



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Writ Petition No. 4413/2017

1. Gvan Bahadur Chhetri

----Petitioners

Versus

1. Union Of India Through Secretary, Ministry Of Defence, New Delhi.
2. The Chief Of The Army Staff, Army Hqs, Sena Bhawan, New Delhi.
3. The General Officer Commanding, 24 Infantry Brigade, C/o 56 Apo.
4. The Commanding Officer, 3 Mechanized Infantry Battalion, C/o 56 Apo.
5. The Commanding Officer, 524 Asc Battalion, C/o 56 Apo.

----Respondents

For Petitioner(s) : Mr. K.K. Shah
For Respondent(s) : Mr. Mukesh Rajpurohit, Dy. SG a/w
Mr. Uttam Singh Rajpurohit
Mr. Govind Chandiramani, Capt. (OIL
Legal), Army.

HON'BLE DR. JUSTICE PUSHPENDRA SINGH BHATI

Judgment

Reportable

Reserved on 29/01/2024

Pronounced on 09/02/2024

1. This petition under Article 226 of the Constitution of India has been preferred claiming the following reliefs:

"It is, therefore, most respectfully prayed that this writ petition may kindly be allowed with costs and by



issuance of an appropriate writ, direction or order the impugned show cause notices dt. 31.03.2017 (annex.7) may kindly be quashed and set aside. It is further prayed that the finding and sentence awarded by the GCM after revision may kindly be directed to be treated as confirmed.

Any other order may also kindly be passed which appears to be just in favour of the petitioner."

2. Brief facts of the case, as placed before this Court by learned counsel for the petitioners, are that the petitioners, while being posted at Army Units located at Bikaner, the General Court Martial (GCM) proceedings were initiated against them by the respondent no.3-General Officer Commanding vide order 26.05.2016. The charge-sheet dated 19.05.2016 was served upon the petitioners, alleging two charges against the petitioners; first charge was under Section 69 of the Army Act, 1950 (*hereinafter referred as to 'Act of 1950'*) along with Section 34 of IPC, and the second charge was under Section 63 of the Act of 1950 alongwith Section 34 of IPC.

2.1. Thereafter, the GCM proceedings were started on 13.06.2016 and continued upto 02.11.2016; after completion of the proceeding, the petitioners were found 'not guilty' of the first charge, while 'found guilty, of the second charge, whereupon the petitioners were convicted and sentenced to undergo rigorous imprisonment for a period of 7 days.

2.2. Thereafter, the aforesaid finding and the conclusion of award of sentence was submitted before the Confirming Authority for confirmation of the same, but the said Authority did not confirm the finding in regard to the first charge and the sentence awarded



pursuant to the GCM proceedings, while sending the proceedings for revision vide order dated 24.12.2016. After the said order, the GCM reassembled on 13.01.2017, and thereafter, upon conclusion of the proceedings, the order dated 16.01.2017 was passed, whereby though the petitioners were again 'not found guilty' of the first charge, but the sentence awarded in regard to the second charge was enhanced from 7 days rigorous imprisonment to 2 months and 29 days rigorous imprisonment, and the sentence was announced on 16.01.2017.

2.3. Thereafter, the aforesaid finding and the enhanced sentence were sent for confirmation and the same were confirmed vide the order dated 08.03.2017; after confirmation, the sentence was promulgated and the extract thereafter was taken at Bikaner by the Units of the petitioners on 27.03.2017 and 18.03.2017 respectively. Subsequently, the respondents issued the impugned show cause notice dated 31.03.2017 under Section 20 (3) of the Act of 1950 read with Rule 17 of the Army Rules 1954 (*hereinafter referred to as 'Rules of 1954'*) for dismissal of the petitioners from services.

2.4. After filing of the instant petition, wherein, the show cause notice dated 31.03.2017 was challenged, the respondents issued yet another show cause notice dated 31.07.2021, which was sought to be brought on record by the petitioners as Annexure-8 with an application for listing of the case for immediate hearing on stay petition.

2.5. Thus, in the above view of the matter, the petitioners are now laying challenge to the aforementioned show cause notices



dated 31.03.2017 and 31.07.2021, claiming the afore-quoted reliefs.

3. Learned counsel for the petitioners submitted that the petitioners were already tried during the Court Martial proceedings for the aforementioned charges, and were found 'not guilty' of the first charge, but were found 'guilty' of the second charge; now, the subsequent impugned show cause notice dated 31.07.2021 is nothing but an act subjecting the petitioners to double jeopardy, which is apparent on face of the record.

