

IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH  
NEW DELHI.

O.A. No.109 of 2010

Ex-Lance Havildar Bhupendra Kumar ...Petitioner

Versus

Union of India & others ...Respondents

For the Petitioner : Mr.S.S. Pandey, Advocate

For the Respondents: Mr. Anil Gautam, Adv. for R-1, 2&4  
Mr. Mohan Kumar, Adv. for R-3.

C O R A M:

HON'BLE MR. JUSTICE A.K.MATHUR, CHAIRPERSON

HON'BLE LT.GEN. S.S.DHLLON, ADMINISTRATIVE MEMBER

**JUDGMENT**  
**20.01.2012**

**BY CHAIRPERSON;**

1. Petitioner by this petition has prayed that the order dated 2.05.2009 may be quashed whereby petitioner was dismissed from service and he may be reinstated with all consequential benefits like back wages, seniority, promotion etc.

2. Petitioner was enrolled on 29.4.1994 in the Indian Army as a Sepoy in the Grenadiers. On 9.2.2007, he was posted to HQ 63 Mountain Brigade Camp located at Nathula, Sikkim and appointed as a Quartermaster. Brig. Barsimhan was doing the duty of Bde Cdr and Col. Vijay Bakshi was performing the duties of Dy. Commander. Col. Vijay Bakshi started passing instructions that ration should be saved. He has also given arbitrary and illegal instructions. Col. Bakshi was annoyed with the applicant because applicant was reluctant to obey his illegal orders. Thereafter, he made a point to send the petitioner on temporary duties. On a number of times, the applicant had reported to Camp Commandant but it appeared that he was also helpless because of the bulldozing behaviour of Col. Bakshi.
3. On 05.06.2007, on the orders of Col. Bakshi, the applicant was sent on temporary duty to Delhi to bring a Golf set. There was some difficulty in getting the golf set and petitioner came back from

temporary duty from Delhi and thereafter Col. Bakshi framed an illegal chargesheet against the applicant for being late by one day and awarded punishment of reprimand on 18.06.2007. But, petitioner strongly protested against the illegal award and punishment was cancelled.

4. On 19.06.2007, when petitioner was performing the duties of Quartermaster, accompanied with Gdr Jasbir Singh and Gr. Suryakant Pandey collected the Govt. rations from 11 Composite Platoon for the troops of HQ 63 Mtn Bde Camp on the indent and brought the same to unit lines in a 2.5 Ton Tata Vehicle. The quantity of ration collected from 11 Composite Platoon was checked on ground along with the copy of voucher supplied by 11 Composite Platoon by Duty Officer, Nb Sub Subhash Singh. No irregularities were noticed by Duty Officer and rations were kept in the unit ration store.
5. It is alleged that Col. Bakshi has come from posting from Bangalore and his family was staying at

Bangalore and applicant was sent to TD to Bangalore to deliver Ration on 27.08.2007. Again on 08.09.2007, the applicant was sent on temporary duty to Bangalore along with ration. It is alleged that in September, 2007, an anonymous complaint was received alleging that Dy.Cdr and Camp Commandant of 63 Bde Camp were selling liquor and ration to the civilians. On this, on 27.09.2007, Col. Bakshi called the applicant in his office and inquired about it and told him not to speak if any court of inquiry was instituted against him. It is alleged that a court of inquiry was conducted by Maj. Girish and handed over to the Brig. Cdr, wherein the statement of all witnesses were recorded. Subsequently, Maj. Girish conducted another court of inquiry and handed over to the Brig. Cdr, but all the witnesses whose statements were recorded earlier declined to change their statement. Thereafter, Maj. Girish destroyed the statements of witnesses taken earlier. It is alleged that the Dy.Cdr was annoyed with the behaviour of CSD NCOs and the applicant. In the



second Court of Inquiry, statements of 2 AEC NCOs, and Gdr Ashif Iqbal were deliberately not recorded because they had very specifically stated that the Dy. Cdr was drawing liquor from the CSD canteen and taking the same to Siliguri to be sold to some civilians. Moreover, the second Court of Inquiry did not comply with Army Rule 180. It is alleged that so far as applicant is concerned, a summary of evidence was recorded by Lt.Col.PS Shekhawat on 22.12.2007 on orders of Col. Vijay Bakshi, OC Tps who himself was personally involved in illegal transactions including selling of liquor. In the Court of Inquiry, petitioner pleaded not guilty to the charge. It was alleged that chargesheet was not supplied to the applicant. In the summary court martial, the petitioner was punished with "Reduced to Ranks and 89 days RI". In consequence of this petitioner was reduced to rank and underwent the said illegal punishment of RI. Since summary court martial was carried out in most illegal manner, this punishment, on advice of Deputy JAG of the Command were set

aside by the Cdr 63 Mtn. Bde. It was alleged that Brig. Cdr was also annoyed with the petitioner and suddenly a show cause notice was issued to the petitioner u/s 20(3) read with AR 17, in which administrative action was sought to be taken against the petitioner on the ground that since summary court martial has been set aside by the respondent and re-trial was impracticable, therefore, the aforesaid show cause notice was sent to the petitioner as to why his services should not be terminated.

