FORM NO. 21

(SEE RULE 102 (1))

ARMED FORCES TRIBUNAL, KOLKATA BENCH

TRANSFERRED APPLICATION NO.4 OF 2010

(ARISING OUT OF WRIT PETITION NO. WP 9693(W) OF 2009)

ON TUESDAY THIS DAY 20th JULY, 2010

CORAM

HON'BLE JUSTICE MR. SADHAN KUMAR GUPTA, MEMBER (JUDICIAL)

HON'BLE LT GEN MADAN GOPAL , MEMBER (ADMINISTRATIVE)

APPLICANT(S) COL DEBASHIH MITRA

IC-41994 presently posted as Col. Q(Land) HQ Bengalarea

246 AJC Bose Road, Kolkata 700027

THROUGH MR. PN CHATURVEDI,ADVOCATE

VERSUS

RESPONDENT(S) 1.UNION OF INDIA ,

service through the Secreary,Ministry of Defence ,

Central Government having his office at

South Block, DHQ PO , New Delhi 110011.

2. THE CHIEF OF ARMY STAFF

Having his office at HQ of MOD(Army) South

Block , New Delhi 110011.

3. THE GENERAL OFFICER COMMANDING,

Western Command Chandi Mndir Punjab.

4. THE ADDITIONAL DIRECTORATE GENERAL,

Discipline and Vigilance Adjutant General's Branch

Integrated HQ of MOD (Army) Nirman Bhawan, P.O.

Delhi 110011.

5. GENERAL OFFICER COMMANDING,

Bengal Area , 246, A J C Bose Road,Calcutta.

THROUGH MR DIPAK KUMAR MUKHERJEE &

MR. RAJIB MUKHERJEE , ADVOCATES

JUDGMENT

HON'BLE JUSTICE SADHAN KUMAR GUPTA , MEMBER (JUDICIAL)

1. The petitioner filed the writ petition no. 9693 (w) of 2009 before the Hon'ble High Court at Calcutta . Subsequently due to establishment of this Tribunal the writ petition was transferred to this Bench and was renumbered as T A no. 4 of 2010 .

2. In the petition it is claimed by the petitioner that he joined Indian Army as a Commissioned Officer in 1983. Subsequently he was posted as Commanding Officer of 28D Regiment in June 2004. Said Regiment was situated at Srinagar and the petitioner was in charge of the same being the Commanding Officer . On 22nd August 2006 the petitioner was served with a Memorandum of Charges and he was informed that on the basis of the said charges a General Court Martial was constituted and accordingly he had to face the said proceeding. He was placed on close arrest from August 29, 2006.

3. Said Court Martial Proceeding commenced on and from August 9, 2006 and it was completed on December 17, 2006. The Court Martial Proceeding was presided over by one Brigadier, four Colonel and assisted by a Judge Advocate of the rank of Lt Colonel. Before the said proceeding, both the prosecution and defence witnesses were examined and cross-examined. After completion of the recording of evidence and upon hearing of argument of both the sides, the GCM gave the verdict of 'not guilty' in

respect of all the 12 charges that were framed against the accused/petitioner . It may be pointed out here that the said GCM was constituted on the basis of the allegations of sexual harassment as made by a lady officer viz. Lt Iman . However, the GCM in its finding disbelieved claim of the said Lt Iman and also the statement made by the other witnesses by observing that they all deliberately made false statements.

4. When the decision was placed before the confirming authority, he preferred to return back the said finding to the GCM for revision and directed the GCM to rehear and to reconsider the earlier decision , which according to the petitioner is against the law. On the basis of the said revision order the members of the GCM reassembled and held sitting from February 2007 to March 2007 . After considering the entire evidence on record the GCM, on revision, held the petitioner 'not guilty' in respect of first , third, fourth , sixth, eighth , ninth , tenth, eleventh and twelfth charges. However, the GCM held the petitioner 'guilty' of the fifth charge and passed the sentence of 'reprimand' subject to confirmation. Although the petitioner was not informed about the decision of the confirming authority in writing , but he was informed verbally that the sentence of reprimand was confirmed . However, no decision of the confirming authority in respect of the finding of 'not guilty' concerning the other charges was received from the confirming authority.

5. The petitioner preferred a post confirmation petition on October 20,2007 as per provision of section 162 (2) of the Army Act before the Defence Secretary Ministry of Defence , praying for setting aside the finding of **"guilty"** so far as the fifth charge is concerned and to confirm the finding of 'not guilty' so far as the other charges, as framed in the GCM.

