Before The Armed Forces Tribunal, Regional Bench, Chandigarh, at Chandimandir.

ORIGINAL APPLICATION NO. 586 OF 2015

Col. Sarup Singh Sidhu …..**Applicant**

Versus

Union of India and Others …..**Respondents**

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Applicant by: Col. N.K. Kohli (Retd.), Advocate.

Respondents by: Shri Vishal Taneja, Central Government Counsel.

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CORAM:

Hon'ble Shri Justice M.S. Chauhan, Judicial Member.

Hon'ble Lt. Gen. Munish Sibal, Administrative Member.

O R D E R
22 September 2017

01. The applicant, who was commissioned in the Indian Army on 20 December 1986, was made to face General Court Martial (GCM) on the accusation that on the night intervening 06 and 07 July 2010 he committed a disgraceful conduct of an indecent kind on the person of Sepoy Arun Krishnan. The GCM, on appreciation of the evidence, held him not guilty of the charge. The Confirming Authority, instead of confirming the finding of "Not Guilty", revised the finding and sent the matter back to the GCM for revision. Even on revision, the GCM held the applicant not guilty of the charge. The Confirming Authority having reserved confirmation by a superior authority, the General Officer Commanding-in-Chief (GOC-in-C), Western Command, did not confirm the finding. The charge, finding and non-confirmation were promulgated under Rule 71 of the Army Rules, 1954 (here-in-after referred to as the Rules). The matter having been placed before him, the Chief Of Army Staff (COAS) formed an opinion that the GCM had

wrongly recorded the finding of acquittal of the applicant (even on revision) by giving him benefit of doubt and for that reason applicant's Court Martial was impracticable and inexpedient but his disgraceful conduct reflected in the evidence contained in the proceedings of the GCM had rendered his further retention in service as undesirable. Accordingly, a show cause notice dated 15 May 2015 calling upon the applicant to show cause, within thirty days, why his services be not terminated under Section 19 of the Army Act, 1950 (here-in-after referred to as the Act) read with Rule 14 of the Rules was served upon him.

02. The applicant has invoked Section 14 of the Armed Forces Tribunal Act, 2007 (55 of 2007) to seek quashing of the show cause notice dated 15 May 2015.

03. Respondents have filed a joint response stating that the application is not maintainable as no right of the applicant has been violated; the application lacks cause of action; and the applicant has not approached this Tribunal with clean hands. While admitting the fact situation, as laid open in the application, the respondents have refuted the grounds pleaded by the applicant to seek quashing of the impugned notice and have prayed dismissal of the application.

04. The applicant has preferred a rejoinder to controvert all what has been said in the written reply adverse to his interest and to reiterate his plea as contained in the application.

05. We have heard learned counsel for the parties and with their valuable assistance have closely examined the record available on the file and the record made available by the respondents for our perusal.

06. Learned counsel for the applicant has argued that the impugned notice is merely reiteration of the view expressed in the order of revision and contains no discussion as to why finding of the GCM was found to be unsustainable warranting non-confirmation. Learned counsel has further argued that in spite of non-confirmation of the finding of "Non Guilty" returned by the GCM, the applicant was