6. Petitioner filed a reply to the show cause notice and brought out the entire facts to the notice of Brig. Cdr alongwith illegality in issue of this show cause notice.
7. Petitioner filed a complaint, against the show cause notice on account of annoyance of Col.Vijay Bakshi, to the Chief of Army Staff with a prayer that Brig.Commander should be stopped in going ahead with his illegal action of dismissing the applicant from service and for continuance in the service as he has

already served the punishment of RI and had been reduced to the ranks as awarded to him by SCM.

8. However, the Brigade Commander passed the order of dismissing the applicant from service w.e.f.04.05.2009 on administrative ground u/s 20(3) read with Army Rule 17 of Army Act and Rules. Petitioner filed a statutory complaint on 24.04.2009 against the said action which was rejected. Hence, petitioner has filed the present petition challenging the aforesaid action.
9. A reply has been filed by the respondent who have taken the position that it is true that petitioner was tried by summary court martial and was awarded the aforesaid punishment of "Reduction to the rank and 89 days RI", but that was set aside due to procedural irregularities, i.e. violation of Rule 34(2) & 118. Since re-trial of the accused on the same charges was impracticable, administrative action ground u/s 20(3) read with Army Rule 17 of the Army Act and



Rules was initiated against the accused for terminating his services.

10. We have heard learned counsel for both the parties and perused the record. Learned Counsel for petitioner submitted that since the proceedings under the summary court martial has already convicted the accused and in pursuance to that, he has suffered a sentence of 89 days RI, therefore, second punishment on the same charge is not permissible as he cannot be punished twice for the same offence. He also submitted that so called Summary Court Martial was in violation of rule 34(2) & 118. However, it has been submitted by the learned counsel for the respondent that after setting aside of the summary court martial proceedings by the next superior reviewing authority, the petitioner was restored back to his rank.

11. The question for consideration is whether in the present case, can the authorities take resort to an administrative action. In order to appreciate the



controversy involved in the matter, it may be relevant to refer to certain provisions of the Act and Rules bearing on the subject. Section 161 lays down that Sentence of Summary Court Martial shall be effective from the date of it is issued.

Section 161 of the Army Act, 1950 reads as under:

"Finding and sentence of a summary court-martial:

- (1) *Save as otherwise provided in sub-section(2), the finding and sentence of a summary court-martial shall not require to be confirmed, but may be carried out forthwith.*
- (2) *If the officer holding the trial is of less than five years service, he shall not, except on active service, carry into effect any sentence until it has received the approval of an officer commanding not less than brigade."*

Section 162 of the Army Act, 1950 reads as under:

"Transmission of proceedings of summary courts-martial:

The proceedings of every summary court-martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or (the Chief of the Army Staff) or any officer empowered in this behalf by (the Chief of the Army Staff), may for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed."

12. Since in the present case the JAG has opined that rule 118 was not applied with. Therefore, proceedings were reviewed and accordingly on the

basis of legal advice, the proceedings of the summary court martial were set-aside by the reviewing authority under Section 162. Thereafter administrative action was initiated under section 20(3) read with Rule 17, which reads as under:

Section 20(3)

*Dismissal removal or reduction by the Chief of the Army Staff and by other officers*

(1).....'

(2).....'

(3)An officer having power not less than brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or junior commissioned officer.'

Rule 17

*Dismissal or removal by Chief of the Army Staff and by other officers*

*Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court or a court-martial, no person shall be dismissed or removed under sub-section(1) or sub-section (3) or section 20; unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service; Provided that if in the opinion of the officer competent to order the dismissal or removal, it is not expedient or reasonably practicable to comply with the provisions of this rule, he may after certifying to that effect, order the dismissal or removal without complying with the procedure set out in this rule. All cases of dismissal or removal under this rule where the prescribed procedure has not been complied with shall be reported to the Central Government."*

