AFR
Reserved
Court No.1

ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW

T.A.No. 1194 of 2010

Wednesday, this 1st day of March, 2017

Hon'ble Mr. Justice D.P.Singh, Member (J)
Hon'ble Air Marshal Anil Chopra, Member (A)

Sri Ram Singh Pradhan, son of late Shri Gopal Singh Pradhan, resiudent of Pradhan Niwas Kunraghat, Gorakhpur.

…….. Petitioner

By Legal Practitioner Shri R. Chandra, learned counsel for the petitioner.

Versus

1. Union of India, through Secretary Defence, Ministry of Defence, New Delhi.

2. Chief of the Army Staff, Army Headquarters, DHQ. P.O. New Delhi-110011

3. Additional Directorate General, Discipline and Vigilence (DV-3), Adjutant General's Branch Army Head Quarters, D.H.Q. P.O. New Delhi-110011

4. The Commanding Officer, 2/1 GR C/o 56 APO

…… Respondents

By Legal Practitioner Shri Asheesh Agnihotri, learned counsel for the respondents, assisted by Maj Soma John, OIC legal Cell.

ORDER

Per Justice D.P.Singh, Member (J)

1. Being aggrieved with the impugned order of dismissal dated 23.07.2003, the petitioner preferred a writ petition bearing No. 48101 of 2003 in the Hon'ble High Court of Judicature at Allahabad, which has been transferred to this Tribunal in pursuance to the provisions contained in Section 34 of the Armed Forces Tribunal Act, now renumbered as T.A.No. 1194 of 2010.

2. We have heard Shri R.Chandra, learned counsel for the applicant and Shri Asheesh Agnihotri, learned Standing Counsel appearing for the respondents, assisted by OIC Legal Cell Major Soma John and perused the record.

3. The petitioner joined the Indian Army as Infantry Soldier Clerk (GD) GP 'Y' GR on 12.07.1977. During the period between 10.05.1996 and August 1997, he was posted as Head Clerk in Branch Recruiting Office, Alwar. He was promoted to the rank of Subedar Clerk vide order dated 05.12.1997, which was given effect from 01.12.1997 (Annexure-2). However, on 02.01.1998 he was asked by the Commanding Officer orally to remove the stars as he was reverted to the post of Naib Subedar. It has been submitted by learned counsel for the petitioner that though the promotion order was passed in writing but no order of reversion in writing was ever passed or communicated to the petitioner by the Commanding Officer. The petitioner was

escorted to Jaipur by a team of two army personnel, where they reported to 61(1) Sub Area on 06.01.1998.

4. It has been submitted by learned counsel for the petitioner that the petitioner was kept detained by the interrogating team for about one and a half years and adopting third degree methods of torture, he was compelled to make a confessional statement with regard to his involvement in recruitment racket. It is submitted that originally the petitioner was tortured and interrogated for espionage, but when nothing was found to prove his involvement, he was framed in recruitment racket. A Court of Inquiry was held on 24.12.1999 with regard to recruitment racket at Alwar wherein he was identified as main accused. During Court of Inquiry, the petitioner appeared as witness No. 13. It is submitted that during Court of Inquiry, none of the witnesses had raised any allegation or made incriminating statement against the petitioner. In spite of the fact that there was no material against the petitioner, he was served with a show cause notice dated 13.06.2003, contained in Annexure-4 to the petition. The petitioner submitted his reply to the said show cause notice, denying the charges leveled against him, vide his response dated 20.06.2003, copy of which has been filed as Annexure-5 to the petition. Submission of learned counsel for the petitioner is that in spite of the fact that there was no material against the petitioner, he was dismissed by the impugned order dated 23.07.2003 in pursuance to the provisions

contained in Section 20 (1) of the Army Act without holding any regular Court Martial proceedings, that too after 26 years of colour service rendered by him. It has been submitted that relying upon the findings of Court of Inquiry and alleged confessional statement of the petitioner, the impugned order of dismissal has been passed without holding a regular inquiry or Court Martial proceedings in order to spoil his unblemished service career, that too on unfounded facts, showing his involvement in recruitment racket, when nothing was found against him during investigation in the alleged espionage case. The sum and substance of the arguments advanced by learned counsel for the petitioner is that: (i) by oral order, the petitioner could not be reverted to the post of Nb/Sub, more so when he alongwith others was promoted to the post of Subedar with due approval by the competent authority vide order dated 05.12.1997 (Annexure-2); (ii) the show cause-notice issued to the petitioner is based on his alleged confessional statement dated 12.01.1998, which was recorded under duress during detention period.