6. Unfortunately the prayer of the petitioner, as made in this respect, was not at all answered and on the contrary on January 28, 2009 he received an order whereby he was transferred to Kolkata. While in his present post, he received a show cause notice on April 4, 2009 under section 19 of the Army Act read with Rule 14 of the Army Rules. The charges which were levelled against him in this show cause notice, were already dealt with in the GCM proceeding . However, the petitioner submitted a reply to the said show cause notice claiming therein that the charges were not sustainable in the eye of law, as the same had already been considered by the GCM and as such the show cause notice , as served upon him , should be quashed. According to the petitioner issuance of show cause notice under section 19 of the Army Act read with Rule 14 of the Army Rules is not only unwarranted in the facts and circumstances of the case but wholly without jurisdiction as this provision can be availed of when the Central Government and Chief of the Army staff are satisfied that the trial of the officer by a Court Martial is

inexpedient or impractical. Since the charges, as mentioned in the show cause notice, were already considered and decided by the GCM, so on the self same ground a further show cause notice cannot be issued in order to remove the petitioner from his service.

7. The petitioner has categorically pointed out to the paragraph 7 of the show cause notice where it was alleged that the petitioner ignored and failed to investigate an earlier complaint made by Lt . Iman against an attempt by Major Sudhir Nowhar of the regiment to molest her . According to the petitioner, Major Sudhir Nowhar faced a Court Martial in respect of the said allegation and the petitioner came to know that in the said GCM, the charges as framed against him were found to be baseless. As such , the petitioner claims that it is palpably clear that the authority issued the show cause notice without application of mind and without considering the fact that actually Major Nowhar was acquitted of the charges in the Court Martial proceeding.

8. The sum and substance of the contention of the petitioner is that when on the basis on the self same allegation he had already been acquitted by a properly constituted GCM , so further administrative action by issuing show cause notice under Rule 14 of the Army Rules is not only impermissible but also against ethics. Administrative action , claims the petitioner , under Rule 14 can only be contemplated

prior to choosing a judicial forum and only when concerning authority comes to a definite finding that trial of the Court Martial is inexpedient and impractical. So far as the present case is concerned that question does not arise at all since already a judicial proceeding in the nature of the GCM which gave its finding.

9. Being aggrieved by and dissatisfied with the issuance of show cause notice, the petitioner preferred this application praying for quashing of the impugned notice dated April 4, 2009 issued under the provision of Section 19 read with Rule 14 of the Army Rules and other consequential reliefs.

10. The application of the petitioner has been contested by the respondent by way of filing affidavit-in-opposition wherein the allegations, as made in the application by the petitioner were denied. According to the respondent authority the charges as framed in the GCM and the charges as mentioned in the show cause notice cannot be said to be same in all respect. They have claimed that show cause notice was issued mainly on the allegation of sexual harassment as was made against the petitioner. It has further been contended by the respondent that there is no bar to issue fresh show cause notice although a person has faced a GCM proceeding on the basis of earlier allegations. They have further claimed that it is always open for the authority to issue such show cause notice when according to them it is impractical or inexpedient to start further Court Martial

proceeding against the petitioner. Since allegations, as made against the petitioner appears to be serious in nature , so the authority decided to issue such show cause notice against the petitioner to consider whether further retention of the petitioner in service will be justified or not. It is the prerogative of the administration to take a decision as to whether a particular person is fit to remain in the service or not and keeping that in mind an enquiry in the form of issuance of show cause notice was issued against the petitioner. Nothing as has yet been decided against the petitioner and it is simply under the process of enquiry . Even the petitioner has submitted his reply in respect of the said show cause notice and as such in all fairness the authority should be allowed to consider the merit of the said show cause notice along with reply as submitted by the petitioner. Since the process is in the midst of the enquiry, it is not permissible for the Court to interfere into the matter and as such the respondent have prayed for dismissal of the application.

11 The petitioner has filed a rejoinder to the affidavit-in-opposition wherein the stand as taken in the application has practically been reiterated. In addition to that it is claimed that the person who signed the verification in the affidavit-in-opposition had no authority in that respect and as such the affidavit-in-opposition, as filed by the respondent should not be taken into consideration . In the rejoinder , the petitioner has claimed that the action taken by the confirming authority regarcing the decision of the GCM was vitiated with extraneous consideration. Some allegations have been made that Lt Iman

was granted an interview by the wife of the said confirming authority. He has further criticized the decision of the confirming authority first to direct for revision in respect of the first finding of the GCM and thereafter in not confirming the finding of the GCM in respect of some of the charges .According to the petitioner the action taken by the confirming authority in directing rehearing of the GCM and subsequent action of not confirming the finding in respect of some of the charges is wholly illegal and as such it should be set aside. It is further claimed by the petitioner in this rejoinder that there was no justification on the part of the concerned authority to issue the show cause notice to the petitioner on the basis of the charges which were already decided by a GCM proceeding, which has got the status of a judicial proceeding as per Section 152 of the Army Act 1950. The petitioner has categorically claimed that the decision of the authority in issuing showing cause notice in his name for the purpose of dismissal from service, is vitiated with illegality and as such it should be held illegal and should at once be quashed .

