cannot be asked to wait for the injury to be caused to him before seeking title Court protection." Since we have come to a conclusion that the Chief of Army Staff has acted without jurisdiction in issuing the show cause notice to the petitioner, it cannot be. said that the writ petition is premature.

(19) At the time of hearing, learned counsel for the petitioner informed us that the respondents are not releasing reprint benefits 'to the petitioner, and that they are under an impression that they need not do so, in view of interim orders of this court. now, there can be no justification for withholding release of retiral benefits to the petitioner.

(20) In these circumstances, we find that the Chief of Army Staff had no jurisdiction to issue the notice dated 8th April, 1988 to the petitioner to show cause why his services should not be terminated under section 19 of the Army Act read with Army Rule 14 on the ground of misconduct alleged in the said notice. Consequently, we quash the show cause notice dated 8th April, 1988, and, in view of the petitioner's retirement from service on 31st May, 1988, we direct the respondents to release retiral benefits to the petitioner within one month from today.

(21) T'HE writ petition is, accordingly, allowed and. Rule nisi is made absolute, with costs. Counsel's fee Rs. 2000.