

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP (C) No. 2003/2006**

% Reserved on : 30.09. 2008
Date of decision : 16.10.2008

S. S. SHEKHAVAT

...PETITIONER

Through: Major K. Ramesh, Advocate

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

Through: Mr.A.K.Bhardwaj, Advocate
With Col. I.S. Singh

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

MOOL CHAND GARG, J.

1. The petitioner a Commissioned Officer of Indian Army promoted to the rank of Lt. Col. was served with a charge sheet dated 15.5.1997 containing five charges alleging supply of unhygienic meat to the troops and management by mixing water in the carcasses. The charge sheet read as under:-

"CHARGE-SHEET"

The accused, IC-39285N Maj SS Shekhawat of 890 Animal Transport Battalion, attached to composite Food Laboratory, Lucknow, an officer holding a permanent commission in the regular Army, is charged

with:-

FIRST CHARGE SUCH AN OFFENCE AS IS MENTIONED

ARMY ACT CLAUSE (F) SECTION 52 OF THE ARMY ACT
Section 52 WITH INTENT TO DEFRAUD,

In that he,

At Lucknow, on 05 Mar 95, being the Supervising Officer, 44 Coy ASC (Supply) Butchery, with intent to defraud, accepted carcasses containing water for issuing to the troops, well knowing that it was his duty to ensure that the said carcasses were to be removed and destroyed under his supervision.

SECOND CHARGE AN ACT PREJUDICIAL TO

Army Act GOOD ORDER AND MILITARY DISCIPLINE.
Section 63

(alternative to *in that he,*

First charge) *at Lucknow, on 05 Mar 95, being the Supervising Officer, 44 Coy ASC (supply) Butchery, improperly accepted carcasses containing water for issuing to the troops, well knowing that it was his duty to ensure that the said carcasses were to be removed and destroyed under his supervision.*

THIRD CHARGE SUCH AN OFFENCE AS MENTIONED

Army Act IN CLAUSE (f) of SECTION 52 OF
Section 52(f) THE ARMY ACT WITH INTENT TO DEFRAUD,

In that he,

At Lucknow, on 30 mar 1995, being the Supervising officer, 44 Coy ASC (supply) Butchery with intent to defraud, accepted carcasses containing water for issuing to the troops, well knowing that it was his duty to ensure that the said carcasses were to be removed and destroyed under his supervision.

FOURTH CHARGE AN ACT PREJUDICIAL TO GOOD

Army Act ORDER AND MILITARY DISCIPLINE,
Section 63

(alternative to *in that he,*

Third charge) *at Lucknow, on 30 mar 95, being the Supervising Officer, 44 Coy ASC(Supply), Butchery, improperly accepted carcasses containing water for issuing to the troops, well knowing that it was his duty to ensure that the said carcasses were to be removed and destroyed under his supervision.*

FIFTH CHARGE AN OMISSION PREJUDICIAL

Army Act *TO GOOD ORDER AND MILITARY DISCIPLINE,*

Section 63 *in that he,*

at Lucknow, on 30 mar 95, improperly omitted to ensure that the green weight and dry weight of carcasses were duly entered in the register by the butchery staff, contrary to para 35 of unit SOP dated 01 Mar 95.

2. The petitioner was tried by a General Court Martial (for short GCM), which exonerated him of all the charges by holding him 'Not Guilty'. The confirming Authority instead of confirming the report exercised its right of revision under Section 160 of the Army Act (hereinafter 'Act') and remanded back the matter to the GCM with certain directions. On remand the GCM recorded additional evidence and examined some more documents. However vide order dated 9.3.1999 the GCM reiterated its earlier stand and again declared the petitioner 'Not Guilty' of all the charges. The respondents again decided not to confirm the report of GCM and issued a notice to the petitioner to show cause, as to why administrative action to convey appropriate censure of the GOC in C be not taken against him. The petitioner sent a reply objecting to the proposed action yet the respondents awarded him Censure of 'Severe Displeasure (recordable)' vide

order dated 8.11.99.