12. We have heard the submission of the learned Advocates for both the sides. The learned Advocate for the petitioner heavily relied upon the decision reported in AIR 1976 S C 3091 Radha Krishan , Major vs- Union of India and AIR 2000 S. C. 3425 Union of India - vs- Charanjit S Gill as well as on the decision reported in AIR 1985 S.C. 703 Chief of the Army Staff & Ors. - vs- Major Dharam Pal Kukrety

On the other hand Mr Mukherjee mainly relied upon the decision reported in 2001 - AIR(S.C) 1772 Union of India vs- Harjit Singh Sandhu and upon the decision reported in AIR 1985 S.C. 703 Chief of the Army Staff & Ors. vs- Major Dharam Pal Kukrety

13 We have heard the argument as advanced by the learned Advocates for both the sides as well as taken into consideration the decision as relied upon by them. In order to come to a decision so far as this hearing is concerned , it is necessary for us to look into the fact as is involved in connection with this case . Admittedly the petitioner at the relevant time was the Commandant of the Unit. During that period there were some troubles involving the petitioner and one lady officer viz. Lt Iman who practically alleged harassment including sexual harassment by the petitioner. On the basis of such allegation, a GCM Proceeding was started against accused-petitioner who was kept under house arrest during such proceeding. In the said GCM Proceeding evidence was recorded at length.Thereafter the GCM gave verdict of **"not guilty"** in favour of the petitioner in respect of all the charges framed against him . When the matter was placed for confirmation, it appears that the confirming authority preferred to send back the matter to the GCM again for review. On the basis of such direction, the GCM again reassembled and after giving all opportunities to the parties it pronounced verdict of **"not guilty"** in respect of the charges as framed against the accused-petitioner excepting the fifth charge.

So far as the fifth charge is concerned the GCM observed that although it was not established that the accused petitioner used the filthy language meant for Lt Iman , but, however , according to it, the use of such language was held to be unbecoming conduct on the part of the commandant and as such they gave special finding of guilty in respect of the said fifth charge with the observation that the language was not meant for Lt Iman . On the basis of this finding in respect of this fifth charge , a sentence of **"reprimand"** was recommended by the GCM. When the matter was placed before the confirming authority for confirmation , it appears that this finding of guilty in respect of the fifth charge and the recommendation of the GCM was confirmed . However, the competent authority observed that the finding of **"not guilty"** in respect of other charges was not confirmed.Thereafter , the Chief of the Army Staff decided to issue show cause notice to the petitioner asking him to submit reply in respect of the charges as mentioned therein, as to why he should not be dismissed from service. The petitioner , however, submitted a reply in respect of the show cause notice and therafter challenging the validity of such show cause notice preferred to move the Hon'ble High Court in its writ jurisdiction under Article 226 of the Constitution of India praying for quashing of such notice. Said writ petition was transferred to this Tribunal by the order of the High Court as per provisios of the Armed Forces Tribunal Act.

14. At the very outset let us consider the technical objection, as taken in the rejoinder. It appears that in the rejoinder a point was taken that that the person who signed in the verification of the affidavit-in-opposition had no capacity to do that and as such the said A/O should be left out of consideration of this Tribunal . Mr Mukherjee , the learned Advocate for the respondent submitted that the person who verified A/O has got the authority to sign the said verification. At the time of hearing , learned Advocate for the petitioner practically did not seriously press this point. In absence of material to the contrary that the person who signed the verification had no capacity to sign the same , we prefer to accept the contention of Mr Mukherjee that the said person had the authority to sign the same . As such , we reject this contention, as raised by the petitioner .

15. Learned Advocate for the petitioner , during his argument tried to impress upon us that the earlier order of the competent authority in sending back the decision of the GCM for revision was not in accordance with law and the Rules , as prescribed . In this respect he cited several provisions of the Army Act and Rules. However, we do not consider such argument at this stage because of the fact that said decision of the competent authority is not under challenge before us.

Admittedly the petitioner participated in the GCM proceeding when it was sent back on remand for revision and as such this question cannot be taken into consideration by this Tribunal particularly when there is no such prayer to that effect.

15. Learned Advocate for the petitioner further argued that in the rejoinder it has been clearly stated that the review order was passed by the then GOC-in-C having extraneous influence in this respect . He pointed out that in the rejoinder it has been stated that Lt Iman met the wife of the G-O-C in order to create influence upon the said authority . In this respect he has drawn our attention to a newspaper cutting . With due respect to the learned Advocate for the petitioner, we are unable to agree with his contention. All these are wild allegations which have not been substantiated by cogent material . As such we do not attach any importance to this type of allegation at this stage particularly when the same is not subject matter to be decided in connection with this application.

