A F R

(SEE RULE 102(1))
ARMED FORCES TRIBUNAL, KOLKATA BENCH

T. A. NO.51/2012

THIS 22ND DAY OF DECEMBER, 2015

CORAM
HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)
HON'BLE LT GEN GAUTAM MOORTHY, MEMBER (ADMINISTRATIVE)

Prakash Chandra Sahoo, S/o Sudam Sahoo,
Village : Bhagawanpur, Post : Naubag,
District : Dhenkanal (Hindal) Orissa.

- Applicant

-versus-

1. Union of India through Secretary, Ministry of Defence, New Delhi-110011
2. Chief of the Army Staff, Army Headquarters, South Block, New Delhi – 110 011
3. Director General of Supplies and Transport Army Hqrs New Delhi-110011
4. Commandant-cum-Chief Record Officer, Army Service Corps Centre (South) & Record, Bangalore

- Respondents

For the petitioner(s) : Miss Manika Roy, Advocate
For the respondent(s) : Mr. Anand Bhandari, Advocate

O R D E R

PER HON'BLE JUSTICE N. K. AGARWAL, MEMBER (JUDICIAL)

This application has been filed by the applicant under Section 14 of the Armed Forces Tribunal Act 2007 (herein after referred as 'Act 2007') claiming relief of quashing the dismissal order dated 15-10-2007 passed by the Commanding Officer No.2, Training Battalion (Supply) and for his reinstatement with all consequential benefits.

2. The brief facts shorn of details are that the applicant was initially enrolled in the Indian Army on 31st July, 2002 and he underwent training in ASC Centre (S) from July 2002 to 23rd December 2003. Though the applicant completed his basic and technical training on 23rd December, 2003, his verification roll shows that no individual by the name of the applicant was staying at the given address. Further, it is alleged that the applicant had produced fake domicile certificate during the time of enrolment. Since the applicant had completed his basic and technical training, the applicant was recommended by the Centre Commandant for his retention in service to avoid loss to the state. Hence along with the recommendations of Officer-in-Charge the applicant's case was forwarded to Integrated Headquarter of MoD (Army) through ASC Records for obtaining the sanction to regularize the fraudulent enrolment. A Court of Inquiry was also ordered by the Commanding Officer No.2, Training Battalion (supply) on 30th December, 2003 to investigate the circumstances under which the applicant produced fake domicile certificate at the time of his enrolment. A Court of Inquiry was conducted and the applicant was tried by a SCM on a charge under Section 44 of the Army Act, 1950 and was awarded 28 days Rigorous Imprisonment in Military Custody and 14 days Detention. But in exercise of the powers vested in Reviewing Officer of SCM under Army Act Sec.162, the authority concerned set aside the sentence of 14 days detention awarded by the Court being illegal and advised that the services of the applicant be terminated administratively under the provisions of Army Rule 13 and asked to obtain audit report from Controller Defence Accounts, Bangalore to regularize the fraudulent enrolment. In view of the Headquarters Southern Command's advise of taking administrative action against the applicant, a show cause notice was served on the applicant by the Commandant, ASC Centre & College on May 3, 2007 under Section 20(3) of the Army Act, 1950 read with Army Rule 17. But as the Show Cause notice was found defective, a fresh show cause notice dated 31-8-2007 was served on the applicant under Army Rule 13(3)(iv) on September 3, 2007 cancelling the previous

show cause notice. On October 15, 2007 on taking the approval of the Commandant, ASC Centre and College, the applicant was discharged from Army Service under Army Rule 13 (3). Subsequently, the applicant had sought for some documents concerning the SCM Trial together with some relevant documents related to his case and those were supplied to him by the Authorities concerned. On 31st January2008 the applicant had submitted a statutory petition to the Chief of Army Staff under Section 164(2) of Army Act, 1950, which according to the applicant should have been decided within a period of one month as laid down in para 365(j) of DSR (Army) 1987-Vol.I, but as the same has not been decided by the Authorities concerned, he filed a Writ Petition (C) No.6203/2008 in the Hon'ble Delhi High Court on 25th August, 2008 seeking a direction to the Chief of Army Staff to decide the Statutory Petition of him under Section 164(2) of the Army Act 1950 and on 26th August, 2008 the Hon'ble High Court of Delhi disposed of the Writ Petition issuing a direction to consider the Statutory Petition of the applicant dated 31-1-2008 within a maximum period of six months from that date. The ASC Records (South) Bangalore vide their communication dated 9th July 2009 had intimated inter alia that the Statutory Petition filed by the applicant had been rejected.