3.1. Learned counsel further submitted that the proceedings were confirmed by the competent authority and the sentence was promulgated to both the petitioners, but the subsequent impugned show cause notice dated 31.07.2021 reveals that the conclusion of the proceedings as regards the first charge was not confirmed by the concerned authority. Learned counsel also submitted that as per Section 160 of the Act of 1950, Confirming Authority can send the proceeding back for revision, but thereafter, it has no option, but to confirm the finding and sentence given by the GCM.

3.2. Learned counsel further submitted that as per Section 153 of the Act of 1950, the sentence awarded by the GCM is not valid unless the same is confirmed by the Competent Authority, and if the said authority does not agree with the finding and sentence awarded by the GCM, then it can send the proceedings for revision back to the GCM for consideration afresh. As per learned counsel, in the present case, the revision order was passed and then the Confirming Authority was having no option, other than confirming



the said order, and therefore, the impugned action of the respondents is not justified in law.

3.3. Learned counsel also submitted that the petitioners were held to be 'not guilty' of the first charge, and after more than five months, the Confirming Authority is bent upon to declare the petitioners 'guilty' of the same charge, while taking the impugned action against the petitioners, which is not sustainable in the eye of law being amounting, amongst others, to double jeopardy.

3.4. In support of such submissions, learned counsel relied upon the following judgments:-

- a) *Union of India & Ors. Vs Harjeet Singh Sandhu (2001) 5 SCC 593;*
- b) *Miner Marvel Jelly Vs Union of India (Writ Petition No. 37710 of 1995 decided on 05.09.2001) passed by the High Court of Karnataka.*

4. On the other hand, learned counsel appearing on behalf of the respondents, while opposing the aforesaid submissions made on behalf of the petitioners, submitted that the present petition is not maintainable, as after coming into force the Armed Force Tribunal Act, 2007, the appropriate remedy for the petitioners to challenge the impugned show cause notices lies before the Armed Forces Tribunal (AFT).

4.1. It was further submitted that both the aforementioned offences forming part of the aforesaid charges have been committed by the petitioners, while performing the duties of Co-driver and Driver respectively, of a School Bus at Bikaner Military Station. It was also submitted that the finding on 'not guilty' of the first charge was not justified because the said charge was



pertaining to an offence of heinous nature, and thus, the retention of the petitioners in service was undesirable. Hence, the impugned show cause notice dated 31.03.2017, which is part of an administrative action under the Section 20 (3) of the Act of 1950 was justified in law.

4.2. It was also submitted that as per Rule 70 of the Rules of 1954, the Confirming Authority has the option of confirming as well as non-confirming the findings of the GCM. In furtherance to the same, the confirming authority also has an option to send the proceedings for revision as provided under Section 160 of the Act of 1950, and the said option can be excised only once by the Competent Authority.

4.3. It was further submitted that the Confirming Authority while exercising the powers under Rule 70 of the Rules of 1954 confirmed the finding and sentence on second charge only, and refused to confirm the finding on the first charge, and therefore, the finding and sentence in respect of the first charge was not confirmed and the same was invalid in terms of Section 153 of the Act of 1950.

4.4. It was also submitted that the scheme of the Army Act and Rules makes it amply clear that action of dismissal or removal from service in respect of a person other than an officer, under Section 20 of the Act of 1950 read with Rules 17 of the Rules of 1954 is an administrative action, and therefore, impugned action of the respondents is justified in law.

4.5. In support of such submissions, learned counsel relied upon the following judgments:-



a) *Union Of India & Ors. Vs. Harjeet Singh Sandhu (2001) 5 SCC 593;*

(b) *Sanjay Marutirao Patil Vs. Union of India & Ors. (2020) 13 SCC 474;*

(c) *Chief of Army Staff & Ors. Vs. Major Dharam Pal Kukrety (1985) 2 SCC 412;*

5. In rejoinder arguments, learned counsel for the petitioners submitted that presently the AFT, Jaipur is not functional, as there are no members posted. It was further submitted that sometimes the members came on temporary duty for 5 days in a month and they are not sitting at Jodhpur Bench of the Tribunal since July, 2016, and therefore, in absence of the functioning of the AFT, the present petitioners cannot be rendered remediless.

5.1. Learned counsel also submitted that once the revision has taken place by the GCM and fresh finding/sentence was passed, the same cannot be reviewed again and the Confirming Authority has to confirm the same, and if the Confirming Authority does not wish to confirm the said finding/sentence after revision, then it can submit the proceeding to the Higher Authority for further necessary action.