5. In reply to show cause notice, the petitioner has categorically stated that he was interrogated between 06.01.1998 and 12.01.1998 in the Interrogation Room with blind-folded eyes. It is stated in his reply (Annexure-5) that the petitioner was kept in 61 Cavalry for one and a half years without leave and on 07.06.199 he was dispatched to Station Headquarters Alwar for Court of Inquiry, which was carried out on

27.12.1999 and onwards, and thereafter dispatched to his parent Unit on 09.10.2000.

6. While challenging the order of dismissal in pursuance to the power conferred under Section 20 (1) of the Army Act read with Army Rule 17, learned counsel for the petitioner has assigned the following reasons:-

(1) The petitioner was tortured and beaten by Investigating Team with blind-folded eyes. To avoid further beating and get relief from further beating and miseries, he signed the confessional statement.

(2) The petitioner was posted at Branch Recruiting Office, Alwar as Head Clerk. He was not empowered to enroll the recruits. The recruitment was done by a Board of Officers, of which the petitioner was not a member. His role was only to assist documentation. The Recruitment Officer Col MS Dhillon and clerical staff present during Court of Inquiry have not deposed against the petitioner.

(3) The petitioner was promoted to the rank of Subedar from 01.12.1997. On 02.01.1998 he was ordered to go 61 Sub Area Jaipur in connection with investigation in certain espionage case by the Commanding Officer. On reverted post, even after completion of five years, nothing was found against the petitioner. When nothing was found against the petitioner in

espionage case, he was tagged to recruitment racket. No evidence came forward with regard to petitioner's involvement in recruitment racket during Court of Inquiry.

(4) Het Singh, who was the main witness, was not produced during Court of Inquiry.

(5) As many as 12 witnesses were examined during Court of Inquiry, but none of them had deposed against the petitioner. Col MS Dhillon made a statement that there was no recruitment racket. None of the witnesses examined during Court of Inquiry supported or corroborated the alleged confessional statement of the petitioner.

(6) Loan taken by the petitioner for construction of his house has got no relation with the recruitment racket; it is at the behest of Het Singh that the petitioner was brought into dispute, though the statement of Het Singh was not recorded.

(7) The bare statement of witness No. 1 Ram Autar that he offered Rs.15000/- to petitioner Nb/Sub Clerk SRS Pradhan for his enrolment has not been corroborated by any other witness; the same has specifically been denied by the petitioner in his statement recorded during Court of Inquiry. Thus, no case is made out against the petitioner. The alleged transaction of money was not of the time when the petitioner is alleged to have been involved in the recruitment racket.

(8) During Court of Inquiry, neither any material has been collected nor it could have been used against the petitioner since the procedure contained in Army Rules has not been followed.

7. On the other hand, learned counsel for the respondents vehemently argued that the petitioner was involved in recruitment racket and he was found guilty during Court of Inquiry, in consequence whereof the order of dismissal was passed. The petitioner had taken illegal gratification while working at Alwar between 05.10.1995 and 05.10.1997. Since he had not completed 28 days' of service on the post of Subedar, which is a mandatory requirement in view of Army Instruction 84/68, he was reverted to the post of Naib Subedar. It is not disputed that he was attached to 61 Cavalry (supra) and was dispatched to Alwar to attend Court of Inquiry, where he remained attached till October, 2000. Thus, at Alwar the petitioner remained attached from June 06, 1999 to October, 2000 during Court of Inquiry. It is alleged that the petitioner was the prime accused of recruitment racket and by order dated 30.10.2000, disciplinary action was initiated against him. In pursuance to Court of Inquiry, the Summary of Evidence was ordered which could not be completed. As such the Chief of Army Staff came to the conclusion that the petitioner is an undesirable person, hence by order dated 23.07.2003, he was dismissed from service. It is submitted that the reply submitted by the petitioner was placed before the Chief of Army Staff, who, after considering the

same, ordered for dismissal of the petitioner on administrative side. In para 23 of the counter affidavit, it has been categorically stated that the order of dismissal was passed on the basis of recommendations/findings of the Court of Inquiry alone. For convenience, para 23 of the counter affidavit is reproduced as under:

