Lt. Col. Puran Singh Rakwal vs Chief Of Army Staff And Anr. Reported In ... on 24 May, 2010

IN THE HIGH COURT OF JAMMU & KASHMIR AT SRINAGAR
SWP No. 967 of 2009
Lt. Col. Puran Singh Rakwal
Petitioners
Union of India & Ors
Respondents
!Mr. A. M. Dar, Advocate
^Mr. S. A. Makroo, Advocate

Honble Mr. Justice Mohammad Yaqoob Mir, Judge
Date: 24/05/2010
:J U D G M E N T:

Impugned order of dismissal from service dated 29th of April, 2009 is alleged to have been passed in violation of the rules, more particularly in violation of principles of natural justice.

Petitioner admittedly was an Army Officer in J&K Light Infantry Records, allegedly is stated to have purchased 51.18 tons of adultered refined soyabeen oil from M/S B. A. Traders, Jabalpur, in the process is alleged to have caused wrongful loss to the department to the tune of Rs.18,79,344=50. As a result thereof case registered as FIR No.RC 23(A)/96-JBER dated 7th of September, 1996 culminated in conviction for commission of offences punishable under Sections 120-B, 420 IPC and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act by Special Judge, Central Bureau of Investigation, Jabalpur on 31.12.2007 and sentenced thereon to undergo three years rigorous imprisonment and to pay fine of Rs.2,000 as reflected in the order impugned. In view of the conviction and sentence awarded, the petitioner has been dismissed from service vide order impugned. Aggrieved thereof, instant petition has been filed.

Learned counsel for the respondents at the very outset projected that the petition is not maintainable as in terms of Article 226 of the Constitution of India it is only that court within whose territorial jurisdiction the cause of action or part of cause of action has accrued, petition can be filed. The petitioner has been convicted at Jabalpur, based on which impugned order has been issued from Delhi and served at Ramgarh, therefore, petition before this Court is not maintainable.

This contention was rightly repelled by the learned counsel for the petitioner by stating that the Chief of the Army Staff (respondent No.2) can be sued anywhere in the Country. In support of this submission, he has rightly placed reliance on the judgment Dinesh Chandra Gahtori Vs. Chief of

Army Staff and anr. reported in (2001) 9 SCC

525. In the reported judgment the High Court of Allahabad had dismissed the writ petition at admission stage on the count of jurisdiction. In the reported case Chief of the Army Staff was one of the party/respondents. The Hon ble Apex Court while reversing the judgment of the High Court ruled that the High Court more importantly should have taken into consideration the fact that the Chief of the Army Staff can be sued anywhere in the Country. Placing reliance only on the cause of action, as the High Court did, was not justified.

Applying the ratio to the instant case, it can safely be concluded that this Court has jurisdiction as the Chief of the Army being the party/respondent can be sued anywhere in the Country.

The contention of the learned counsel for the petitioner that the judgment where-under petitioner was convicted and sentence was awarded, stand challenged before the High Court of Madhya Pradesh by medium of Criminal Appeal No.29/2008 and pursuant to order dated 9.1.2008 the sentence awarded against the petitioner has been suspended and he has been also released on bail, therefore, conviction and sentence awarded has not attained finality, as such, respondents should have waited for the final results of the appeal before passing the impugned order of dismissal.

This contention was rightly repelled by the learned counsel for the respondents while placing reliance on the judgment rendered by the Hon ble Apex Court in Union of India & Ors. Vs. Ramesh Kumar reported in 1997 STPL(LE) 23804 SC. In the reported judgment it was held that the Tribunal was not correct in quashing the order of dismissal and rules do not provide that on suspension of sentence the order of dismissal stands obliterated and that the dismissed government servant has to be treated under suspension. It has been further held that the suspension of execution of sentence under Section 389 Cr.P.C, conviction continues and is not obliterated. It shall be quite relevant to quote para 7 of the said judgment:

> . A bare reading of Rule 19 shows that the Disciplinary Authority is empowered to take action against a Government servant on the ground of misconduct which has led to his conviction on a criminal charge. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Government servant has to be treated under suspension till disposal of appeal by the appellate court. The rules also do not provide the Disciplinary Authority to await disposal of the appeal by the Appellate Court filed by the Government servant for taking action against him on the ground of misconduct which has led to his conviction by a competent court of law.

Having regard to the provisions of the rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a competent court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. Under Section 389 of the Code of Criminal Procedure, the Appellate Court has power to suspend the execution of sentence and to release an accused on

bail. When the Appellate court suspends the execution of sentence, and grants bail to an accused the effect of an order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence under Section 389 Cr.P.C. an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Government servant on a misconduct which led to his conviction by the court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the appellate court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of criminal Appeal by the High Court.