6. Heard learned counsel of the parties as well as perused the record of the case alongwith the judgments cited at the Bar.

7. This Court observes that the petitioners faced the proceedings in question while being posted at Army Units located at Bikaner, whereafter, the charge-sheet was served upon the petitioners, charging the petitioners as above. After completion of the proceedings in question, the petitioners were found to be 'not guilty' of the first charge, while being found to be 'guilty' of the



second charge, and were ordered to undergo the imprisonment as above.

7.1. Thereafter, the aforesaid proceedings were submitted before the Confirming Authority for confirmation, but the same were not confirmed, and the respondents sent the proceeding for revision vide order dated 24.12.2016. After the said order, the GCM reassembled, and upon reconsidering the matter, passed the order dated 16.01.2017 to the effect that the petitioners are not found guilty of the first charge, but found guilty of the second charge and awarded the enhanced sentence, as mentioned above. Thereupon, the aforesaid sentence was sent for confirmation and the same was confirmed as regards the second charge only. Subsequently, the respondents issued the impugned show cause notice dated 31.03.2017 seeking the explanation of the petitioners regarding the charge in question and as to why their services be not terminated on count of the first charge.

8. This Court further observes that as revealed from the charge sheet dated 19.05.2016, the petitioners were facing two charges and the GCM was initiated in regard to the said charges. The said charges are reproduced as hereunder:

First Charge

Army Act Section 69: COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, read with section 34 of the Indian Penal Code **AGGRAVATED SEXUAL ASSAULT, CONTRARY TO SECTION 10 OF THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012**

In that they, together,

at Bikaner Military Station, on 30 September 2015, with sexual intent, touched the genitals of Miss XYZ, aged 03 years and 05 months daughter of Havildar ABC, thereby committed an aggravated sexual assault.

Second Charge

Army Act Section 63: AN OMISSION PREJUDICIAL TO GOOD ORDER AND read with section 34 of the Indian Penal Code **MILITARY DISCIPLINE**

In that they, together,





at Bikaner Military Station, on 30 September 2015, having come to know that Miss XYZ, aged about 03 years and 05 months had been left out in the school bus, improperly omitted to report the same to the school authorities and parents of the child.

9. At this juncture, it is considered appropriate to reproduce the relevant portions of the judgment rendered by the Hon'ble Apex Court in the case of **Sanjay Marutirao Patil (Supra)** as hereunder-:

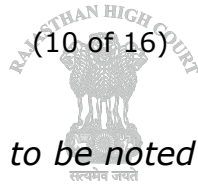


"6.1. At the outset, it is required to be noted that in the present case, the appellant has been dismissed from service by the Commander, Respondent 3 herein, while exercising powers under Section 20 of the Army Act read with Rule 17 of the Army Rules. It is the case on behalf of the appellant that as earlier he was subjected to the Summary Court Martial for the very charges of misconduct for which the order of dismissal has been passed and earlier the Summary Court Martial passed an order of reduction in rank, the subsequent order of dismissal passed by Respondent 3 herein in exercise of powers under Section 20 of the Army Act is bad in law and would be violative of the principle of double jeopardy.

6.2. On the other hand, it is the case on behalf of the Department that power of dismissal under Section 20 of the Army Act vested with the Chief of Army Staff and other officers is an independent power and the two sections, Sections 20 and 71 of the Army Act, are, therefore, mutually exclusive. While considering the submission on behalf of the Department that power under Section 20 of the Army Act is an independent power vested with the Chief of Army Staff and other officers, the decision of this Court in *Harjeet Singh Sandhu [Union of India v. Harjeet Singh Sandhu, (2001) 5 SCC 593 : 2001 SCC (L&S) 891]* is required to be referred to and considered.

.....

6.4. In light of the aforesaid observations and the law laid down by this Court, the order of dismissal dismissing the appellant from service which was passed by Respondent 3 herein in exercise of power under Section 20 of the Army Act and its legality is required to be considered.