3. Initially the application (OA No.302 of 2011) under Section 15 of the Act of 2007 challenging the SCM proceedings and resultant conviction was filed by the applicant before the Principal Bench of Armed Forces Tribunal, New Delhi, which was subsequently transferred to this Bench of AFT (TA 51 of 2012). During the pendency of aforesaid petition the applicant filed MA No.106 of 2013 for conversion of his case under Section 14 of the Act 2007 confining his challenge to discharge/dismissal order dated 15-10-2007.

4. Ms Monika Roy, the learned counsel appearing on behalf of the applicant submitted despite conviction order passed by the SCM, the applicant was neither terminated, nor dismissed and after suffering the imprisonment with effect from 1st May 2006 to 28th May, 2006, he was allowed to continue in service for more than a year and only thereafter he was served with a show cause notice dated 3rd May 2007 under Section

20(3) of the Army Act, 1950, read with Rule 17, which was properly replied by the applicant. Yet another show cause notice was served on him, which is totally illegal and unfounded. She further submitted that under Article 20(2) of the Constitution of India no person can be taken on the self same cause of action more than once. As the applicant had already inflicted 28 days Rigorous Imprisonment on the same cause of action, the Show Cause notice issued to him for his termination from service on administrative ground tantamount to double jeopardy. It has also been submitted by her that Rule 13(3)(iv) of the Army Rule only prescribes the authority who can discharge the employee and the same is not the substantive provision under which the applicant can be discharged and therefore the Discharge Order which had been passed by the respondents in a slipshod manner, without giving applicant the full opportunity of hearing; without passing a reasoned order and without considering the relevant provisions of the Act 2007 and passed in violation of the principles of natural justice is bad in law and deserves to be quashed.

5. Per contra, Mr. Anand Bhandari, the learned counsel appearing for the respondents placing his reliance upon a Judgement of Hon'ble Supreme Court in **2001(3) SCC 414 (Union of India & Ors vs Sunil Kumar Sarkar)** submitted that two proceedings, i.e. SCM proceeding and proceedings for discharge on administrative ground operate in two different fields though the crime or the misconduct might arise out of the same Act. The Court Martial proceedings deal with the penal aspect of the misconduct while the proceedings under Rule 13 deal with the administrative aspect of misconduct. The two proceedings do not overlap and the applicant's discharge on administrative ground is not violative of Article 20 of the Constitution of India. While supporting the applicant's discharge it was further contended by Mr. Bhandari that the applicant has been rightly discharged invoking Rule 13 and the application is liable to be rejected.

6. We have heard the learned counsel for the parties and perused the paper book.

7. Though in the application several reliefs have been claimed, but the applicant by filing the amendment application and which was allowed by this Tribunal vide order dated 15-5-2014 confined his relief to the extent of challenging his dismissal order and learned counsel also argued to the above extent only. Thus, question remains for our determination are:

a) Whether the applicant's Discharge Order dated 15-10-2007 tantamounts to double jeopardy and is in violation of Article 20 of the Constitution of India as the same has been passed on the same set of facts on which the applicant had suffered conviction in SCM proceeding.

b) Whether the Discharge Order passed under Rule 13(3)(iv) without taking recourse to substantive provision under the Act of 2007, without adhering to the principles of natural justice is bad in law and is liable to be quashed.

8. Before adverting to the facts of the case it would be appropriate to reproduce Article 20(2) of the Constitution of India and Section 121 of the Army Act, 1950 which reads as under :

"20. Protection in respect of conviction for offices –

(2) No person shall be prosecuted and punished for the same offence more than once."

Section 121 of Army Act, 1950 :

"Prohibition of second trial
When any person subject to this Act has been acquitted or convicted of an offence by a court- martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court- martial or dealt with under the said sections."

9 (a) To attract the applicability of Article 20(2) there must be a second prosecution and punishment for the same offence for which the accused has been prosecuted and punished previously. A subsequent trial or a prosecution and punishment are not barred if the ingredients of the two offences are distinct.

(b) The principle of double jeopardy has its roots in the common law maxim "nemo debet bis vexari" a man shall not be brought into danger for

one and the same offence more than once. If a person is charged again for the same offence, he can plead, as a complete defence, his former conviction, or as it is technically expressed, take the plea of autrefois convict. In order to invoke the protection of article 20(2) there must be (i) a prosecution as well as punishment in respect of the same offence before a court of competent jurisdiction or a tribunal; (ii) the proceedings contemplated are in the nature of criminal proceedings; and prosecution in this context would mean initiation of criminal proceedings in accordance with prescribed procedure in the statute.