3. The petitioner pleads that such a course of action was not available to the respondents having no sanction of law and was a time barred action. It is also his case that the aforesaid punishment came in the way for his promotion to the rank of Lt. Colonel which was delayed considerably. A petition filed by the petitioner challenging the aforesaid action under Section 164(2) of the Army Act was rejected by the Competent Authority vide order dated 22.7.2003. Hence the petitioner filed the present writ petition with the following prayers:

“(i) Issue a writ, order or direction in the form of certiorari to quash the Govt. of India-Ministry of Defence Order dated 22.07.2003 and the censure of Severe Displeasure (recordable) dated 08.11.1999, as also the consequent result of the Selection Board No.4 for promotion to the rank of lieutenant colonel for selection grade declared vide order dated 17 Dec 2002

“(ii) Issue a writ, order or direction in the form of Mandamus to the respondents to hold a Selection Board No.4 for consideration of the petitioner for promotion to the rank of Lt. Col. Selection Grade as a fresh candidate with retrospective original seniority

“(iii) Pass such other and further exemplary orders/directions as may be deemed just and proper by this Hon’ble Court for the consequential benefits of the petitioner in the circumstances of the case.”

4. The show cause notice issued to the petitioner on 6th July, 1999 proposing administrative action reads as under:

*“Mukhyalaya Madhya Raman
Headquarters
Central Command*

19905/5534/A (DV)

Lucknow – 226 002

06 Jul 99

IC-39285N Maj SS Shekhawat
890 AT Bn ASC
att to CFL ASC Lucknow

SHOW CAUSE NOTICE : OFFICERS

1. You were Officer-in-Charge Butchery of 44 Coy ASC (Sup) Type 'E' Lucknow. The following lapses have been observed by the GOC-in-C from the perusal of the proceedings of the Court of Inquiry held to investigate the irregularities and mismanagement in the above mentioned Butchery resulting in issue of deed animals and carcasses containing profuse quantity of water on 30 Mar 95 :-

(a) That you allowed use of water on the carcasses to increase their physical weight contrary to ASC Trg. Vol-II Sec IV and MG ASC Tech Insrtr. 09/89 dated 28 Apr 89, which resulted in burning of 11 kgs. of the Meat on 30 Mar 95.

(b) That you allowed inedible oils to remain attached with the carcasses before issue to troops on 30 Mar 95.

(c) That you managed falsification of document with the help of butchery staff with intent to make wrongful loss to the troops on 30 Mar 95 and subsequent days.

(d) That you failed to ensure correct maintenance of documents by you subordinates in the butchery.

(e) That you had been casual in dealing with the units in the issuance of meat during your tenure and making such remarks as "Nobody could do a thing to us" or words to that effect.

2. In view of the above mentioned lapses on your part, you are hereby afforded an opportunity to explain your conduct on the said counts and to explain as to why administrative action by way of appropriate ensure of GOC-in-C, Central Command not be conveyed to you.

3. You should submit your reply to show cause notice through normal staff channel within 30 days of its receipt failing which it would be assumed that you have no ground to urge against the proposed action and an ex parte decision will be taken.

Sd/XX

Brig 'A', for GOC in C"

5. The impugned order conveying the award of Censure dated

9.11.99 is also reproduced:

“DIRECTIONS OF THE GENERAL OFFICER COMMANDING-IN-CHIEF, CENTRAL COMMAND ON THE REPLY TO SHOW CAUSE NOTICE IN RESPECT OF IC-39285N MAJ SS SHEKHAWAT OF 890 ANIMAL TRANSPORT BATTALION ASC (EX 44 COMPANY ASC (SUPPLY) ATTACHED WITH COMPOSITE FOOD LABORATORY ASC, LUCKNOW

1. The reply to Show Cause Notice dated 23 Jul 99, submitted by IC-39285N Maj SS Shekhawat of 890 Animal Transport Battalion ASC attached with Composite Food Laboratory, ASC Lucknow has been examined in the light of Court of Inquiry proceedings, recommendations of commanders in chain and other documents on record.

2. I agree with the recommendations of General officer Commanding Uttar Pradesh Area.

3. The reply of the officer is unsatisfactory. As Officer-in-Charge Butchery of 44 Company ASC, (Supply) Type ‘E’ Lucknow, he allowed use of water on the carcasses to increase their physical weight contrary to the provisions of ASC Training Volume II, Section IV and MG ASC Technical Instructions of 09/89 resulting in subsequent destruction of 111 kgs Meat on 30 Mar 1995. Besides, the officer allowed inedible oils to remain attached with the carcasses at the time of issue to the troops on 30 Mar 1995. It is also on record that the officer did not ensure proper supervision over his subordinate staff and maintenance of documentation in the butchery which resulted in wrongful loss to the troops on 30 Mar 95 and subsequent days.