16. We have already pointed out that the cause of action for filing this application arose when the authority issued a show cause notice in the name of the petitioner asking him to submit his explanation in respect of the charges as mentioned in the said show cause notice. In the show cause notice it was also mentioned that on the basis of these charges the petitioner was to explain as to why he should not be dismissed

from service. In this respect, the learned Advocate for the petitioner argued that a bare reading of the charges, as mentioned in the show cause notice will show that all these charges were in fact the subject matter of the GCM that was faced by the accused petitioner earlier. According to him , it is not permissible for the authority to again proceed with those charges in order to get rid of the petitioner from the service when in fact those charges were considered by the GCM proceeding which has the status of judicial proceeding as per provision of section 152 of the Army Act. As against this, the learned Advocate for the respondent argued that the charges as mentioned in the show cause notice and in the GCM Proceeding, are not similar . He emphasized that a specific charge of sexual harassment was made in the show cause notice against the petitioner and as such it cannot be said that the charges which are mentioned in the show cause notice have been decided earlier in the GCM Proceeding. He further argued that even if it is held that those charges are similar, then also as per the provision of law, the concerned authority has got every right to take such steps for dismissal of an unbecoming service officer. In this respect he has heavily relied upon the decision reported in AIR 1985 S.C 703 (Supra)

17. We have considered this submission of the learned Advocates . In order to get a clear picture in this respect, we propose to examine the charges as were framed in the GCM and the charges which were mentioned in the show cause notice. The following charges were framed in the GCM :-

(a) First Charge Army Act Sec. 69

Committing a civil offence, that is to say , using criminal force to a woman with intent to outrage her modesty, contrary to section 354 of the Indian Penal Code.

In that he,

At field, on or about 08 May 2005, during the rehearsal of demonstration on laser training aid, used criminal force to WS-OO980M Lt. Iman of the same Regiment , by putting his hand above her bre. intending thereby to outrage her modesty.

(b) Second charge Army Act Sec. 69

Committing a civil offence , that is to say , using criminal force to a woman with intent to outrage her modesty,contrary to section 354 of the Indian Penal Code

In that he ,

At field, during last week of April 2005, while carrying out the briefs of Annual Test Exercise of the said Regiment used criminal force to WS-00980M Lt Iman of the same Regiment, by placing his hand on her thigh, intending thereby to outrage her modesty.

(c)Third charge Army Act Sec 45

Being an officer behaving in a manner unbecoming of his position and the character expected of him.

In that he ,

At field , between Mar 2005 and May 2005 , when Commanding Officer of the same Regiment , used to hold thigh of WS-008OM Lt Iman with his hands , during physical training parade of the said Regiment

(d) Fourth charge Army Act Sec. 69

Committing a civil offence , that is to say , using criminal force to a woman with intent to outrage her modesty , contrary to section 354 of the Indian Penal Code.

In that he ,

At field, on 18 Jan 2005 , during social function in the Officers Mess of the same Regiment , used criminal force to WS-oo98OM Lt Iman of the same Regiment , by putting his hand on her breast, intending thereby to outrage her modesty.

(e)Fifth charge Army Act Sec. 45

Being an officer behaving in a manner unbecoming of his position and the character expected of him

In that he ,

At field , on the night of 08/09 Jan 2005 , as Commanding officer, when addressing the officers in a conference in the officers mess of the same regiment , called WS-OO98OM Lt Iman of the same Regiment "a whore" and "a prostitute"

(f) Sixth charge Army Act Sec. 63

An Act prejudicial to good order and Military Discipline

In that he ,

At field, on 20 June 2005, in the convening order no. 303401/A dated 20 Jun 2005 of a Court of Inquiry ordered by him, improperly used highly derogatory language, to wit, "to investigate the circumstances under which IC -62518W Capt RS Pundir and WS-00980M Lt Iman were found locked inside room no. T-4 in the Officers Mess accommodation block no. 32 on 19 Jun 2005 and Lt Iman found in compromising state with Capt RS Pundir at about 2345h" , well knowing that no such incident had occurred.

(g) Seventh charge Army Act Sec 45

Being an officer behaving in a manner unbecoming his position and the character expected of him

In that he ,

At field, on 21 Jun 2005 , when Commanding Officer of the same Regiment , wrote a demi official letter to Dr(Mrs) Ashmita Singh , the mother of WS-00980M Lt Iman of the same Regiment , using highly derogatory language, to wit, "your daughter again has got involved with a series of unethical acts which are not acceptable in an

organization like ours . She seems to be hell bent on involving herself with males. Firstly, she told me a lie that she is going to Patna for her mausi's marriage whereas she was proceeding to spend days at Pune with her old colleague Capt Manoj with whom she had affairs earlier . She told a bundle of lies, for this which have been exposed now .Thereafter , yesterday night at 11.30 pm she was found in a male officer's room".

(h) Eighth charge Army Act Sec. 63

An act prejudicial to good order and Military Discipline.

In that he ,

At Jalandhar , between 09 Mar 2006 and 10 Mar 2006, improperly and without authority compelled, IC-63524W Capt K Khanoria of the same Regiment to give a statement to him at his office/residence.

(i) Ninth charge Army Act Sec 63

An act prejudicial to good order and Military Discipline

In that he ,

At Jalandar, on 10 Mar 2006 , coerced IC-62269H Capt GK Pathak of the same Regiment , to give a statement to him mentioning the poor character of WS-00980M Lt Iman of the same Regiment.