Next contention of the learned counsel for the petitioner is that while passing the impugned order, petitioner was not given an opportunity of being heard, that being so principles of natural justice have been violated which renders the order impugned as bad. In support of this contention learned counsel has placed reliance on a judgment reported in 1983 LAB.I.C.67 rendered by the Gujarat High Court in the case captioned Kiritkumar B. Vyas Vs. State of Gujarat & anr and also on the judgment rendered by the Hon ble Apex Court reported in (1976) 3 SCC 190.

In both the two judgments, dismissal from service in the light of Rule 14 the Gujarat Civil Services (Discipline and Appeal) Rules, Rule 14 of the Railway Servants (Discipline & Appeal) Rules, 1968 and proviso (a) to Article 311(2), it has been concluded that before passing order of dismissal, opportunity of being heard should have been afforded to the delinquent officer.

Section 19 provides that the Central Government may dismiss or remove from service any person subject to the provisions of the Act and the Rules and Regulations made there-under. It is in this connection Rule 14 of the Army Rules has to be adhered to. Rule 14 is reproduced here-under:

> Rule 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 Sec. 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:
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> PROVIDED THAT this sub-rule shall not apply
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> (a) where the service is terminated on the ground of misconduct which has led to his conviction by a criminal Court; or
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> (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.
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> (2) When after considering the reports on an officer s misconduct, the Central Government, or the Chief of the Army Staff is satisfied that the trial of the officer by a

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 all reports adverse t him and he shall be called upon to submit, in writing, his explanation and defence:

PROVIDED THAT the Chief of the Army Staff may withhold from disclosure any such report or portion thereof if, in his opinion, its disclosure is not in the interest of the security of the State.

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 Government, with the officer s defence and the recommendation of the Chief of the Army Staff as to termination of the officer s service in the manner specified in sub-rule (4).

(3) Where, upon the conviction of an officer by a Criminal Court, the Central Government or the Chief of the Army Staff considers that the conduct of the officer which has led to his conviction renders his further retention in service undesirable, a certified copy of the judgment of the Criminal Court convicting him shall be submitted to the Central Government with the recommendation of the Chief of the Army Staff as to the termination of the officer s service in the manner specified in sub-rule (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:

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(a)          dismissed from the service; or
(b)         removed from the service; or
(c)  compulsorily retired from the service.
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(5) The Central Government after considering the reports and the officer s defence, 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

(a) dismiss or remove the officer with or without pension or gratuity; or

(b) compulsorily retire him from the service with pension and gratuity, if any, admissible to him. Plain reading of Rule 14 provides that when termination is proposed under Section 19 on account of misconduct, the effected person has to be given opportunity to show cause in the manner specified in sub-rule 2 but sub-rule 1 of Rule 14 is controlled by proviso as referred above where-under the requirement of giving an opportunity to show cause is not warranted when the service is terminated on the ground of misconduct which has led to the conviction by a Criminal Court. This position of the proviso is also covered by sub-rule 5 of Rule 14. As per sub-rule 4

> quoted above, the Chief of the Army Staff in case of persons covered by sub-rule 2 or sub-rule 3 has to make recommendation as to whether the officer s service should be terminated, and if so, whether the officer should be dismissed from the service or removed from the service or compulsorily retired from the service.

Rule 5 provides that the Central Government after considering the reports and the officer s defence, if any, or the judgment of the Criminal Court, as the case may be, and the recommendations of the Chief of the Army Staff, may dismiss or remove the officer with or without pension or gratuity or compulsorily retire him from the service with pension. The recommendation of the Chief of Army Staff in both cases covered by sub-rule 2 as well as sub-rule 3 is imperative but in cases covered by sub-rule 2 the Central Government has to consider the reports and the officers defence, if any, because in that situation in terms of the said rule, the concerned officer has a right to show cause against the order of termination, whereas in case of sub-rule 3 relatable to the proviso to sub-rule 1, it is only the judgment of the Criminal Court and the recommendations of the Chief of the Army which are to be considered for dismissal or removal from service.

So far as proviso to sub-rule 1 of Rule 14 is concerned, it in categoric terms provides that if the officer whose services are to be terminated on the ground of misconduct which has led to his conviction by Criminal Court, no show cause notice is required, but the said position is controlled by sub-rule 3, in terms whereof the Chief of the Army Staff has to consider desirability/undesirability of retention in service of such officer and then to make recommendation, in such situation rule of natural justice is imported and adherence to the same becomes imperative.