4. I, therefore, direct that my ‘Severe Displeasure (to be recorded) be conveyed to IC-39285N Maj SS Shekhawat (ex 44 Company ASC (Supply) Type ‘E’) of 890 Animal Transport Battalion ASC attached to Composite Food Laboratory ASC Lucknow for the above mentioned lapses on his part.

Station: Lucknow

Dated: 08 Nov 99

(Surjit S Sangra)

Lieutenant General

General Officer Commanding-in-Chief.”

6. The petitioner has submitted that once the GCM reiterated its findings 2nd time after revision of the original findings, there

was no other option available to the respondents except to confirm the same. It is stated that the action of the confirming authority instead of confirming the findings so returned by the GCM and taking administrative action against him is illegal and unjustified. It is submitted that the impugned action amounts to a third trial of the petitioner for the same charges by taking recourse to the so-called administrative action for which there is no sanction either under the Act or the Rules framed there under. It is submitted that the action is perverse and is only an example of command bias besides being malicious.

7. The petitioner has also relied upon the following judgments of different High Courts to support his case; (i) *Subedar Surat Singh Vs. UOI* (AIR 1970 J&K 179) (ii) *Dharam Pal Vs. Chief of Army Staff* (1978 Lab IC 9) and (iii) *J.S. Kang Vs. UOI*, 1987 Lab IC 1839.

8. It is also his case that the impugned action is barred by limitation under Section 122 of the Army Act which prescribes limitation of three years from the date of offence or at best from the date of the knowledge of the offence for taking disciplinary proceedings against an accused. In the present case the period of three years commenced with effect from 6th October, 1995 when a Court of Inquiry was instituted and is therefore unsustainable in law. To support the plea of limitation the petitioner has relied upon the case of *Major Radha Krishnan Vs. UOI*, (1996) 3 SCR

837. It is also submitted that the action of the respondents not only suffers from the vice of double jeopardy but is also contrary to the policy letter of the Army Headquarter dated 5th January, 1989 laying down the guidelines for issuing Censure. Reliance has been made upon paragraph 5 of the aforesaid policy letter which reads as under:

“5. Attention is invited to Para 42 of the Regulations for the Army, 1962, which stipulates that persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a Court Martial or prosecuted in a Civil Court. Such cases will not be disposed of summarily or by administrative action.”

It is submitted that it was not a case covered by the aforesaid paragraph.

9. It is stated that even though the award of censure does not debar a person from being considered for promotion, yet it is taken cognizance of while looking to the officer's overall record of service in assessing his performance. A recordable censure writes off the officer's career by such an order. It is thus pleaded that on account of the impugned award Selection Board No. 4 was totally prejudiced against the petitioner and delayed his promotion till 17th December, 2002 though it was due much earlier.

10. On the other hand, the respondents have opposed the petition by filing a counter affidavit. It has been stated that the

petition is completely misconceived, denying that the impugned order issued by the General Officer Commanding is an order which can be termed as unprecedented one way or the other. It has been submitted that every sentence "holding the accused guilty or not guilty" by a Court Martial is liable to be revised in accordance with Section 160 of the Army Act. However, when the proceedings are not confirmed, the competent authority can proceed under section 19 of the Army Act read with Army Rule 14(2). It is submitted that Section 122 of the Army Act is not applicable in the present case being a case of administrative action. It was pointed that the Judgment delivered in the Case of *Radha Krishnan (supra)* stands overruled by the Supreme Court in the case of *UOI Vs. Harjeet Singh Sandhu* reported in *JT 2001 (4) Sc 597*. Besides placing reliance on the Judgment of the Apex Court in *Harjeet Singh Sandhu's case (supra)*, reliance has also been placed upon the decision given by the Apex Court in the case of *Chief of Army Staff and Ors. Vs. Major Dharam Pal Kukrety as reported in [(1985) 2 SCC 412]* and another Judgment delivered by the Apex Court in *Union of India and Ors. Vs. J.S.Sivia, MLJ 1996 SC 3* where award of censure has been held as Custom of Service.