8. However, it is required to be noted that at the relevant time, the aforesaid lapses/charges were not considered to be fraudulent in nature and the appellant was tried by Summary Court Martial for the said lapses/charges under Section 63 of the Army Act. Thereafter, the appellant was inflicted with the penalty of reduction in rank. Nothing is on record that the order passed by the Summary Court Martial by which the appellant was reduced in rank was even confirmed by the Chief of the Army Staff in exercise of powers under Section 164 of the Army Act. Therefore, it cannot be said that the order passed by the Summary Court Martial by which the appellant was inflicted with the penalty of reduction in rank attained finality on being confirmed by the competent authority (in the present case the Chief of the Army Staff). **Therefore, considering the observations made by this Court in paras 24 to 27 (more particularly, para 27) in Harjeet Singh Sandhu [Union of India v. Harjeet Singh Sandhu, (2001) 5 SCC 593 : 2001 SCC (L&S) 891], it was open for the competent authority to exercise powers under Section 20 of the Army Act read with Rule 17 of the Army Rules. The power vested with the Chief of the Army Staff and conferred under Section 20 of the Army Act is an independent power available and for which the procedure under Rule 17 of the Army Rules is required to be followed, however, subject to the restrictions as observed by this Court in para 27 in Harjeet Singh Sandhu [Union of India v. Harjeet Singh Sandhu, (2001) 5 SCC 593 : 2001 SCC (L&S) 891]. Meaning thereby that only in a case where the final verdict of guilty or not guilty pronounced by a Court Martial has been confirmed by the competent authority and has attained finality, the power to proceed under Section 19 read with Rule 14 or Section 20 read with Rule 17 shall not be available to be exercised. In other words, so long as a final verdict of guilty or not guilty pronounced by a Court Martial and confirmed by the competent authority as to be effective is not available, the power to proceed under Section 19 read with Rule 14 or Section 20 read with Rule 17, as the case may be, exists and remains available to be exercised.**





Therefore, in the facts and circumstances of the case and in the absence of any confirmation of the order passed by the Summary Court Martial by which he the appellant was reduced to rank, Respondent 3 herein was justified in exercising the power under Section 20 read with Rule 17. At this stage, it is required to be noted that while exercising the power under Section 20 of the Army Act, the only procedure which is required to be followed would be under Rule 17 of the Army Rules, namely, a person who is sought to be dismissed or removed from service 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. In the present case, such an opportunity has been given to the appellant and therefore the proper procedure has been followed before dismissing the appellant from service, in exercise of powers under Section 20 of the Army Act.

9.1. It is also considered appropriate to reproduce the relevant portions of the judgment rendered by the Hon'ble Apex Court in the case of **Union Of India & Ors. Vs. Harjeet Singh Sandhu (Supra)** as hereunder-:

"27. Section 127 was to be found in the Army Act as originally enacted which provided that a person convicted or acquitted by a Court Martial could be tried again by a criminal court for the same offence or on the same facts subject to previous sanction of the Central Government. The provision was deleted by Act 37 of 1992 [The Army (Amendment) Act, 1992]. This deletion is suggestive of the legislative intent to confer finality to the finding and sentence of Court Martial subject to their being confirmed and not annulled. Power to confirm finding and sentence of Court Martial and the power to annul the proceedings on the ground of being illegal or unjust, both provisions read together indicate that the finding and sentence of Court Martial if legal and just have to be ordinarily confirmed but





they may be annulled on the ground of illegality or unjustness. An obligation is cast on the confirming authority to examine the legality and justness of the proceedings before confirming them. Questions of correctness, legality and propriety of the order passed by any Court Martial and the regularity of any proceedings to which the order of Court Martial relates can be raised by way of petition under Section 164. Once the finding and the sentence, if any, have been confirmed, the Court Martial being a Special Tribunal dispensing military justice, it would not be permissible to exercise additionally the power conferred by Section 19 read with Rule 14 and to inflict a penalty thereunder if the Court Martial has not chosen to inflict the same by way of punishment under Section 71. To permit such a course would be violative of the principle of double jeopardy and would also be subversive of the efficacy of the court-martial proceedings, finding and sentence. **So long as a final verdict of guilty or not guilty, pronounced by a Court Martial and confirmed by the competent authority so as to be effective is not available, the power to proceed under Section 19 read with Rule 14(2) exists and remains available to be exercised.**

10. This Court also observes that after conclusion of the disciplinary proceedings/Court Martial proceedings against the petitioners, the sentence in question was ordered, as per Rule 67 of the Rules of 1954 and the said sentence was announced and made subject to the confirmation by the competent authority; thereafter the said finding and sentence was sent for confirmation to the Confirming Authority and the said Authority confirmed the said sentence as per Rule 70 of the Rules of 1954.

The said Rules 67 & 70 are reproduced as hereunder:-





"67. Announcement of sentence and signing and transmission of proceedings.