(j) Tenth charge Army Act Sec 63

An act prejudicial to good order and Military Discipline

In that he,

At field, between 20 Jun 2005 and 30 Jun 2005 , threatened IC-62518W Capt RS Pundir of the same Regiment , to wit, "I will court martial you, I will ruin your life" or words to that effect , when he objected to the language used in the convening order no. 30340l/A dated 20 Jun 2005k of the unit Court of inquiry as mentioned in the sixth charge.

(k) Eleventh charge Army Act Sec 45.

Being an officer behaving in a manner unbecoming his position and the character expected of him.

In that he ,

At field, on 20 Jun 2005 , as Commanding officer, when called WS-00980M Lt Iman of the same Regiment, in his office, used abusing language to her, to wit, "that she was having a honeymoon there and that she had given her hole to Capt RS Pundir last night.And that her hole was not satisfied by one man and she wanted a different male every night and , therefore, all the jawans of the Regt were in danger since she was a whore roaming around freely in the Regt and needed a new man everyday" or words to that effect.

(I) Twelfth charge Army Act Sec. 45

Being an officer behaving in a manner unbecoming his position and the character expected of him

In that he ,

At field, on 21 June 2005, when Commanding Officer of the same Regiment , during Physical Training Parade, used abusing language to WS-00980M Lt. Iman of the same Regiment, to wit, "she was in habit of sleeping with the man.First she slept with Maj Sudhir Nohwar of 104 AD Bty, then she slept with Capt RS Pundir of 105 AD Bty. And now it was turn of 106 AD Bty" or words to that effect.

18. In the show cause notice following allegations were made against the petitioner and he was directed to give an explanation for the same :-

I. And whereas you, while performing the duties of CO of 28 AD Regt.ordered a Court of Inquiry on 20 Jun 2005 , "to investigate the circumstances under which Capt RS Pundir and Lt.Iman were found locked inside room no.T4 in the offers' Mess accn. Block no.32 and on 19 June 2005 Lt Iman was found in compromising state with Capt Pundir at about 2345 hrs." ,the language being a definite attempt to prejudice the ensuring inquiry.

2.And Whereas this by act of prejudging 'evidence' against Lt Iman at the time of ordering a C of I into the circumstances, you caused harassment to a lady officer, your subordinate. This act is found unbecoming of you as a Commanding Officer.

3. And Whereas you wrote a DO letter to the mother of Lt Iman of 21 Jan 2005 using highly derogatory language to wit ,"Your daughter again got involved with a series of unethical acts which are not acceptable in an org like Army. She seems hell bent on involving with males. Firstly she told me a lie that she is going to Patna for her mausi's marriage,whereas she was proceeding to spend days at Pune with her old colleague Capt Manoj with whom she had an affair earlier. She told a bundle of lies for this which has been exposed now.Thereafter ,yesterday night at 11.30 p.m. she was found in a male offr's room"

4. And Whereas the language used in the DO letter written by you to themother of Lt Iman constitutes incriminating and damning testimony impinging on moral competency expected of a unit Cdr as the DO letter contains statements which had not been found to be correct by ay inquiry at that point of time.

5. And Whereas by writing to DO letter aforesaid to the mother of Lt Iman ,in a manner and using words without abundant caution and unbecoming of an officer, you have caused mental trauma and harassment to the lady officer, your subordinate.

6. And Whereas the fact that you ignored and failed to investigate an earlier complaint made by Lt Iman aforesaid against an attempt by IC-57 118A Major Sudhir Nohwar of your regiment to molest her amounts to inexplicable dereliction or responsibility, unacceptable as conduct of the Commanding officer of a regiment.

7. And Whereas an appreciation of your subsequent actions and words in interacting with the lady officer strongly evince a coloured vision and obnoxious persistent systematic design to cause sexual harassment to the lady officer, your subordinate.

8. And Whereas the above facts were placed before the Chief of the Army Staff who is of the opinion that the documented evidence on record has substantiated your unwarranted and unwelcome obvious sexual harassment of Lt Iman , that further trial by Court Martial is inexpedient and impracticable and considering your action being in gross violation of military ethos, your further retention is not considered desirable due to your overall misconduct as CO 28 AD Regiment which is unbecoming of an officer and a gentleman.

9. Now therefore , in accordance with the directions of the Chief of the Army Staff, you are hereby so informed and on his behalf called upon to submit your defence in writing within 30 days of receipt of this notice as to why your services should not be terminated under the provisions of Army Act Section 19 read with Army Rule 14 failing which it will be presumed that you have nothing to state in your defence and exparte decision will be taken.

19. We have compared the charges with the allegations as made in the show cause notice. It appears to us that the allegation no. 2 as mentioned in the show cause notice is same as that of the charge no. 6 framed in the GCM. Same thing may be said in respect of the allegation no. 3 of the show cause notice. Similarly the allegation nos. 5 and 6 was detailed in the seventh charge as framed before the GCM against the petitioner.