11. It may be appropriate to take note of following paragraphs of the judgment in the case of *Major Dharam Pal Kukrety (supra)* as observed after taking note of the provisions of the Army Act in

"13. It is pertinent to note that under Section 160 the confirming authority has the power to direct a revision of the finding of a court-martial only once. There is no power in the confirming authority, if it does not agree with the finding on revision, to direct a second revision of such finding. In the absence of any such confirmation, whether of the original finding or of the finding on revision, by reason of the provisions of Section 153 the finding is not valid. Therefore, in the case of the Respondent, the finding of the general court-martial on revision not having been confirmed was not valid. Could he, therefore, be tried again by another court-martial on the same charges ? Under Section 121, a person subject to the Army Act, who has been acquitted or convicted of an offence by a court-martial or by a criminal court, is not liable to be tried again for the same offence by a court-martial. It can well be argued that by reason of the provisions of Section 153 under which no finding or sentence of a general, district or summary general court-martial is valid except in so far as it is confirmed as provided by the Army Act a person cannot be said to have been acquitted or convicted by a court-martial until the finding of "guilty" or "not guilty" in his case has been confirmed by the confirming authority. There is, however, no express provision in the Army Act which empowers the holding of a fresh court-martial when the finding of a court-martial on revision is not confirmed.

14. The decisions of three High Courts may be referred to in this connection. The first decision is that of Allahabad High Court in G.B. Singh v. Union of India and Ors. [1973] CrL. L.J. 485. That was a case under the Air Force Act, 1950 (Act No. 45 of 1950). In that case, the officer was found guilty by a general court-martial and sentenced to be dismissed from service. The finding and sentence was referred to the confirming authority. The confirming authority passed an order reserving the same for confirmation by superior authority and forwarded the proceedings to the Chief of the Air Staff. The Chief of the Air staff passed an order not confirming the finding or sentence awarded by the court-martial. The finding and sentence which were not confirmed by the Chief of Air Staff were promulgated after the lapse of about ten months. A fresh general court-martial was convened to retry the officer. On enquiry the officer was informed that

the findings and sentence of the general court-martial had not been confirmed as it was found that the proceedings were not in order and, therefore, there was no valid order convicting or acquitting the officer. After considering the relevant provisions of the Air Force Act and the Air Force Rules, 1969, which are in part materia with the corresponding provisions of the Army Act and the Army Rules, a learned Single Judge of the Allahabad High Court held that the effect of non-confirmation was that though the finding and sentence passed by the court-martial existed, they could not be put into effect unless they had been confirmed under the provisions of the Air Force Act, and that in such a case Section 120 of the Air Force Act (which is in pari materia with Section 121 of the Army Act) barred a second trial by a court-martial. In Major Manohar Lal v. The Union of India and Anr. 1971 (1) S.L.R. 717 the petitioner was tried by a general court-martial which found him not guilty. The General Officer Commanding-in-Chief held the proceedings to be null and void on the ground that one of the members of the court-martial was of the rank of Captain and was thus lower in the rank to the petitioner and no certificate had been recorded by the officer convening the court-martial as required by Rule 40(2) of the Army Rules, that an officer of the rank of the petitioner was not available and he, therefore, ordered a retrial. A learned Single Judge of the Punjab and Haryana High Court held that under the Army Act and the Army Rules, a Captain was eligible to be made a member of a general court-martial and the mere fact that the convening officer did not append the certificate that an officer of the rank of the petitioner was not available did not make the Constitution of the general court martial invalid or the finding given by it to be without jurisdiction or the proceedings of the trial before it to be null and void. He further held that as the petitioner had no say in the Constitution of the general court-martial and had suffered the trial before it, the proceedings could not have been declared null and void on a highly technical ground. The learned Single Judge, therefore, came to the conclusion that the second trial of the petitioner was without jurisdiction and the sentence imposed upon him in consequence of that trial was wholly illegal. In J.C. 13018 Subedar Surat Singh v. The Chief Engineer Projects (Beacon). Co. 56 A.P.O. A.I.R. 1970 J. & K. 17. A Division Bench of the Jammu and Kashmir High Court held that though every finding of a general court-martial, whether of acquittal or of guilt, cannot be recorded as valid unless it is

confirmed by the competent authority, the Legislature could not have reasonably intended that an officer convening a general court martial can go on dissolving such court-martials and reconstituting them ad infinitum until he obtained a verdict or a finding of his own liking. The Division Bench further held that such a position would not only be against public policy and the ancient maxim "nemo debet bis vexari pro una et eadem causa" (no man ought to be twice vexed for one and the same cause) but would also reduce the provisions of the Army Act to a mockery and give an appearance of mala fides. According to the Jammu and Kashmir High Court, in such a case the proper course for the confirming authority would be to refer the case to its superior authority for confirmation.

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".

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."