granted substantive rank of Colonel (Time Scale) with retrospective effect from 20 December 2012 vide order dated 15 July 2014, *Annexure A8*. It, therefore, emerges that the case against the applicant stood closed and recommendation, if any, for termination of his services by the Head Quarters, Western Command consequent to non-confirmation of finding of "Non Guilty" returned by the GCM, did not find favour with the Chief of Army Staff as, otherwise the Disciplinary and Vigilance ban against him would not have been lifted nor he would have been considered and cleared for promotion to substantive rank of Colonel (Time Scale). It has also been argued that the impugned notice has been issued one and a half years after non-confirmation of the finding of the GCM which shows that the confirming authority has been driven by whim, capriciousness and obstinacy than reason and fairness. It is also contended by the learned counsel for the applicant that finding of the GCM having not been confirmed was rendered invalid in terms of Section 153 which means that there has been no trial by the GCM. Therefore, it cannot be said that the trial of the applicant by a court-martial was inexpedient or impracticable. The Confirming Authority could also direct the applicant to be tried for the same offence or on the same facts by a Criminal Court under Section 127. Learned counsel has placed reliance upon *Union of India versus Harjeet Singh Sandhu*, (2001) 5 SCC 593, *Ghurey Lal versus State of U.P.*, (2008) 10 Supreme Court Cases 450, *Batcu Venkateshwarlu and others versus Public Prosecutor, High Court of A.P.*, (2008) 16 Supreme Court Cases 256, *Lunaram versus Bhupat Singh and others*, (2009) Supreme Court Cases 749, *V.N. Ratheesh versus State of Kerala,*(2006) 10 SCC 617 and *State Represented by Inspector of Police versus Manikandan and others*, Criminal appeal Nos. 1647-1648 of 2008 decided on 28 April 2015 (SC).

07. With regard an objection of lack of cause of action, learned counsel for the applicant has argued that issuance of show cause notice for dismissal gives the applicant a valid cause of action to approach this Tribunal because the threatened termination of services

of the applicant is manifestly prejudicial and without jurisdiction. In such a situation, the applicant cannot be asked to wait for his ouster from service before seeking the Tribunal's protection.

08. On the contrary, learned counsel for the respondents, while relying upon *Harjeet Singh Sandhu* (supra) has argued that while Section 165 empowers Central Government, the Chief of Army Staff and the prescribed officer, as the case may be, to annul proceedings of Court Martial if these are illegal or unjust but a delinquent officer cannot be allowed to escape the consequences of his misconduct only because power of non-confirmation has been used twice and power to proceed under Section 19 read with Rule 14 is available even after such annulment of the Court Martial.

09. Reliance on behalf of the respondents has also been placed upon *Chief of Army Staff versus Major Dharam Pal Kukreti*, (1985) Supreme Court Cases 412, *Executive Engineer Bihar State Housing Board versus Ramesh Kumar Singh*, (1996) 1 Supreme Court Cases 327, *Union of India and another versus Kunisetty Styanarana*, (2006) 12 Supreme Court Cases 28, *Special Director and another versus Mohd. Ghulam Ghouse and another*, (2004) 3 Supreme Court Cases 440, *State of Uttar Pradesh versus Brahm Dutt Sharma and another*, (1987) 2 Supreme Court Cases 179, *Secretary Ministry of Defence versus Prabhash Chandra Mirdha*, (2012) 11 Supreme Court Cases 565 and *Flt. Lt. MPS Godara versus Union of India and others*, OA No. 88 of 2015 decided by the Principal Bench of this Tribunal on 23 February 2015, to contend that show cause notice served upon the applicant cannot be said to be without jurisdiction and at the stage of show cause notice interference by this Tribunal is not warranted.

10. No other or further point has been urged on either side.

11. Facts are not in dispute. The only two questions we are called upon to answer are (i) could the impugned notice under Rule 14 of the Rules be issued to the applicant after the GCM had returned finding of “Non Guilty” in the first instance and after revision?, and (ii) is the

instant Original Application challenging the show cause notice maintainable?