20. As far as the allegation no. 7 as mentioned in the show cause notice, it appears from the document, as filed at the time of hearing, that there was a Court Martial proceeding against Major Sudhir Nohwar . Said person was acquitted in the said Court Martial proceeding. As such, it is clear that so far as the allegation as contained in paragraphs 2, 3, 4, 5, 6 and 7 are concerned all were previously dealt with by a legally constituted GCM , where it was clearly observed that those charges could not be substantiated against the petitioner and also against Major Sudhir Nohwar . It is alleged in the show cause notice that the petitioner ignored and failed to take action on the basis of the complaint of Lt Iman against Sudhir Nohwar. This allegation has no credibility, since on the basis of such allegation Major Nohwar already faced a Court Martial Proceeding and acquitted. So question of petiontioner's ignoring the complaint of Lt Iman does not arise at all. We have already pointed out that on the basis of the self same allegation as mentioned above the petitioner faced Court Martial Proceeding and was acquitted. As per Section 152 of the Army Act a Court Martial

proceeding shall be deemed to be judicial proceeding. Section 152 of the Army Act runs as follows :-

152. Powers of court-martial in relation to proceedings under this Act.

Any trial by a Court martial under the provisions of this Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code (45 of 1960) and the court martial shall be deemed to be a court within the meaning of [sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)].

So when a person has already been tried in a judicial proceeding of the Army Establishment, then we fail to understand as to how the said matter could again be reopened by way of issuing a further show cause notice on the self same allegation. We do not find any acceptable explanation in this respect.

21. Learned Advocate for the respondents argued that show cause notice was issued on the allegation of sexual harassment caused to Lt Iman by the petitioner which is not connected with the earlier GCM proceeding. We are unable to accept this position. If we take into consideration the entire charge sheet on the basis of which the GCM proceeding was conducted then it will appear that in fact the allegations amounted to nothing but sexual harassment. We fail to understand as to how and why the authority is bent upon giving a colourable explanation in this respect.

22. If we look into the allegation no. 9 of the show cause notice then it will appear that it has been stated therein to the effect:-

"And whereas an appreciation of your subsequent actions and words in interacting with the lady officer strongly evince a coloured vision and obnoxious persistent systematic design to cause sexual harassment to the lady officer, your subordinate."

It appears from this allegation that it was mentioned therein that the petitioner was guilty of causing sexual harassment by his subsequent action and words in interacting with the lady officer. It means that the show cause notice suggested that after the GCM proceeding there was further alleged sexual harassment caused to the lady officer. In this respect we can look into the Rule 14 (2) of the Army Rules which reads as follows :-

"When after considering the reports on an officer's misconduct, the Central Government or the Chief of the Army Staff is satisfied that the trial of the officer by a Court Martial is inexpedient or impracticable, but is of the opinion , that the further retention of the said officer in the service is undesirable , the Chief of the Army Staff shall so inform the officer <u>together with all reports adverse to him</u> (emphasis given) and he shall be called upon to submit , in writing , his explanation and defence."

So this Rule clearly provides that under such circumstances all such reports which are adverse to the petitioner, as has been mentioned in allegation no. 7, should be supplied to him. So far as this show cause notice is concerned, it appears that no such incriminating material was supplied to the petitioner. This is clearly against the statutory provision.

23. In paragraph 9 of the show cause notice it was mentioned that when the contents of paragraphs 2 to 8 of the show cause notice were placed before the Chief of the Army Staff, then he formed the opinion that continuation of the petitioner in the Armed Forces was not desirable which resulted in issuance of show cause notice. There is no dispute that the Chief of the Army Staff has such power to issue such type of show cause notice , but the word as used in Rule 14(2) suggests that all the papers connecting the person concerned should be placed before him for taking a final decision . Nothing has been produced before us to show as to what documents were placed before the Chief of the Army Staff in taking such decision . Particularly there is no mention in the show cause notice that the Chief of the Army Staff was informed about the finding of the GCM both original as well as upon revision. There is reason to believe that such finding was not placed before the Chief of the Army Staff and even if it was placed before him, then also it must be said that the Chief of the Army Staff failed to apply his mind properly to arrive at his satisfaction in this respect by way of ignoring the finding of the GCM. We have already pointed out that the Court Martial Proceeding is a judicial

proceeding for all practical purpose as provided in Section 152 of the Army Act 1950.The finding of the GCM , being the highest judicial forum in respect of the army discipline, to our mind cannot be ignored in this way If it is done , then there is no meaning for holding a Court Martial Proceeding.Surely it was not the intention of the legislature to permit the executive authority to do away with the decision of the GCM by a stroke of pen and without assigning any reason whatsoever.

24. The learned Advocate for the respondents argued that there is no bar for the Chief of the Army Staff or the Central Government to take action as per Section 19 of the Army Act read with Rule 14(2) of the Army Rules in dismissing an unwanted officer even though he was found not guilty in the GCM In this respect he has drawn our attention to the order passed by the confirming authority in respect of finding of the GCM on revision, wherein it was mentioned to the effect : -

" I do not confirm the finding of not guilty arrived at in respect of first, third , fourth , sixth, seventh, eighth , ninth , tenth , eleventh and twelfth charges."