12. Some of the paragraphs in case of *Harjeet Singh Sandhu* (*supra*) which also throws light on the controversy relevant for our decision are reproduced hereunder:

"35. As the term used in sub-rule (2) of Rule 14 is 'impracticable' and not 'not reasonably practicable', there is more an element of subjectivity sought to be introduced by this provision in the process of arriving at the satisfaction, obviously because the rule is dealing with the satisfaction arrived at by the Central Government or the Chief of the Army Staff, in the matter of disciplinary action on account of misconduct committed by an officer of Army which decision would have been arrived at by taking into consideration the then prevailing fact situation warranting such decision after considering the reports on officer's misconduct.

36. The learned Additional Solicitor General cited a few examples wherein the trial by court martial may be rendered 'impracticable', to wit:-

i) a misconduct amounting to an offence having been rendered not triable by court martial by expiration of the period of limitation prescribed by Section 122;

ii) a court martial having been dissolved after its commencement on account of the number of officers required by the Act to validly constitute a court martial being reduce below the minimum or any other exigency contemplated by Section 117 occurring and the court martial cannot be convened to commence afresh on

account of bar of limitation under Section 122 having come into play;

iii) The Central Government, the Chief of the Army Staff or any prescribed officer having annulled the proceedings of any court martial on the ground that they are illegal or unjust within the meaning of Section 165 of the Act and by that time the bar of limitation under Section 122 having come into play;

iv) Any finding or sentence of a court martial requiring confirmation having been ordered to be revised by order of the confirming authority but in spite of such revision having not been confirmed once again and s subsequent revision of finding or sentence being not contemplated by the provisions of the Act; further a revised (SIC) having been provided by Section 160;

v) A person subject to the provisions of Army Act having secured a stay order from a court of law on commencement of court martial and by the time the stay order is vacated by the court of law the bar of limitation provided by Section 122 coming into play.”

13. The Apex Court answered the aforesaid questions in the following manner:

*“39. 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 confirming authority. The Act does not contemplate that the finding and sentence of a court martial must necessarily be confirmed merely because they have been returned for the second time. 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 exercise 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.

XXX XXX XXX

41. Having thus explained the law and clarified the same by providing resolutions to the several illustrative problems posed by the learned ASG for the consideration of this Court (which are illustrative and not exhaustive), we are of the opinion that the expiry of period of limitation under Section 122 of the Act does not ipso facto take away the exercise of power under Section 19 read with Rule 14. ***The power is available to be exercised though in the facts and circumstances of an individual case, it may be inexpedient to exercise such power or the exercise of such power may stand vitiated if it is shown to have been exercised in a manner which may be called colorable exercise of power or an abuse of power, what at times is also termed in administrative law as fraud on power.*** The misconduct committed a number of years before, which was not promptly and within the prescribed period of limitation subjected to trial by court martial, and also by reference to which the power under Section 19 was not promptly exercised may cease to be relevant by long lapse of time. A subsequent misconduct though less serious may aggravate the gravity of an earlier misconduct and provide need for exercise of power under Section 19. That would all depend on the facts and circumstances of an individual case. No hard and fast rule can be laid down in that behalf. A broad proposition that power under Section 19 read with Rule 14 cannot be exercised solely on the ground of court martial proceedings having not commenced within the period of limitation prescribed by Section 122 of the Act, cannot be accepted. In the scheme of the Act and the purpose sought to be achieved by Section 19 read Rule 14, there is no reason to place a narrow construction on the term 'impracticable' and therefore on availability or happening of such events as render trial by court-martial

impermissible or legally impossible or not practicable, the situation would be covered by the expression-the trial by court-martial having become 'impracticable'.

*42. Exercise of power under Section 19 read with Rule 14 is open to judicial review on well settled parameters of administrative law governing judicial review of administrative action such as when the exercise of power is shown to have been vitiated by mala fides or is found to be based wholly on extraneous and/or irrelevant grounds or is found to be a clear case of extraneous and/or abuse to power or what is sometimes called fraud on power, i.e. where the power is exercised for achieving an oblique end. The truth or correctness or the adequacy of the material available before the authority exercising the power cannot be revalued or weighed by the court while exercising power of judicial review. Even if some of the material, on which the action taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material available on which the action can be sustained. **The court would presume the validity of the exercise of power but shall not hesitate to interfere if the invalidity or unconstitutionality is clearly demonstrated. If two views are possible, the court shall not interfere by substituting its own satisfaction or opinion for the satisfaction or opinion of the authority exercising the power.***