12. Both the above questions have already been answered by the Hon'ble Supreme Court in *Major Dharam Pal Kukrety's case* (supra). The Respondent in this case was a permanent commissioned officer of the Indian Army holding the substantive rank of Captain and the acting rank of Major. He was tried by a GCM on four charges based on a charge-sheet issued by the Commandant, Ordnance Depot, Fort, Allahabad. The GCM announced its finding of "Not Guilty" subject to confirmation. The General Officer Commanding, who was the confirming authority, did not confirm the verdict and sent back the finding for revision. The same GCM reassembled and after hearing both the sides and taking into consideration the observations made by the confirming authority adhered to its original view and once again announced the finding that the respondent was "Not Guilty ". The General Officer Commanding reserved confirmation of the finding on revision by a superior authority, namely, the General Officer Commanding in-Chief, who did not confirm the finding on revision of the GCM. The charges made against the respondent, the finding and the non-confirmation thereof were promulgated as required by Rule 71 of the Rules. Thereafter, under Rule 14 of the Rules, a show cause notice was served upon the respondent stating that the Chief of the Army Staff had carefully considered the facts of the case as also the respondent's defence at the trial and being satisfied that a fresh trial by a court-martial for the said offences was inexpedient and he was of the opinion that respondent's misconduct as disclosed in the proceedings rendered his further retention in the service undesirable. The respondent was called upon by the said notice to submit his explanation and defence, if any, within twenty-five days of the receipt of the said notice. Along with the said notice copies of abstracts of evidence and the court-martial proceedings were forwarded to the respondent. The respondent challenged the notice in the High Court of Allahabad by way of a writ petition which was allowed. When the

matter was taken to the Hon'ble Supreme Court, similar pleas as in the instant case were raised. However, turning down the pleas of the respondent, the Hon'ble Supreme Court ruled as under:

> *"15. **This being the position, what then is the course open to the Central Government or the Chief of the Army Staff when the finding of a court-martial even on revision is perverse or against the weight of evidence on record? The High Court in its judgment under appeal has also held that in such a case a fresh trial by another court-martial is not permissible. The crucial question, therefore, is whether the Central Government or the Chief of the Army Staff can have resort to Rule 14 of the Army Rules. Though it is open to the Central Government or the Chief of the Army Staff to have recourse to that Rule in the first instance without directing trial by a court-martial of the concerned officer, there is no provision in the Army Act or in Rule 14 or any of the other rules of the Army Rules which prohibits the Central Government or the Chief of the Army Staff from resorting in such a case to Rule 14. Can it, however, be said that in such a case a trial by a court-martial is inexpedient or impracticable? The Shorter Oxford English Dictionary, Third Edition, defines the word "inexpedient" as meaning "not expedient; disadvantageous in the circumstances, unadvisable, impolitic". 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".***
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> ***16. 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 the Army Staff would be to take action against the Respondent under Rule 14, which he did. The action of the Chief of the Army Staff in issuing the impugned notice was, therefore, neither without jurisdiction nor unwarranted in law."***

13. On behalf of the applicant reliance has also been placed on *Harjeet Singh Sandhu* (supra) to support his contention that the impugned show cause notice is colourable exercise of power as the confirming authority has been driven by whim, capriciousness and obstinacy than reason and fairness. True, in the case of *Harjeet Singh Sandhu* (supra) it has been observed that there may be cases wherein the exercise of power under Section 19 may be vitiated as an abuse of

power and "Refusal to confirm is a power to be exercised, like all other powers to take administrative decision, reasonably and fairly and not by whim, caprice or obstinacy". Nonetheless, in this case it has also been held that exercising power under Section 19 read with Rule 14 consequent upon court martial proceedings being annulled for the second time because of having been found to be illegal or unjust, the exercise would not suffer from lack of jurisdiction. Part of the judgment relevant to the controversy herein involved is as follows:

> *"36. In illustrations (iii) and (iv) also, in our opinion, the exercise of power under Section 19 read with Rule 14 cannot be excluded. The finding and sentence of the court martial are ineffective unless confirmed by the confining authority. The Act does not contemplate that the finding and sentence of a court martial must necessarily be confirmed merely because they, the COAS and any prescribed officer, as the case may be, to annul the proceedings have been returned for the second time. Section 165 vests power in the Central Government of any court martial if the same are found to be illegal or unjust. The delinquent officer cannot be allowed to escape the consequences of his misconduct solely because court martial proceedings have been adjudged illegal or unjust for the second time. The power under Section 19 read with Rule 14 shall be available to be exercised in such a case though in an individual case the exercise of power may be vitiated as an abuse of power. The option to have a delinquent officer being tried by court martial having been so exercised and finding as to guilt and sentence having been returned for or against the delinquent officer by the court martial for the second time, on just and legal trial, ordinarily such finding and sentence should be acceptable so as to be confirmed. Power to annul the proceedings cannot be exercised repeatedly on the sole ground that the finding or the sentence does not meet the expectation of the confirming authority. Refusal to confirm is a power to be exercised, like all other powers to take administrative decision, reasonably and fairly and not by whim, caprice or obstinacy. Exercising power under Section 19 read with Rule 14 consequent upon court martial proceedings being annulled for the second time because of having been found to be illegal or unjust, the exercise would not suffer from lack of jurisdiction though it may be vitiated on the ground of 'inexpediency' within the meaning of Rule 14(2) or on the ground of abuse of power or colourable exercise of power in a given case."*

14. It shall stand repetition here that after the GCM held the applicant not guilty of the charge, on revision, the Confirming Authority, did not refuse confirmation of the finding of "Not Guilty", rather reserved confirmation by a superior authority i.e. the General Officer Commanding-in-Chief (GOC-in-C), Western Command who did not confirm the said finding and decision to serve the impugned

notice upon the applicant has been taken by the Chief Of Army Staff (COAS) after taking into consideration of the entire record including the evidence contained in the proceedings of the GCM. This should suffice to negative the contention based on abuse or colourable exercise of power or the impugned notice being an outcome of whim, capriciousness and obstinacy than reason and fairness, more so when the applicant has not been able to show any circumstances of personal, professional or any other type of bias against any of the authorities.

15. Any comment on the materials relied upon by the Chief of Army Staff to form an opinion that retention of the applicant in service is rendered undesirable, is thoughtfully refrained from, for such a comment may, in all probability, prejudice case of either side at the time of final disposal of the matter by the competent punishing authority. This also renders unnecessary a reference to the judgments relied upon by the applicant pertaining to appreciation of evidence by the appeal court hearing an appeal against acquittal.

16. judgments relied upon on behalf of the respondents are unequivocal that court's interference at the stage of show cause notice may be justified only if the notice is *ex facie* a "nullity" or totally "without jurisdiction" in the traditional sense of that expression - that is to say, that even the commencement or initiation of the proceedings, on the face of it and without anything more, is totally unauthorised and it is shown that the authority issuing the notice has no power or jurisdiction, to enter upon the enquiry in question. In all other cases, it is only appropriate that the individual concerned should avail of the alternate remedy and show cause against the action proposed in the notice before the authority concerned. In the event of an adverse decision, it is always open to him, to assail the same before an appropriate forum.

17. On the issue of the promotion of applicant to the rank of Colonel (Time Scale), relevant records have been scrutinized by us in

detail. The applicant has been granted promotion to the substantive rank of Colonel (Time Scale) with effect from 20 December 2012 vide *Annexure A-8*. The applicant during this time was on Disciplinary & Vigilance ban since the finding of the GCM had not been promulgated. The Discipline and Vigilance ban was lifted post promulgation of finding of "Not Guilty" and the applicant was granted promotion to the substantive rank of Colonel (Time Scale) on the authority of IHQ of MoD Letter No. 37852/Col (TS)/2014/I/MS-84 dated 15 July 2014 (Annexure A-8). This only shows that applicant's conduct therefor would have been found to be acceptable as per laid down rules on the date his promotion was due. This circumstance, therefore, cannot be read to mean that it amounted to exoneration of the applicant of the misconduct he has been charged with.

18. In the result, the Original Application is found to be meritless and is dismissed.

19. The interim stay granted by this Tribunal on 02 July 2015 is hereby vacated.

20. No costs.

[**Lt. Gen. Munish Sibal**]
Member (A)

[**Justice M.S. Chauhan**]
Member (J)

22 **September 2017**

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