> *"23. The contents of paragraph no. 24 of the writ petition are baseless, misconceived and false hence denied. In reply it is stated that the order of dismissal was passed on the basis of recommendations/ findings of the Court of Inquiry alone. As a matter of fact, a chain of evidence alongwith admission of guilt contained in the confessional statement made by the petitioner abundantly establish the involvement of the petitioner in malpractice involving acceptance of illegal gratification from the candidates for recruitment into the Army. This was to an extent where even the security of the State could have been seriously jeopardized.*
>
> *That based on the directions of the Court of Inquiry, a Summary of Evidence was ordered, which could not completed as the case had become time barred and it was impracticable to commence the GCM.*
>
> *Consequently, thereupon the case was considered by the COAS, who in his opinion came to the conclusion that further retention of the petitioner in the Army was undesirable. The petitioner was therefore served with a show cause notice. In terms of Army Act Section 20(1) read with Army Rule 17. The petitioner gave his reply. This reply was placed before the Chief of the Army Staff, who having duly considered the same, found that the explanations given to the show cause notice by the petitioner notice were unsatisfactory. The Chief of the Army Staff therefore, considered the dismissal of the petitioner from service, which order was communicated to the petitioner vide Army Headquarters letter no. PCB/30689/Disp/Gen/Dv-3(A) dated 17 July, 2003."*

Subject to aforesaid backdrop and arguments advanced by learned counsel for the parties, we proceed to consider the impugned order on merit.

REVERSION

8. Admittedly, the petitioner was promoted to the post of Subedar by order dated 05.12.1997. In para 9 of the petition, it is stated that the petitioner was reverted orally by the order of the Commanding Officer. In reply to para 9 of the petition, it is stated by the respondents in the counter affidavit that the order of reversion was passed in terms of Army Instructions 84/68. However, no such order has been placed on record by which it could be ascertained that the petitioner was reverted in terms of Army Instructions 84/68 on account of non-completion of mandatory unbroken period of 28 days of service. In the absence of any specific reply with regard to 'oral order' passed by the Commanding Officer reverting the petitioner and depriving him of the stars of Subedar, it may be inferred that the contents of para 9 of the petition are correct.

9. A perusal of the promotional order dated 05.12.1997 passed by OIC Records shows that the petitioner alongwith others was promoted to the rank of PA Sub on merits. For convenience, the said promotional order, contained in Annexure-2 to the petition, is reproduced as under:

"Tele: 01792
Extn-209

REGD/SDS
Abhilekh 1 Gorkha Rifles
Records 1st Gorkha Rifles
Substhu(Shimla Hills)-173206

623/2/166/RA-1
211 Cr
(Unit concerned)

5 Dec. 97

Promotion: JCOs (CLKs.)

1. Promotion to the rk of PA Sub in respect of the u/s Nb Sub/Clks is approved and ordered wef 01 Dec. 97 provided they fulfil the conditions shown in appex out :-

(a) Jc-60270 of Nb Sub/clks
Anil Kumar, 1/1 GR
(b) JC- 002082 D Bg Sub/Clk
Sri Ram Singh Pradhan, 2/1 GR
(c) JC-602092N Nb Sub/clks
Sher Bahadur Pun, Records 1 GR

2. Assumption Court as per AI B4/ be may please be two to this office on completion of 28 days consecutive period in the unpaid acting rk of sub, so that the occurrence may be pub in record part 11 order.

3. Before effecting promotion please ensure JCOs are meeting para 3(a)(i) to (111) of AO 20/81 criteria and render cart thereto.

4. I. please ack.
11. Ack vide 1025/A 17 Dec. 97.

Sd/- illegible
(Gurmit Singh)
Captain
Offg Senior Record Officer
For OIC Records

Encls: one
At/
BR/FR
32"

10. Once the petitioner was promoted in writing and permitted to discharge duties on the post of Subedar alongwith two other persons, the respondents seem to be *functus officio* to revert him by oral order. Regular promotion done on the higher post could not have been set

aside by oral order affecting the petitioner's civil rights, that too by singling him out for undisclosed reasons. Three persons were promoted i.e Anil Kumar Kunwar, Sri Ram Singh Pradhan (petitioner) and Sher Bahadur Pun, then why the petitioner alone has been reverted orally, is not understandable.

11. Moreover, the Commanding Officer being the subordinate authority to the Army Headquarters seems to lack jurisdiction to exercise such powers, that too orally. In view of above, the order of reversion of the petitioner to the lower rank under the teeth of Army Instructions (supra) seems to suffer from the vice of arbitrariness and is hit by Article 14 of the Constitution of India, hence not sustainable.