XXX XXX XXX"

14. In the present case one of the point urged by the petitioner was that Army Act does not speak anything about the Award of Censure. However this issue is also governed by their policy letter No.32908/AG/DV-I. The relevant extract of the same is reproduced hereunder:

"5. Censure is awardable where the act, conduct or commission is of minor nature, both in nature and gravity. An offence of serious nature under the Army Act will not be disposed of by award of a censure but will be

*dealt with by initiating a disciplinary action. Attention, in particular, is invited to para 432 of the Regulations for the Army, 1962, which stipulates that "persons committing offences involving moral turpitude, fraud, theft, dishonesty and culpable negligence involving financial loss to public or regimental property must be tried by a court martial or prosecuted in a Civil court. Such cases will not be disposed of summarily or by administrative action". **In view of the foregoing, there should be no occasion for offences involving moral turpitude misappropriation, financial or other. Offences of serious nature being dealt with by award of censure when disciplinary action is possible/feasible.** If for some reason, a case of this nature does come across, where trial is inexpedient or impracticable, administrative action for termination of service of the delinquent person should be initiated.*

6. Cases which are not of minor nature and which do not involve moral turpitude, fraud, theft and dishonesty and where trial by GCM is either not practicable being time-barred or is not expedient due to other reasons may in appropriate cases at the discretion of the GOC-in-C be forwarded to Army Headquarters (D&V Dte) for consideration to award of censure by the COAS, so as to avoid resorting to the extreme step of action under the provisions of Army Act Section 19 read with Army Rule 14."

15. We have heard the submissions on behalf of both the parties and have gone through written submissions and have also examined the original record produced before us regarding the steps taken by the respondents before awarding the impugned punishment to the petitioner.

16. At the outset, it may be mentioned that merely because the proceedings have not been confirmed regarding the findings returned by the Court Martial does not prevent the authorities to take administrative action which according to the respondent has been passed by the Competent Authority after taking into consideration the reply of the petitioner as also after doing detailed analysis of the evidence brought before the GCM including the documents and rule position before sending the matter to the Competent Authority which awarded the punishment of Censure of 'severe displeasure recordable' in the peculiar facts of the case.

17. At this juncture, it would also be relevant to quote few paragraphs from the judgment delivered by the Apex Court in case of *Union of India Vs. Brig. J. S. Sivia (supra)*, where it has been held:

"8. It is obvious from various documents mentioned above that the award of censure is being regulated by 'Customs of the service.' The Army Order dated January 24, 1942 takes us to August 26, 1927 and as such there is reasonable basis to assume that the award of censure is being governed by the "Customs of the service" right from the inception of the Indian Army. That being the position the award of censure is the binding rule of the army service. Section 3 (v) of the Act and Regulations 9 of the Regulations recognize the existence of "customs of the service". The definition of "Commanding Officer" clearly says that in the discharge of his duties as a Commanding Officer, he has to abide by the "customs of the service". Similarly Regulation 9 which lays down the duties of the Commanding Officer, specifically says that the Commanding Officer has to discharge his functions keeping in view the regulations and the 'customs of the service'. From the scheme of the Act, Rules, Regulations and the various Army orders issued from time to time, it is

clearly beyond doubt that the award of censure is a part of the custom of the Army and has the binding force.

9. Even otherwise, keeping in view the status, responsibility and functions of the Chief of the Army Staff, it would be permissible for him under law to issue Army Orders from time to time for the maintenance of discipline and keeping control of the Army which is under his command. A bare reading of Rule 15 shows that it is the satisfaction of the Chief of the Army Staff on the basis of which an Officer can be declared unfit to be retained in the service due to inefficiency. The Chief of the Army Staff can lay down criteria by way of Army Orders to guide his discretion under Rule 15 of the Rules."