(1) The sentence together with any recommendation to mercy and the reasons for any such recommendation will be announced forthwith in open court. The sentence will be announced as subject to confirmation.

70. Confirmation.

Upon receiving the proceedings of a general or district court-martial, the confirming authority may confirm or refuse confirmation, or, reserve confirmation for superior authority, and the confirmation, non-confirmation, or reservation shall be entered in and form part of the proceedings."

11. This Court further observes that the Confirming Authority at the time of confirmation may once revise the finding and sentence and send the same for revision under Section 160 of the Act of 1950. This Court also observes that the finding and sentence cannot be held as valid unless it is confirmed by the Confirming Authority as per Section 153 of the Act of 1950.

The said Section 153 is reproduced as hereunder-:

"153. Finding and sentence not valid, unless confirmed.

No finding or sentence of a general, district or summary general, court- martial shall be valid except so far as it may be confirmed as provided by this Act.

160. Revision of finding or sentence.

(1) Any finding or sentence of a court- martial which requires confirmation may be once revised by order of the confirming authority and on such revision, the Court, if so directed by the con- firming authority, may take additional evidence.

(2) The Court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.



(3) *In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the Court shall proceed with the revision, provided that, if a general court- martial, it still consists of five officers, or, if a summary general or district court- martial, of three officers."*

12. This Court also observes that in the present case, the petitioners were not found guilty of the first charge, but were found guilty of the second charge; even after revision order as passed by the Confirming Authority, the Confirming Authority vide order dated 08.03.2017 confirmed the finding and sentence only on the second charge, while finding on the first charge was not confirmed by the Confirming Authority as the same is reflected in Annexure R/1 to the reply filed on behalf of the respondents.

The order dated 08.03.2017 is reproduced hereunder:-

"CONFIRMATION MINUTE BY GENERAL OFFICER COMMANDING, 24 INFANTRY DIVISION THE CONFIRMING AUTHORITY IN GENERAL COURT MARTIAL IN RESPECT OF NUMBER 14934738W (LANCE NAIK) GYAN BAHADUR CHHETRI OF 3 MECHANISED INFANTRY ATTACHED TO 190 MEDIUM REGIMENT

1. *I confirm the finding on the second charge but do not confirm the finding on the first charge (on revision) of the Court.*

2. *I confirm the sentence (on revision) awarded by the Court.*

Signed at Bikaner this Eighth day of March 2017

sd/-

(BS Dhanoa)

Major General



13. This Court further observes that after non-confirmation of the finding on the first charge, the respondents exercised the power under Section 20 of the Act of 1950 read with Rule 17 of the Rules of 1954 in issuing the impugned show cause notice and seeking the explanation of the petitioners as to why their services be not terminated. This Court also observes that only the finding and sentence on second charge was confirmed, which attained finality, but on count of non-confirmation of the finding on the first charge not attaining the finality, the impugned action of the respondents is justified in law.

14. This Court further observes that it is a settled law that if the Confirming Authority does not confirm a finding on any charge, whether such finding is of "guilty" or "not guilty", then the powers under Section 20 of the Act of 1950 read with Rule 17 of the Rules of 1954 shall be available to be exercised by the concerned Authority. In the present case, the Confirming Authority did not confirm the finding on the first charge and therefore, in absence of such confirmation, the respondents have rightly issued the impugned show cause notice under the aforesaid provisions of law.

15. This Court further observes that in an Army Unit, the personnel are required to maintain good conduct and high degree of discipline, while strictly following the Rules and Regulation of the Army. In the present case, the petitioners



were charged for an offence of very serious nature, and looking into the same, the impugned action which was preceded by proper enquiry and disciplinary proceedings, cannot be said to be suffering from any legal infirmity.

16. This Court also observes that the judgment rendered in the case of **Union Of India & Ors. Vs. Harjeet Singh Sandhu (Supra)** cited by learned counsel for the petitioners was considered by the Hon'ble Apex Court in the case of **Sanjay Marutirao Patil (Supra)** and in other judgments, which clearly render the judgment cited on behalf of the petitioners non-applicable in the facts and circumstances of the case at hand.

17. Thus, in light of the aforesaid observations and in view of the afore-quoted precedent laws as well as looking into the factual matrix of the present case, this Court does not find it a fit case so as to grant any relief to the petitioners in the present petition.

18. Consequently, the present petition is dismissed. All pending applications stand disposed of.

(DR. PUSHPENDRA SINGH BHATI), J.

Skant/-