(c) As regards article 20(2) dealing with double jeopardy what bars is prosecution and punishment after an earlier punishment for the same offence. 'Offence' here means an offence as defined in section 3(37) of the General Clauses Act, 1897, i.e. any act or omission made punishable by any law for the time being in force. Breaches which may loosely be termed "offences" came to our mind, fall within the purview of Art.20. We speak loosely of social offences and of departmental offences, but these lapses cannot obviously come within the purview of the word "offence" within the meaning of the Article 20.

(d) A bare reading of Article 20(2) and Section 121 of the Army Act 1950 would reveal the doctrine of double jeopardy in Article 20(2) is circumscribed only to prosecution culminating in conviction, i.e. imbibes only principle of autrefois convict, and does not imbibe within it principle of autrefois acquit, whereas Section 121 postulates applicability of principles of both autrefois acquit and autrefois convict to court martial or trial by criminal courts, but then restricts insulation to second court martial or a dealing under Sections 80,83,84 & 85 of the Army Act.

10. Where a Government employee has been punished for the same misconduct both under the Army Act as also under the Central Civil Services (Classification and Control and Appeal), Rules, 1965, a question arises whether this would tantamount to 'double jeopardy'. The Hon'ble Supreme Court in Sunil Kumar Sarkar's (supra) case has held that the two

proceedings operate in two different fields though the crime or misconduct may arise out of the same act. The Court Martial proceedings deal with the personal aspect of the misconduct while proceedings under the Central Rules deal with the disciplinary aspect of the misconduct. The two proceedings do not overlap.

11 The High Court of Calcutta in case of **Suresh Chandra vs Himangshu Kumar Roy and Others (AIR 1953 Cal 316; 1951 SCC Online Cal 72)**, has held in para 37 that the word "Prosecution" in Article 20(2) means judicial proceedings before a Court or a legal tribunal. It cannot have reference to departmental or disciplinary proceedings taken for inflicting departmental penalty or punishment on an officer belonging to the department for any misconduct.

12. A Constitution Bench of Hon'ble Supreme Court in the matter of the **Maqbool Hussain vs. State of Bombay 1953 SCR 730** has held :

> "7. **The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in *Reg* v. *Miles*). To the same effect is the ancient maxim "*Nimo Bis Debet Puniri pro Uno Delicto*", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "*Pro Eadem Causa*", that is, for the same cause.**
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> **11.** These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence.
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> **12.** The words "before a court of law or judicial tribunal" are not to be found in Article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein:— "convicted", "commission of the act charged as an

> offence", "be subjected to a penalty", "commission of the offence", "prosecuted, and punished, accused of any offence, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure".

13. Further, the Hon'ble Supreme Court in the matter of **R.P. Kapur vs Union of India** (AIR 1964 SC 787) has observed "if criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant who is convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable."

14. The Hon'ble Supreme Court in **Deputy General of Police vs. S. Samuthiram (2013) 1 SCC 598** has held that acquittal of an employee by a Criminal Court would not automatically and conclusively impact Departmental proceedings.

15. Recently Hon'ble Supreme Court in a case of **Union of India and another vs Purushottam** reported in **[(2015) 3 Supreme Court Cases 779]** has elaborately dealt with the concept of double jeopardy and held the doctrine of double jeopardy in Art.20(2) is circumscribed only to prosecution culminating in conviction i.e. imbibes only principle of autrefois convict and does not imbibe within it principle of autrefois acquit. It further held a fortiori Art.20(2) palpably postulates that prescribed successive punishment must be of criminal character. Thus departmental or disciplinary proceedings, even if punitive and even attracting principle of autrefois convict in amplitude are not outlawed by Article 20(2) of the Constitution of India.

16. The applicant's counsel tried to distinguish Sunil Kumar Sarkar's case (supra) on the basis that the same speaks of administrative action under Central Civil Services (Classification, Control and Appeal) Rules and therefore is not applicable in the facts of the present case. In our opinion the ratio of law as laid down by Hon'ble Supreme Court in the aforesaid case is that Article 20(2) does not bar the administrative action and

therefore it applies with all force in the facts and circumstances of the present case.

17. It is thus clear from above provisions & several pronouncements of Hon'ble Apex Court that the Departmental or Disciplinary Proceedings even if punitive or even attracting the principle of autrefois convict in amplitude are not outlawed by Article 20(2) of the Constitution of India. It is further clear even under Section 121 of the Army Rule 1950 only simultaneous Court Martial and trial by Criminal Court is barred and not the administrative action.