18. We have already taken note of the judgments delivered in the case of *Maj. Dharam Pal Kukrety and Harjeet Singh Sandhu (Supra)*. We can now sum up the circumstances and the manner along with the curbs which are there in taking administrative action upon the respondents, in cases where it is decided not to confirm the findings of the Court Martial even on the 2nd occasion but to take administrative action. They can be as follows:

- a) It is not mandatory for the Confirming Authority to confirm the findings of a Court Martial given on the 2nd occasion after remand of the case in exercise of the power exercised by the said authority under Section 160 of the Army Act.*
- b) Unless the findings of the Court Martial holding an accused 'guilty' or 'not guilty' are confirmed, the accused can neither be treated as 'guilty' nor can be treated as 'not guilty' for the offences alleged against him despite his trial.*

- c) *There is no provision under the Army Act or the rules which empowers holding of a fresh Court Martial when the finding of a Court Martial is not confirmed even for the 2nd time.*
- d) *In an appropriate case, where holding of fresh court martial is impracticable or inexpedient; the Chief of Army Staff is authorized to take action against the incumbent under Section 19 of the Act r/w Rule 14 of the Army Rules which empowers the Chief of Army Staff even to terminate the service of the incumbent, of course subject to the order passed by the Central Government in this regard.*
- e) *However, the existence of this power may also include passing of a lesser sentence other than termination of services including award of censure in view of their policy decision (supra) in cases covered by para 5 and 6 thereof.*
- f) *The term used in Sub-rule 2 of Rule 14 which says that a fresh Court Martial is impracticable or not reasonably practicable has an element of subjectivity in arriving at the satisfaction by the Chief of Army Staff/ GOC in C and/or the Central Government as the case may be, regarding the*

misconduct committed by an accused and needs to be reached after taking into consideration the then prevailing facts and other circumstances as also the reports of court martial and the misconduct of the accused.

g) As held in Sandhu's case, situation may arise where it may be impracticable or inexpedient to have a fresh Court Martial within the time prescribed under Section 122 of the Army Act, yet there may be cases where the power vested in the Army Authorities under Section 19 read with Rule 14 cannot be excluded even if the report of the GCM is not confirmed for the 2nd time.

h) Exercise of such power may be vitiated as an abuse of power in a given case. Such power cannot be exercised only because the findings or the sentence does not meet the expectations of the Confirming Authority. The power available to the Authorities under Section 19 read with Rule 14 stands vitiated if it is shown to be a colorable exercise of power or an abuse of power which at times has been described in administrative law as fraud of power, or is only an attempt to enforce will of superior authorities without justification.

- i) *A misconduct committed number of years ago, for which action was not taken promptly within the prescribed period of limitation may also be a factor to vitiate such proceedings. However that would all depend on the facts and circumstances of the case and no hard and fast rules can be laid down in this behalf.*
- j) *Exercise of such power is always subject to judicial review in accordance with the well settled principles of law governing review of Administrative action. As and when it is shown that the exercise of power is vitiated by mala fide and found to be based upon irrelevant consideration, or is found to be a clear case of excess of power or what is sometimes called fraud of power it may be set aside.*
- k) *Normally the discretions so exercised must be presumed to have been rightly exercised and is not to be readily interfered with, even if two views are possible.*
- l) *In terms of policy letter No. 32908/AG/DV-I power of awarding of censure is very much available to the Chief of Army Staff/GCC in appropriate case where it is not practicable or expedient to hold a*

fresh Court Martial; provided the offence alleged to have been committed are offences involving moral turpitude, fraud or dishonesty and must be tried by Court Martial or by a Civil Court.

m) Award of Censure has also been described as Custom of Service even though such award is not part of statute but the award of the same would also be guided by the Policy framed in this regard and is subject to para 5 and 6 of the same.

19. Taking into consideration the pronouncements of the Apex Courts, we have no hesitation but to hold that none of the Judgments cited by the petitioner comes to his rescue. The Judgment in *Radha Krishnan's case (supra)* is an overruled Judgment specifically on the point that Section 122 of the Act bars taking administrative action on the ground of limitation.

20. However the rule position, the policy issued by the Chief of Army Staff with respect to the award of censure and the law laid down in the cases of *Major Dharam Pal Kukrety*, *Harjeet Singh Sandhu* and *J.S. Sivia (supra)* permits the respondents to pass the impugned order despite findings returned by the court martial holding the incumbent not guilty of the charges even for the 2nd time provided such a punishment is justified for the reasons available on record as an administrative action which is also described as "custom of service".

21. Thus the only question which needs consideration by us is as to whether the competent authority had sufficient material before it to arrive at the satisfaction to award such a punishment on administrative side in the facts of the present case and that the case is not a case of exercising fraud in Administrative Action.