According to Mr Mukherjee , since the confirming officer did not confirm the finding of 'not guilty' of the GCM proceeding in respect of those charges , so it is always open for the Chief of the Army Staff to take step for dismissal of the officer concerned as per Rule 14(2).

25. As against this, the learned Advocate for the petitioner argued that when the petitioner was tried in a Court Martial Proceeding and was acquitted, then such type of further punitive action on the part of the authority concerned is not at all permissible. In this respect he has relied upon the decision reported in AIR 1996 S C 3091 (Supra) .We have perused the said decision . It appears that in the said case the Division Bench of the Hon'ble Apex Court held :-

"Where the trial by Court Martial against offences committed by an Army Personal was barred by limitation under section 122 of the Act , the summary procedure for termination under Rule 14(2) of the Rules, cannot be followed on the ground that the trial by Court Martial was, inexpedient or impracticable"

This decision was taken into consideration by the three Judges Bench of the Hon'ble Apex Court in the case of Union of India vs- Harjit SinghSandhu 2001 AIR (S.C) 1772. In paragraph 42 the Hon'ble Judges observed to the effect :-

"We are also of the opinion that Major Radha Krishan's case (1996 AIR SCW 1548; AIR 1996 SC 3091) lays down propositions too broad to be acceptable to the extent it holds that once the period of limitation for trial by Court martial is over, the authorities cannot take action under Rule 14(2). We also do not agree with the proposition that for the purpose of Rule 14(2), impracticability is a concept different from impossibility (or impermissibility , for that matter). The view of the Court in that case should be treated as confined to the facts and

circumstances of that case alone. We agree with submission of the learned Additional Solicitor General that the case of Dharm Pal Kukrety (AIR 1985 SC 703; 111986 Labic 41 ; 1985 Cri.L.J page 913) being a three Judges Bench decision of this Court , should have been placed before the Two Judges Bench which heard and decided Major Radha Krishan's case."

As such we are of the opinion that for the purpose of this hearing the Radha Kishan's case is of no help for the petitioner.

26. Be that as it may, the fact remains that almost on the self same charges which were decided in the GCM Proceeding , the show cause notice for dismissal from service was issued. The learned Advocate for the petitioner argued that it is not permissible as it will cause double jeopardy . According to Mr Chaturvedi , the learned Advocate for the petitioner once the authority decided to proceed against the officer concerned by way of forming GCM and once in the said Court Martial Proceeding the said officer was found "not guilty" then it is not open for the authority to take administrative action to dismiss the said officer from service by way of nullifying the finding as given by the GCM. According to him, it was always open for the authority to take administrative action first instead of proceeding against an officer by way of forming GCM.

27. As against this Mr Mukherjee submits that it is always open for the Chief of the Army Staff or the Central Government to take such administrative action against an erring officer, although he might have been found not guilty in a Court Martial Proceeding in respect of same charge. In this respect he has relied heavily upon the decision reported in AIR 1985 S.C 703 (Supra)

28. We have taken into consideration the submission made by the learned Advocates for both the sides and the decisions which were relied upon by them in support of their respective contention. It is the admitted position that the show cause notice was issued in the name of the petitioner as per provision of Section 19 of the Army Act read with Rule 14 of the Army Rules. Said Rule clearly provides that when the Central Government or the Chief of the Army Staff is satisfied that the trial of the officer by a Court Martial is inexpedient or impracticable , but is of the opinion that the further retention of the said officer in the service is undesirable , the Chief of the Army Staff shall so inform the officer together with all reports adverse to him and he shall be called upon to submit , in writing , his explanation and defence. Plain reading of this provision shows that such a course can be resorted to only when it appears that the trial of the officer by a Court Martial is inexpedient or impracticable . So far as the present case is concerned, it is the admitted position that the trial of the petitioner took place in the GCM and both in original decision as well as the decision on revision the petitioner was found "not guilty" of the charge excepting one for which already punishment for

reprimand was recommended. So the question of trial by Court Martial being inexpedient or impracticable does not arise at all so far as the present case is concerned. Mr Mukherjee , learned Advocate for the respondents argued that the confirming authority did not agree with the finding of 'not guilty', as passed in the GCM. According to him , under such circumstances further Court Martial proceeding in respect of the petitioner is neither expedient nor practicable and as such authority concerned has got every right to take administrative action under Rule 14 of the Army Rules.

29. We regret , we cannot agree with this argument. If the proposition is accepted then it will create a dangerous situation. Whenever a decision of GCM is not upto the liking of the authority, then the authority will in all cases take administrative action of this nature by way of simply mentioning that further trial by Court Martial is inexpedient or impracticable, causing immense hardship to a member of the service. We must not forget that the authority being Chief of the Army Staff is also a creature of the Constitution of a Democratic Country. If this type of action is taken there will be no sanctity of the Court Martial Proceeding which is the highest judicial proceeding so far as the Army Personnel's discipline matters are concerned.