COURT OF INQUIRY

12. Though the petitioner has been dismissed exercising the powers on administrative side under Section 20(1) of the Army Act, but as admitted by the respondents in the counter affidavit, the ground for dismissal is the finding recorded by the Court of Inquiry. The Court of Inquiry is held under Rules 177, 178, 179 and 180 of the Army Rules, 1954, according to which a person, whose reputation and career is involved, must be present during Court of Inquiry and he should also be permitted to cross-examine the witnesses. Photostat copy of the Court of Inquiry, which is handwritten, has been filed alongwith an affidavit dated 16.01.2017. A perusal of the Court of Inquiry shows that the petitioner's statement was recorded as witness No. 13. He has been duly examined by the court, wherein he denied his involvement in

any recruitment racket. Except **Witness No. 1 Parmanand and Witness No. 9 Col MS Dhillon**, none of the witnesses has been cross-examined by the petitioner and the answers given by the witnesses therein do not appear to infer that the petitioner had actually any association with the alleged recruitment racket. So far as other witnesses are concerned, after cross-examination by Court, it has been written- "Questioned by Nb Sub SRS Pradhan" and adjacent to it, the remark is "none" and at bottom with regard to defence, a note has been made with remark "no". In some of the statements, it has been indicated that the petitioner declined to cross-examine the witnesses. The submission of petitioner's counsel seems to be correct that he was not provided reasonable opportunity to cross-examine the witnesses and lead evidence in defence.

13. Even otherwise, our attention has been invited to the statements of witnesses recorded during Court of Inquiry, wherein they have stated that they did not give any money to the petitioner during recruitment process. To quote certain observations during Court of Inquiry:

Witness No. 1 Parmanand stated that he never visited Alwar prior to 30.03.1997. In reply to the question put by the court as to whether he recognized the person sitting in the court by face, his answer was that he did not recognize him and he was meeting him for the first time.

Similar question was put by the court to **Witness No. 2 Maj Mukesh Gupta**, in reply to which he stated that he did not recognize

the person sitting by his side in the court and he also did not see any abnormality in his dealings.

Witness No. 3 Udaivir Singh, Witness No. 4 KMK Tiwari, Witness No. 5 SK Rattan and **Witness No. 6 NK Sathyen VI** recognized the petitioner, stating that he was Head Clerk at BRO Alwar. They denied any such incident having taken place in which the petitioner would have taken any financial gratification by providing illegal assistance to some persons for recruitment.

Witness No. 7 SK Singh too denied having any contact with Het Singh, an MES employee, who is said to be an agent involved in the recruitment racket.

Witness No. 8 Kulsharn Singh also denied having any person of BRO Alwar ever visited him in order to secure recruitment of any candidate by illegal means. He said that he did not know any MES employee by the name of Het Singh.

Witness No. 9 Col MS Dhillon in answer to a question put by the court, denied having ever noticed during his tenure any association of MES employee known as Het Singh with the petitioner. He also denied that there was any recruiting racket in BRO Alwar. This witness was cross-examined by the petitioner with respect to a recruitment rally at Dholpur in which three candidates were caught with fake call letters, which were allegedly provided to them by said Het Singh. The witness replied that he did not remember the incident

and also said that during his tenure, he had not visited Dholpur as he was away on A/L at that time.

Witness No. 10 is Ram Avtar, who was supplying milk to petitioner's family, stated that he offered Rs.15000/- to get him enrolled, which was refused by the petitioner. He denied that he had offered any potential candidate to the petitioner for recruitment. He also denied having come to know about any case in which money was being offered to BRO staff for getting candidates enrolled in Army.

Witness No. 11 is **Indrapal Singh.** He stated that he was running a STD booth. The petitioner had come to his STD booth 3-4 times for making calls. He denied having supplied any candidates for recruitment.

Witness No. 12 Imrat Khan also denied having paid any money or supplied any candidates to the petitioner for recruitment, as he did not know the petitioner.

Witness No. 13 is the petitioner himself, who categorically stated that he did not know anybody, who might have come to him or tried to contact him for recruitment. He also denied having any relation with Het Singh or any transaction having taken place in respect of recruitment. He further stated that he had taken loan of rupees two lacs from his brother-in-law, who was a money lender and was living in Nepal.

14. The only evidence against the petitioner is of **Witness No. 10 is Ram Avtar,** who used to supply milk to petitioner's family. He is said

to have offered Rs.15000/- for his enrollment, that too was refused by the petitioner. Once the petitioner had refused to accept bribe or gratification for enrollment of Ram Avtar, then how and under what circumstances it makes out a case to hold the petitioner guilty and to punish him, is not understandable. There appears to be no evidence on record under Court of Inquiry, which may constitute an offence or misconduct to award major penalty of dismissal. It seems to be a case of non-application of mind, proceeding mechanically against the petitioner. The respondents have not brought on record or informed during the course of hearing as to whether any action was taken against the members of the Recruitment Board. In the circumstances, an inference may be drawn that no action was taken in the matter and no one including the members of the Recruitment Board was punished in the alleged recruitment racket.