18. From the scheme of the Army Act and rules framed thereunder it is amply clear that actions such as : Dismissal or Removal from service at the pleasure of the President of India under Army Act Section 18 read with Article 310 of the Constitution of India; Termination of Service by Central Government under Army Act Section 19 and read with Army Rules 13-A, 14, 15 & 15 A and Discharge, Dismissal and removal by Chief of Army Staff and other officers, in respect of a person other than an officer, under Army Act Section 20 read with Army Rules 13, 17 are Administrative Action. The applicant was therefore certainly discharged from his service administratively and the respondents were not precluded from passing such administrative order against the applicant on the same or similar cause of action. Therefore, in our considered opinion the applicant's discharge order does not tantamount to double jeopardy within the meaning of Article 20 of the Constitution of India as well as Section 121 of the Army Act.

19 Coming to the next question vide discharge certificate dated 15-10-2007, the applicant had been discharged under Rule 13 (3)(IV) of the Army Rules 1954. As per Section 22 of the Army Act any person subject to this Act may be retired, released or discharged from the service by such authority and in such manner as may be prescribed. Section 23 mandates for issuance of certificate in favour of such person who is dismissed,

removed, discharged, retired or released from the service. Rule 13(1) and Rule 17 of Army Rules 1954 reads as under :

> **"**13. **Authorities empowered to authorise discharge** – (1) Each of the authorities specified in column 3 of the Table below, shall be the competent authority to discharge from service person subject to the Act specified in column 1 thereof on the grounds specified in Column 2".
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> "17**. Dismissal or removal by Chief of the Army Staff and by other officers**.—Save in the case where a person is dismissed or removed from service on the ground of conduct which has led to his conviction by a criminal court, or a court-martial, no person shall be dismissed or removed under sub-section (1) or sub-section (3), 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".

It appears from Rule 17 that a person can be dismissed or removed even without issuing of show cause notice on the ground of conviction by a Criminal Court or by Court Martial.

20. It is not in dispute that the applicant has been tried by SCM under Section 44 of Army Act and had suffered conviction. The applicant did not challenge the same and the proceedings have now attained finality. Under Rule 17 in such a situation the applicant could have been dismissed or removed even without issuing of show cause notice. However, pursuant to advice of the HQ Southern Command the applicant has been served with a show cause notice earlier by mistake under Section 20 read with Rule 17 and since there was some error another show cause was issued under Rule 13(3)(vi). The same was replied by the applicant and thereafter the impugned discharge order has been issued. Rule 13(3)(iv) reads as under :

> 13(3) "In this table "Commanding officer" means the officer commanding the crops or department to which the person to be

discharged belongs except that in the case of junior commissioned officers and warrant officers of the Special Medical Section of the Army Medical Crops, the "commanding officer" means the Director of the Medical Service, Army, and in the case of junior commissioned officer and warrant officers of Remounts, Veterinary and Farms, Crops, the "Commanding Officer" means the Director Remounts, Veterinary and Farms.

TABLE

Category	Grounds of discharge	Competent authority to authorise discharge	Manner of discharge.
Persons enrolled under the Act but not attested	IV. All classes of discharge.	Commanding Officer or officer commanding Recruit Reception Camp, or a Recruiting, Technical Recruiting or Deputy Technical Recruiting Officer.	In the case of persons requesting to be discharged before fulfilling the conditions of their enrolment, the Commanding Officers will exercise this power only where he is satisfied as to the desirability of sanctioning the application that the strength of the unit will not thereby be unduly reduced. Recruits who are considered unlikely to become efficient soldiers will be dealt with under this item.

Certainly under Rule 13 (3)(IV) a recruit who is unlikely to become efficient soldier may be discharged.

21. True the authorities should have mentioned in the show cause notice the substantive provision under the Army Act such as Section 20. However, contents of show cause notice are very clear and unambiguous and non-mentioning of provisions will not render the discharge order invalid which is otherwise valid. In as much as, the same has been passed after clearly disclosing the cause of action, i.e. documents and material which led to applicant's conviction under Section 44 of the Army Act. Even otherwise grant of full opportunity of hearing and of adducing evidence in

the facts and circumstances of the case would have been an empty and useless formality. Rule 13(3)(iv) also does not say so.

22. Considering every aspect of the matter, we are of the considered opinion that the impugned discharge order is neither tantamount to double jeopardy within the meaning of Article 20 of the Constitution of India, as well as Section 121 of the Army Act, nor suffers from any vice or arbitrariness and is perfectly legal and sustainable.

23. For the forging the application deserves to be and is hereby dismissed. No order as to costs.

LT GEN GAUTAM MOORTHY)
Member (Administrative)

(JUSTICE N. K. AGARWAL)
Member (Judicial)

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