30. Mr Mukherjee further argued by placing reliance upon the Dharampal Kukrety's case in support of his contention that when the finding of not guilty was not

confirmed by the confirming authority, then it is always open for the authority to take administrative action under Rule 14 of the Army Rules. We have perused the said decision. No doubt it is decided in the said decision that it is open for the authority to take administrative action if the finding of the Court Martial authority is not confirmed. It will be beneficial for all of us to quote the relevant portion of the said decision wherein it has been stated :-

"When the finding of a Court Martial even on revision is perverse or against the weight of evidence on record and the finding is not confirmed a fresh trial by another Court Martial is not permissible and therefore in such a case the Central Government or the Chief of the Army Staff can resort to Rule 14 of the Rules and issuing of notice by him is neither without jurisdiction nor unwarranted in law."

31. By citing this decision Mr Mukherjee vehemently argued that the action, as taken by the authority in this respect being legal should not be interfered with by this Tribunal. We have considered the ratio, as decided in the said decision . If we look into the said decision then it will appear that the Hon'ble Apex Court held that such administrative action can only be taken if the finding of the Court Martial is **perverse or against the weight of evidence on record**. (emphasis supplied).So primary condition for taking recourse to Rule 14 under such a case is to come to a conclusion that the finding of the GCM proceeding is **perverse or against the weight of evidence on record**. Nowhere

in the show cause notice we find that the authority concerned mentioned it. Even the confirming authority while not confirming the finding of the GCM did not state any reason as to why he was not accepting the finding of the GCM even on revision . It may be pointed out here that when the Kukrety's case was decided at that time the amendment of Rule 62 did not take place. At that time there was no provision for giving reason by the Court Martial authority while giving a finding . Subsequently in the year 1993 by way of amendment it has been made mandatory to give reason in support of such finding . If a Court Martial authority while pronouncing its finding is to give reason, then when the confirming authority disagrees with such finding, then it is quite natural and desirable that he should also give his reason for his not concurring with the finding of the GCM. Here nothing has been done and nowhere it is mentioned that before issuing such show cause notice the authority concerned was satisfied that the finding of the GCM was perverse or against the weight of evidence on record.Unless or until there is such finding , in our opinion, it is not permissible for the authority to take such administrative action in order to nullify the finding of the Court Martial authority.

32. Considering all such circumstances, as discussed above, we are of the opinion that the issuance of the show cause notice by the authority against the petitioner is nothing but colorable exercise of power in order to frustrate the

decision of the Court Martial authority . There is reason to believe that the authority was bent upon to get rid of the petitioner from the service by any means whatsoever . To our mind , the impugned show cause notice as was issued by the authority in the name of the petitioner is illegal and consequently should be quashed .

33. Mr Mukherjee further argued that since the petitioner already submitted reply to the show cause notice which is under the consideration of the authority concerned, it is not desirable that this Court should interfere in this respect at this stage. He submits that the concerned authority should be allowed to take a decision in this respect by way of considering the allegations as made in the show cause notice and the reply as submitted by the petitioner against it.

34. We , however, do not agree with this argument . Since , in our opinion , the show cause notice as was issued against the petitioner was illegal , so question of permitting the authority to proceed with the matter any further does not arise at all. If such course of action is permitted then it will undoubtedly create anomaly and confusion . As such , we reject this contention of Mr Mukherjee.

35. The learned Advocate for the petitioner argued much regarding the finding of guilty and the imposition of sentence of reprimand upon the petitioner by the Court Martial authority and he prayed that the said finding should also be set aside. We regret, we cannot agree with this contention. The finding in this respect of such authority is not challenged so far as this hearing is concerned. We are to confine our attention in this case only with the issuance of show cause notice and in our above discussion we have already dealt with the matter at length. Since there is no such prayer in respect of the said finding of guilty of the second and fifth charge which were there before the Court Martial proceeding, we refrain ourselves from making any comment to that effect. It is always open for the petitioner to challenge the said finding before an appropriate forum provided it is permissible in law.

36. In the result, the application succeed on contest but without cost.

37. The show cause notice dated 4th April 2009 as per provision of the Army Act under Section 19 read with Army Rule 14 as was issued on behalf of the Chief of the Army Staff, the respondent no. 2 herein, against the petitioner is quashed and the respondents are restrained from taking any action against the petitioner on the basis of such show case notice ,

38. Urgent Photostat copy of this judgment be handed over to both the parties, if applied for.

(Justice Sadhan Kumar Gupta)
Member(Judicial)

I agree

(Lt Gen Madan Gopal)
Member(Administrative)

Later

After the judgment is passed, Mr Mukherjee, the Ld Advocate for the respondents prayed for stay of the judgment for ten weeks. We have considered such prayed and upon consideration, such prayer is rejected.

(Justice Sadhan Kumar Gupta)
Member(Judicial)

I agree

(Lt Gen Madan Gopal)
Member(Administrative)