Now coming to the judgments as referred to by the learned counsel for the petitioner. In 1983 LAB.I.C. 67, the Division Bench of the Gujarat High Court considered Rule 14 (1)(i) of the Gujarat Civil Services (Discipline and Appeal) Rules (hereinafter referred as Gujarat Rules) and Rule 14 of the Railway Servants (Discipline & Appeal) Rules, 1968 (hereinafter referred as the Rules of 1968). While referring to the said rule position, it has been concluded that in terms of Rule 14(2), the disciplinary authority may consider the circumstances of the case concerned and pass such orders thereon as it deems fit. Similarly while referring to sub-rule (iii) of Rule 14 of the Railway Servants (Discipline & Appeal) Rules wherein it is provided that the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit, the position of according consideration and then to pass orders as deemed fit as it is under sub-rule (iii) of Rule 14 of the Rules of 1968, Court held that rule of natural justice is imported which enjoins that before taking final action in the matter the delinquent employee should be heard. It is relevant to quote para 6 of the judgment:

> . The scope and ambit of the R.14(i) of the Railway Servants (Discipline & Appeal) Rules, 1968 was also on the anvil, in a case reported in AIR 1975 SC 2216: (1975 Lab IC 1598) (Divl. Personnel officer v. T. r.

Challapan) and the Supreme Court in para 21 observed as under:

The concluding part of R.14(1) merely imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. The word consider in the last part of R.14(1) merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This provision confers power on the disciplinary authority to decide whether in the facts and circumstances of a particular case what penalty, if at all, should be imposed on the delinquent employee. (Emphasis added).

These observations also make it clear that mere conviction on a criminal charge would not dispense with the requirement of at least an application of mind on the pat of the disciplinary authority on the question of quantum of punishment after affording reasonable opportunity to the delinquent to be heard in regard to the quantum of punishment. Mere conviction, therefore, cannot be utilized for passing an order of dismissal blind-foldedly without hearing the delinquent on the question of sentence. Needless to add that this would be so even in case where the disciplinary authority exercises powers R.14 of the Gujarat Civil Service (Discipline and Appeal) Rules. In the judgment rendered by the Hon ble Apex Court reported in (1976)3 SCC 190, the scope of word consider as occur in Rule 14 of the Rules of 1968 has been interpreted to mean that it imports a rule of natural justice in enjoining that before taking final action in the matter the delinquent employee should be heard and the circumstances of the case may be objectively considered. By means of the said judgment it has been held that the word consider is wide enough to require the disciplinary authority to hold a detailed determination of the matter.

The Hon ble Apex Court in the reported judgment while considering the scope of Article 311(2) proviso (a) and Rule 14(i) of the Rules of 1968 concluded that the Rule 14 despite incorporating the principles of proviso (a) to Article 311(2) enjoins on the disciplinary authority to consider the circumstances of the case before passing any order. It is a fallacy to presume that the conviction of a delinquent employee simipliciter without anything more will result in his automatic dismissal or remove from service. It shall be quite relevant to quote para 12 of the judgment:

2. Another point which is closely connected with this question is as to the effect of Section 12 of the Act which runs thus:

Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law.

It was suggested that Section 12 of the Act completely obliterates the effect of any conviction and wises out the disqualification attached to a conviction of an offence

under such law. This argument, in our opinion, is based on a gross misreading of the provisions of Section 12 of the act. The words attaching to a conviction of an offence under such law refer to two contingencies: (i) that there must be a disqualification resulting from a conviction; and (ii) that such disqualification must be provided by some law other than the Probation of offenders Act. The Penal Code does not contain any such disqualification. Therefore, it cannot be said that Section 18 of the Act contemplates an automatic disqualifications attaching to a conviction and obliteration of the criminal misconduct of the accused. It is also manifest that disqualification is essentially different in its connotation from the word misconduct . Disqualification cannot be an automatic consequence of misconduct, unless the statute so requires. Proof of misconduct may or may not lead to disqualification, because this matter rests on the facts and circumstances of a particular case or the language in which the particular statute is covered. In the instant case neither Article 311(2) proviso (a) nor Rule 14 (i) of the Rules of 1968 contain any express provision that the moment a person is found guilty of a misconduct on a criminal charge he will have to be automatically dismissed from service. Article 311(2) proviso

(a) is an enabling provision which merely dispenses with the various stages of the departmental inquiry and the show-cause notice. Rule 14 despite incorporating the principles of proviso (a) to Article 311(2) enjoins on a disciplinary authority to consider the circumstances of the case before passing any order. Thus, in our opinion, it is a fallacy to presume that the conviction of a delinquent employee simpliciter without any anything more will result in his automatic dismissal or removal from service. What emerges from the above referred para is that the Article 311(2) proviso (a) is an enabling provision which merely dispenses with the various stages of departmental enquiry and the show cause notice. Rule 14 of the Rules of 1968 despite incorporating the principles of proviso (a) to Article 311(2) enjoins on the disciplinary authority to consider circumstances of the case before passing any order. Rule 14 of the Gujarat Rules provides for according consideration even after conviction and awarding of sentence which warrants providing of opportunity of being heard, whereas sub-rule 3 of Rule 14 of the Army Rules also provide for consideration vis-`-vis termination on the ground of misconduct which has led to conviction by a Criminal Court. In terms of sub-rule 5 of Rule 14 what is required to be considered is the judgment of the Criminal Court and the recommendations of the Chief of Army Staff.