15. A question cropped up as to whether while exercising the power of judicial review, it is open to record a finding by the appreciation of evidence. Hon'ble the Supreme Court in a recent case, reported in *2017 (1) SCT 1*, **H.P. State Electricity Board Ltd versus Mahesh Dahiya**, relying upon its earlier judgments observed as under:

> *"On the scope of judicial review, the Division Bench itself has referred to judgment of this Court reported in* ***M.V. BIJLANI VERSUS UNION OF INDIA AND OTHERS 2006 (2) S.C.T. 454: (2006) 5 SCC 88.*** *This Court, noticing the scope of judicial review in context of disciplinary proceeding made following observations in para 25:*

> *"It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."*

25. The three Judge Bench of this Court in ***B.C. CHATURVEDI v. UNION OF INDIA AND OTHERS, 1996 (1) S.C.T. 617: 1995 (6) SCC 749*** *had noticed the scope of judicial review with regard to disciplinary proceeding. Following observations have been made in paras 12 and 13:*

> *"12. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold*

inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof of fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re-appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case." "13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has coextensive power to re- appreciate the evidence or the nature of punishment. In a disciplinary inquiry, the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. ***In Union of India V. H.C. Goel*****, A.I.R. 1964 SC 364,** *this Court held at p. 728 that if the conclusion, upon consideration of the evidence reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could issued."*

Keeping in view the fact that the order of dismissal against the petitioner has been passed without regular inquiry or Court Martial and the petitioner has been punished in pursuance to power exercised under Section 20 (1) of the Army Act, it was incumbent upon the authorities to correctly appreciate the material and findings on record under the Court of Inquiry before passing the impugned order, which apparently has not been done in the present case.

16. The next limb of the question required to be considered is whether relying upon the Court of Inquiry, the order of dismissal, that too when there is no incriminating material on record, could be passed? The procedure with regard to Court of Inquiry has been given in Rules 179 and 180 of the Army Rules 1954. For convenience, the same are reproduced as under:

> ***179 Procedure***.—*(1) The court shall be guided by the written instructions of the authority who assembled the court. The instructions shall be full and specific and shall state the general character of the information required. They shall also state whether a report is required or not.*
>
> *(2) The officer who assembled the court shall, when the court is held on a returned prisoner of war or on a prisoner of war who is still absent, direct the court to record its opinion whether the person concerned was taken prisoner through his own willful neglect of duty, or whether he served with or under, or aided the enemy; he shall also direct the court to record its opinion in the case of a returned prisoner of war; whether he returned as soon as possible to the service and in the case of a prisoner of war still absent whether he failed to return to*

the service when it was possible for him to do so. The officer who assembled the court shall also record his own opinion on these points.

(3) Previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of the court, to all persons concerned in the inquiry except a prisoner of war who is still absent.

(4) The count may put such questions to a witness as it thinks desirable for testing the truth or accuracy of any evidence he has given and otherwise for eliciting the truth.

(5) The court may be re-assembled as often as the officer who assembled the court may direct, for the purpose of examining additional witnesses, or further examining any witness, or recording further information.

(5A) Any witness may be summoned to attend by order under the hand of the officer assembling the Court. The summons shall be in the Form provided in Appendix III.]

(6) The whole of the proceedings of a court of inquiry shall be forwarded by the presiding officer to the officer who assembled the court.

***180. Procedure when character of a person subject to the Act is involved**.— Save in the case of a prisoner of war who is still absent whenever any inquiry affects the character or military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure that any such person so affected and not previously notified receives*

notice of and fully understands his rights, under this rule."

Keeping in view the aforesaid statutory provisions, two things are apparent; first, when character of a person is involved, he should be given full opportunity of being present throughout in the inquiry and of making a statement; and secondly, the presiding officer of the court shall ensure that the person so affected fully understands his rights under this rule.

That apart, under Rule 182 of the Army Rules, it has been provided that proceedings of Court of Inquiry are not admissible in evidence. For convenience, Rule 182 of the Army Rules is reproduced as under:

***"182. Proceeding of court of inquiry not admissible in evidence**.—The proceedings of a court of inquiry, or any confession, statement, or answer to a question, made or given at a court of inquiry, shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial of such person for willfully giving false evidence before that court;*

Provided that nothing in this rule shall prevent the proceeding from being used by the prosecution or the defence for the purpose of cross-examining any witness."