13. In the present case, the sentence of the summary court martial has been put to nought by the authorities. Therefore, learned counsel for the petitioner submitted that whatever evidence which has been recorded was in violation of rule 34(2) & 118 and cannot be read against the petitioner and once the summary court martial has been set aside by the reviewing authority, then the entire evidence is rendered vitiated. In this connection learned counsel has invited our attention to the decision given by coordinating bench of this Tribunal given in the case of (***Ex-Hav.RP Singh Vs. Union of India and Ex.Hav./SKT/GS&C Raklesh Dhaka Vs. UOI***). With great respect the decision of the Hon'ble Supreme Court in the case of ***UOI Vs. Harjeet Singh Sandhu (2001 5 SCC 593)*** seems not to have been brought to the attention of the coordinating bench. The three judges bench in the case of ***UOI Vs. Harjeet Singh Sandhu (Supra)*** in somewhat identical situation has held that Central Government has



power u/s 19 read with Rule 14 despite the fact that the court martial proceedings has been held against the incumbent and he has been exonerated by the charges. In the case of Sandhu, twice a Court Martial was held and in that the court martial authorities exonerated the petitioner but the proceedings were not confirmed by the confirming authority. Thereafter the confirming authority resorted to section 19 of the Army Act read with rule 14. The question arose that after the court martial having been held and persons have not been found guilty, can the power u/s 19 read with rule 14 be resorted to or not. The argument of principle of double jeopardy and competence of the Government of India to resort to such power was seriously debated. Their Lordships have affirmed the power of section 19 read with rule 14 of the Army Act & Rules which reads as under:

*Section 19*

*Termination of service by Central Government*

*Subject to the provisions of this Act and the rules and regulations made thereunder the Central Government may*



*dismiss, or remove from the service, any person subject to this Act.*

#### *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 section 19 on account of misconduct, he shall be given an opportunity to show cause in the manner specific is sub-rule(2) against such action-*

*Provided that this sub-rule shall not apply-*

- (a) Where the service is terminated on the ground of misconduct which has led to his conviction by a criminal court; or*
- (b) Where the Central Government is satisfied that for reasons, to be recorded in writing, it is not expedient or reasonably practicable to give the officer an opportunity of showing cause.*
- (3) 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 to 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 Central Government, the case shall be submitted to the Central Government, with the officer's defence and 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) 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 Judgement 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).

(5) 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) Compulsorily retired from the service

(6) The Central Government after considering the reports and the officer's defence, if any, or the judgement 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.

#### 14. Their Lordships also held that:

"Power to confirm finding and sentence of Court Martial and the power to annul the proceedings on the ground of being illegal or unjust, both provisions read together indicate that the finding and sentence of Court Martial if legal and just have to be ordinarily confirmed but they may be annulled on the ground of illegality or unjustness. An obligation is cast on the confirming authority to examine the legality and justness of the proceedings before confirming them. Questions of correctness, legality and propriety of the order passed by any Court Martial and legality of any proceedings to which the order or Court Martial relates can be raised by way of petition under section 164. Once the finding and the sentence have been confirmed, the Court martial, being a Special Tribunal dispensing military justice, it would not be permissible to additionally exercise the power conferred by Section 19 read with Rule 14 and to inflict a penalty thereunder if the Court Martial has not chosen to inflict the same by way of punishment under Section 71. To permit such a course would be violative of the principle of double jeopardy and would also be subversive of the efficacy of the court-martial proceedings, finding and sentence. So long as a final verdict of guilty or no guilty, pronounced by a Court Martial and confirmed by the competent authority so as to be effective is not available, the power to proceed under Section 19 read with Rule 142(2) exists and remains available to be exercised."

15. This was with regard to the officer but same power has been conferred u/s 20(3) read with rule 17, as reproduced above, with regard to persons below officers rank. Therefore, both the powers are parametrical with each other and in identical case, the Hon'ble Supreme Court has held that administrative power u/s 19 read with rule 14 with regard to officers is reserved by the Central Government on the recommendations of the Chief of the Army Staff and they can be resorted to irrespective of the fact that court martial authorities has found him not guilty twice over. In the present case, petitioner's SCM has been found to be defective as it was violative of Rule 34(2) & 118 of the Army Rules, therefore, reviewing authority has set aside that finding and restored the petitioner back to his rank. Thereafter, a show cause notice was issued to the petitioner that why he should not be dismissed from service on the charges of misconduct. In reply to that he filed a reply and contested the matter and thereafter, authority have passed an order of



dismissal from service. This in our opinion appears to be justified in view of the ratio laid down by the Apex Court in the case of **UOI Vs. Harjeet Singh Sandhu (Supra)**. Hence, we don't find any merit in the petition and accordingly it is dismissed.

16. No order as to costs.

---

[Justice A.K. Mathur]  
Chairperson

---

[Lt. Genl. SS Dhillon]  
Member (A)

New Delhi  
20<sup>th</sup> January, 2012