Therefore, wording consideration employed in sub-rule 2 of Rule 14 of Gujarat Rules, Rule 14(iii) of the Rules of 1968 and sub-rule (3) of Rule 14 of the Army Rules have similarity in the context of providing or non-providing of opportunity of being heard.

The word consider as employed in Rule 14 of Gujarat Rules, Rule 14 of the Rules of 1968 and the word consider as employed in sub-rule 3 of Rule 14 of the Army Rules in context is on the same footing because the word consider as employed in Rule 14 of Gujarat Rules and the Rules of 1968

provides that the authority has to consider the circumstances of the case and make such orders thereof as it deems fit whereas the word considers employed in sub-rule 3 and sub-rule 5 of the Rule 14 of Army Rules vis-`-vis cases of misconduct of the officer which has led to conviction is to be considered and it is on that basis the Chief of the Army Staff has to make recommendation, thereafter it is the judgment of the Criminal Court and the said recommendations of the Chief of the Army Staff which has to be considered by the Central Government before passing the order of dismissal. Proviso (a) to Article 311(2) of the Constitution though has been held to be an enabling provision but it has also been held that it does not enjoin or confer a mandatory duty on the disciplinary authority to pass an order of dismissal, removal or reduction in rank the moment an employee is convicted. The matter is left completely to the discretion of the disciplinary authority and the only reservation made is that the departmental enquiry contemplated by this provision as also by the Departmental Rules is dispensed with.

The proviso though being an enabling provision but in case the rules governing the procedure for proposed action provide for consideration of the circumstances, then the rule of natural justice has a role to play. It all depends upon the relevant applicable rules.

The wording employed in sub-rule 3 and sub-rule 5 of Rule 14 of the Army Rules provide for accord of consideration to the conduct. The rule making authority has purposely given the discretion to the Chief of the Army Staff to consider and to opine as to whether the conduct of the officer which has led to his conviction renders his further retention in service undesirable. The said discretion is controlled by accord of consideration even after judgment of the Criminal Court convicting the officer. Sub- Rule 3 of Rule 14 which provide that where upon the conviction of an officer by a Criminal Court, the Central Government or the Chief of the Army Staff considers that the conduct of the officer which has led to his conviction renders his further retention in service undesirable, would also indicate that the rules of natural justice shall have to be adhered to and the officer concerned, as a necessary, corollary has to be given opportunity of being heard before recommendation of his case for dismissal of his service by the Chief of Army Staff and also before the Central Government passes the order of dismissal as the same has not to be only on the basis of the judgment of the Criminal Court but also on the recommendations of the Chief of the Army Staff. So the Chief of the Army Staff before making recommendations has to record reasons that the retention of the officer in service is undesirable. Therefore, delinquent officer has every right of being heard. In the instant case the petitioner all along has been representing and claiming that he has been innocent, that situation was also required to be taken note of. In case same would have been considered after petitioner would have been heard, may be the Chief of the Army Staff may have chosen to wait for the results of the Criminal appeal which though otherwise is not required.

The judgment where-under the petitioner is convicted and sentenced, cannot be the only base for dismissal as the conjoint reading of sub-rule 3 and sub-rule 5 of Rule 14 of the Army Rules provides that upon conviction and sentence, the Chief of the Army Staff has to consider as to whether retention in service is undesirable and then it is on the basis of copy of the judgment and the recommendations of the Chief of the Army Staff, Central Government can pass the order of dismissal. In case rule would have provided that it is only on the basis of the judgment of Criminal Court recording conviction the officer is not to be retained in the service, then position would have

been somewhat different. The moment Chief of the Army Staff has to consider the desirability of retention in service, it in itself import rule of natural justice and thereby warrants providing of opportunity of being heard to the officer before being recommended to be dismissed from service or before order of dismissal is passed which in the instant case has not been done.

In the upshot the impugned order of dismissal, for the stated reasons, is found unsustainable, therefore, is quashed leaving it open to the respondents to proceed afresh, if they so choose, strictly in accordance with Rule 14, more particularly sub-rule 3 of the Army Rules. While doing so, petitioner shall be given a reasonable opportunity of being heard, same shall be in consonance with rules of natural justice.

Petition accordingly succeeds, so shall stand disposed of on aforesaid terms.

Srinagar (Mohammad Yaqoob Mir)
24.05.2010 Judge
Mohammad Altaf