17. A plain reading of Rule 182 of the Army Rules shows that in Court of Inquiry, the initial step is to collect material to proceed against

a person through Court Martial proceedings after recording Summary of Evidence. It may not be used as substantive evidence. The maximum it may be used for the purposes of cross-examination of any witness during proceedings taken thereafter. Accordingly, it appears that the findings recorded under Court of Inquiry could not have been used to dispense with the services of an army personnel in pursuance to power under Section 20 of the Army Act without holding any regular Court Martial proceedings. It was incumbent upon the respondents to satisfy themselves before exercising the extraordinary power conferred by Section 20 of the Army Act from other materials that constitutes serious misconduct and requires to impose a major penalty, which seems to have not been done.

18. Repeatedly the Hon'ble Supreme Court in number of cases held that the Court of Inquiry is only a fact-finding inquiry and is not admissible in evidence. During Court of Inquiry, the person being tried should be given full opportunity to remain present and cross-examine the witnesses. Vide *(1997) 9 SCC 1*, **Maj Gen Inder Jit Kumar versus Union of India,** *(1991) 2 SCC 382,* **Major G.S.Sodhi versus Union of India** and *(1982) 3 SCC 140,* **Lt Col Prithi Pal Singh Bedi etc. versus Union of India and others.**

19. Keeping in view the fact that there is no incriminating evidence against the petitioner recorded during Court of Inquiry (supra), the order of punishment awarded to him relying upon such Court of Inquiry

seems to suffer from serious illegality for two reasons; first, that Court of Inquiry could not have been used as substantive evidence in the absence of any additional material to exercise power under Section 20 of the Act by the authority; and secondly, since the evidence collected during Court of Inquiry does not contain any incriminating material against the petitioner, he could not have been punished on the basis unfounded facts.

20. The impugned order of dismissal has been passed in pursuance to power conferred under sub-section (3) of Section 20 of the Army Act. Army Rule 17 provides the procedure to exercise such powers. For convenience, Army Rule 17 is reproduced as under:

> ***"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 subsection (3), of 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."*

Under Army Rule 17, it is mandatory to inform the particulars of the cause of action against the delinquent and allow reasonable time to state in writing 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. Though under proviso to said Rule, the Chief of the Army Staff has got powers to dispense with show cause notice if in compelling circumstances it is not expedient or reasonably practicable to comply with the provisions of this rule, but in the present case a show cause notice was issued, to which the applicant had submitted his reply. Under Rule 17, it is obligatory on the part of the appropriate authority to inform the particulars of the cause of action, in response to which the charged officer or accused has right to defend himself by assigning reasons. In the present case, the show cause notice dated 13.06.2003 contains the charge with regard to bribery from civilians in the alleged enrollment scandal. For convenience, para 1 of the show cause notice, which is the sum and substance of the allegation against the petitioner, is reproduced below:

> *"1. WHEREAS, the proceedings of a Court of Inquiry convened by Station HQ, Alwar vide convening order No. 500/6/Rect/A dated 24 Dec. 1999 read with your confessional statement dated 12 Jan 1998 recorded by Liaison Unit of 61(1) Sub Area has revealed that at Alwar, between 10 May 1996 and Aug 1997, while working as Head Clerk of the Branch Recruiting Office, Alwar, you obtained for yourself from Shri Imrat Khan, Shri Mishri Lal, Shri Indra Pal and Shri Balram, all*

civilians, gratification of Rs. 80,000/-, Rs. 1,00,000/-, Rs.1,00,000/- and Rs. 70,000/- respectively as a motive on the understanding that you all procure enrolment of the candidates brought by the said Imrat Khan and other civilians for recruitment in Army".

In response to the aforesaid notice, the petitioner had submitted his reply on 20.06.2003 as contained in Annexure-5 to the petition. While submitting the reply, the petitioner has categorically stated that he was kept under custody for one and a half years and during this period he was tortured, humiliated and beaten up by the Investigating team, hence to save his life and pain from torture, he made the confessional statement. But during Court of Inquiry, none of the witnesses has established the allegation contained in the show cause notice. It has been categorically pleaded by the petitioner that the recruitment was basically done by the Board, of which he was not a member. His duty was only to assist the Board with regard to documentation, as admitted by the Recruitment Officer Col MS Dhillon in his statement, hence it is neither justified nor lawful to charge the petitioner for the alleged bribe scandal. The petitioner has dealt with the statements of witnesses including the statement of Ram Avtar while submitting reply (supra). He has also stated that Het Singh, the main witness, who had raised allegation against the petitioner, was not produced during Court of Inquiry. The petitioner took stand that there is no material and charges against him have not been established. No

transaction of money had taken place. For convenience, a portion of reply given by the petitioner is quoted as under:

> *"(e) Before the Court 12 witnesses were examined against me but none of them deposed that I have taken any gratification from recruits. Witness Col MS Dhillan deposed that during recruitment there was no any recruitment racket. No any witness before the court supported or corroborated to the so-called confessional statement. If at all the contents of confessional statement are correct then witness might have supported and deposed against me in court. There is no corroboration evidence to the confessional statement I have performed and performing my duty honestly for the nation. The chit of demand draft which were obtained from me are the back drafts sent by me for the purpose of returned or loan taken by me for the construction of my house. It seems that Mr. Het Singh is the main person who falsely involved me in the case. But the court failed to secure his present and failed to brought him before the court for evidence. Because of this I could not cross-examined. Him. No any candidate of recruitment disposed in the court against me that I have taken any gratification from him or from any other candidates. Witness No. 1 Shri Ramavtar S/o Khubram answered to the question No. 12 by the court that he offered Rs.15000/- to Nb/Sub (Clk) SRS Pradhan to get him enrolled which was refused by Nb/Sub SRS Pradhan, said deposition is on page No.18. STD Boot owner, some times, did not take money from me of Telephone call but he used to took money sometime from none by the said STD bill as we both are having good relations and it at all is want to favour him every time he might have allowed the free calls but that did not happened. No transaction of money even taken place between STD Booth owner and me. Evidence on record is not sufficient to held me guilty as statement of witnesses carry more weightage then statement of that evidence of witness must be supporting to the confessional statement. I am unnecessary became a victim."*

After receipt of aforesaid reply of the petitioner, the impugned order of punishment was passed without applying mind to the grounds raised by the petitioner. The categorical reply submitted by the petitioner that no incriminating material was found against him, has not been taken into account while passing the order of punishment.

Sub-section (3) of Section 20 of the Army Act confers extraordinary powers on the Chief of the Army Staff to dismiss a subordinate employee or officer by serving a notice. For exercise of such extraordinary powers, there must be extraordinary circumstances since a person is divested of his right to defend. The Hon'ble Supreme Court in the case of **Union of India and others versus Harjeet Singh Sandhu, (Appeals (Civil) No.2721 and 2722 of 2001, decided on 11.04.2001),** while considering the power conferred by Section 19 read with Rule 14, whereby the Government has got similar power, held that (i) there should be a satisfaction that retrial by a Court Martial is impracticable; and (ii) that there should be formation of opinion that further retention of the accused in the service is undesirable.

In the case of **Harjeet Singh Sandhu** (supra), the Hon'ble Supreme Court held that if retrial by a Court Martial is rendered impracticable, the extraordinary powers conferred by Section 19 of 20, as is in the present case (emphasis supplied), may be exercised, but that is subject to the condition that the explanation submitted by the

delinquent officer must be considered with reasoned findings. Their Lordships further held that the court would ordinarily not interfere so long as there is some relevant material available on which the action taken can be sustained. The court would presume the validity of the exercise of power but shall not hesitate if the invalidity or unconstitutionality is clearly demonstrated.

Keeping in view the broader principle for exercise of power by the Chief of the Army Staff, it is our considered view that the impugned order of punishment suffers from substantive illegality, invalidity and unconstitutionality, particularly for two reasons; first, sole reliance placed by the Chief of the Army Staff on the evidence and findings recorded during Court of Inquiry is unfounded, there being no incriminating material against the petitioner to prove his guilt; and secondly, in spite of the attention drawn by the petitioner with categorical pleadings that it is a case of no evidence as there is no incriminating material available against him either in the Court of Inquiry or otherwise, the Chief of the Army Staff has not assigned any reason for exercise of extraordinary powers conferred under Section 20 of the Army Act.

21. Apart from above, while submitting reply to the show cause notice, the petitioner has made a statement, showing as to in what manner he has been framed and compelled to confess during course of interrogation. No finding has been recorded by the competent authority

including Chief of the Army Staff on the grounds raised by the petitioner in response to show cause notice. Even precisely, the material objection raised by the petitioner has not been dealt with. Since the petitioner's source of livelihood was being affected, it was constitutional obligation on the part of the authority while passing the impugned order of dismissal to have looked into the grounds raised and dealt with the same by passing a reasoned order. The Hon'ble Supreme Court in **S.N.Mukherjee versus Union of India, (1991) 1 S.C.T 241: AIR 1990 SC 1984,** long back ruled that reason is the pulse-beat of Article 14 of the Constitution and it is from the reason (may be in precise) the affected person should know on what ground he or she has been punished. It is the essential requirement of Rule of Law to disclose reasons, may be in brief, in judicial or quasi judicial orders keeping in view the reply submitted.