22. In this regard we have examined the original records and found that the decision to recommend awarding administrative punishment on the petitioner despite his exoneration by the court martial even after remand is based upon relevant consideration. In the aforesaid case the Deputy Judge Advocate General, after analyzing the evidence including the additional evidence recorded by the GCM on remand of the case has made certain observations which were accepted by the competent authority. These observations explain the process of reasoning in coming to a conclusion to award punishment to the petitioner on administrative side. Those conclusions are:

It would not be out of place to mention here that inspite of unambiguous provisions as contained in para 98 (k) of ASC Regulations, 1950, para 588 of the ASC Trg Vol.-ii, 1968 and explicit stipulation in para 48 of the 'special conditions' to the contract deed, regarding the time and stage when meat dressed is to be considered to have been accepted by the ASC, there appears to be some sort of intentionally created confusion in this regard. The genesis of Supply Depot ASC Lucknow letter No 1413/ST-5 dt 30 Apr 95 (EXh-'00) and HQ UP Area letter No. 251710/Bchy/ST-5 dt 17 May 95 (Exh-'PP') and the evidence of PW-4 before the GCM

on this aspect, do signify the existence of such confusion, which apparently prompted the Court to conclude that the meat dressed would deem to have been accepted only, once it is issued to units and the fact of such issue has been duly entered in IAFS-15200. The above position, if accepted, would be a dangerous preposition, as it would mean that the functionaries of the Supply Depot then, cannot be held responsible for the quality of meat issued to the units. You may, therefore, like to take up the matter with HQ Central Command and Army HQ for issuing clear instructions in this regard which should be in consonance with aforesaid instructions and ASC Regulations, Para 98 (K).

Notwithstanding the above, before parting with the case, I draw your kind attention to the fact that EX-Sub (SKT) RP Sharma, JCO-in-Charge of the said butchery was tried by GCM and found guilty of the offences under Army Act Section 52(f) for such an offence as is mentioned in clause (f) of Section 52 of the Army Act with intent to defraud (on two counts) the particulars averring "that he at Lucknow, on the night of 04/05 Mar 95, being the JCO incharge, 44 Coy ASC (Supply) Butchery, with intent to defraud, allowed M/s Mohd. Tahir, Contractor to put water into the carcasses for issuing to the troops well knowing that it was his duty to ensure that water was not so put into carcasses"; and "that he at Lucknow, on the night on 29/30 Mar 95, being the JCO-in-charge, 44 Coy ASC (Supply) Butchery, with intent to defraud, allowed M/s Mohd Tahir, contractor to put water into carcasses for issuing to the troops, well knowing that it was his duty to ensure that water was not put into carcasses"; which has already been confirmed. **Thus, the factum of water having been put into carcasses on the said dates is averred against the accused, also stood established as deposed by various prosecution**

witnesses and which were so accepted by him and then issued to units for consumption of troops. Therefore, considering the fact that no one should be allowed to perpetrate criminal acts with impunity and that there is no alternative course available under the law in this case, I am of the opinion that after non confirmation of the findings of 'not guilty' by GOC-in-C Central Command, administrative action for the award of appropriate censure of the Army Cdr should be initiated. You may, if agree with me, take necessary action at this appropriate time in this regard."

The aforesaid conclusions were accepted by the competent authority while passing the impugned order.

23. On having gone through the original record which contains the process of reasoning as well as analysis of evidence and reference to relevant instructions which were not followed and have been simply ignored by the Court Martial in returning the findings of Not Guilty, we are of the view that the respondents were justified in forming the opinion to award the punishment of censure to the petitioner in respect of the subject matter of the present writ petition. We are satisfied that in the present case the reasons which have been gone into in the minds of the concerned Army authorities are sufficient to have adopted the course of action in passing the impugned order more so because the Show Cause Memo has been issued about the administrative lapses and lack of supervision on the part of the petitioner. The case is clearly covered by para 6 of the Policy Guidelines for imposition

of Censure in such cases. Even otherwise the office memorandum goes to show that the punishment of “severe displeasure (recordable)” is only a temporary punishment which goes off the record after a period of three years. The petitioner has already been promoted to the next rank after the expiry of three years and thus it has not come in his way for his further promotion.

24. Moreover, the petitioner has approached this Court in the year 2006 while the award of censure was made in 1999. The promotion of the petitioner has been effected in the year 2002. Thus, the petition is barred by the principles of delay and laches.

25. Thus, we do not find any infirmity in the approach of the authorities for exercising our jurisdiction under Article 226 of the Constitution of India. The writ petition is dismissed with no orders as to costs.

MOOL CHAND GARG,J

SANJAY KRISHAN KAUL,J

OCTOBER 16, 2008
sv/dc