22. Shri Asheesh Agnihotri, learned counsel for the respondents while inviting our attention to the case of **Harjeet Singh** (supra), submitted that in the present case, even if regular procedure adopted by Court Martial was dropped and an order under Section 20(3) of the Army Act was passed, the same cannot be said to suffer from any illegality. The argument advanced by learned counsel for the respondents does not seem to be correct; rather for the reasons discussed hereinabove, the case of **Harjeet Singh** (supra) helps the petitioner. The case of **Chief of the Army Staff and others versus**

Major Dharam Pal Kukrety *(1985) 2 SCC 412*, referred to by learned counsel for the respondents, has been considered by the Hon'ble Supreme Court in the case of **Harjeet Singh** (supra), hence it requires no further discussion.

23. Learned counsel for the respondents has vehemently argued that assignment of reason is not necessary in the order of removal or dismissal passed under Section 20(3) of the Act. In support of his submission, he has placed reliance on a case reported in *(2014) 6 SCC 351*, **Union of India and others versus Major S.P.Sharma and others.** It is not disputed that the *pleasure doctrine* can be applied by the President in cases where he is satisfied that in the interest of security of the State, it is not expedient to hold enquiry, but in catena of decisions the Hon'ble Supreme Court has held that even if reason is not assigned in the impugned order, it must be borne out from the record that the stringent procedure under Section 20 of the Army Act is adopted since continuance of any enquiry shall not be in the interest of security of the State. The satisfaction must be recorded and it should be borne out from the record that the authorities have applied their mind with regard to allegations and material on record and they are satisfied that regular enquiry shall not be in national interest; instead the same shall be detrimental to the security of the State. Moreover, the case of **Major S.P.Sharma** (supra) deals with a case wherein from the material available a fraud was established against the person charged. In the

present case, there is no such material on record including COI where there is any whisper against the accused with respect to his guilt. Even in the statement of Ram Avtar (supra), the case set up against the petitioner is only that he offered an amount of Rs.15000/- to the petitioner for his enrollment in the Army, which he refused to accept. Such an act of the petitioner shows his honesty and not his guilty mind.

24. To sum up, before taking action in exercise of extraordinary powers conferred under Section 20 of the Army Act, though no reason may be assigned, but it shall always be incumbent upon the authorities to satisfy themselves with regard to availability of sufficient material while bypassing the regular mode of enquiry or trial. The court may, in appropriate cases, lift the veil to find out whether the order is based on any misconduct of the Government servant. Vide **Ram Ekbal Sharma versus State of Bihar**, *AIR 1990 SC 1368* and **Baikuntha versus C.D.M.O,** *AIR 1992 SC 1020.* In this view of the matter, the cases relied upon by learned counsel for the respondents do not extend any help to them, rather they strengthen the case of the petitioner. Even the case of **Rajvir Singh versus Secretary, Ministry of Defence and others**, relied upon by the respondents does not seem to apply in the facts and circumstances of the present case. In the case of **Rajvir Singh** (supra), the Hon'ble Supreme Court decided the matter with regard to convening order, limitation and competence of convening authority to pass the order. In the present case, as discussed above, the

question cropped up is, whether in the absence of any incriminating material or evidence or allegation constituting misconduct, a person can be punished? Obviously, the answer would be "No".

25. In view of above, our considered opinion is that the petitioner has been punished on unfounded grounds. There is no material on record including the evidence and findings recorded during Court of Inquiry, which may constitute a case of misconduct against him. In the absence of any material, it shall not be open for the respondents to punish an army personnel just to fulfill the command of higher-ups, more so when no member of Recruiting Committee or Board has been called upon to explain his conduct, or charged and punished. It appears that a small fry has been fixed up and actual culprits, if any, spared.

26. For the discussions held above, the OA deserves to be allowed and is hereby allowed. The impugned order of dismissal dated 23.07.2003 is set aside with all consequential benefits. The petitioner shall be deemed to have continued in service in the rank of Subedar till the age of superannuation for the purposes of payment of consequential benefits including arrears of salary and regular pension. However, he shall be entitled to arrears of salary to the extent of 50% only. Let entire benefits in terms of the present order be provided to the petitioner expeditiously, say within a period of four months from today.

There would be no order as to costs.

Let this order be communicated to the respondents by OIC Legal Cell immediately.

Original records submitted by the respondents' counsel shall be returned back to him forthwith by the Registry.

Certified copy of the order be issued to the parties on usual charges within three days.

(Air Marshal Anil Chopra)
Member (A)

(Justice D.P.Singh)
Member (J)

Dated: March, 2017
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