UNION OF INDIA & ANR. A

v.

V.N. SAXENA

(Civil Appeal No. 2764 of 2007)

APRIL 1, 2008 B

[DR. ARIJIT PASAYAT AND P. SATHASIVAM, JJ.]

Service Law – Termination from Army Service – High Court quashed the order of termination, relying on a judgment passed by Supreme Court – On appeal, held: The foundation of judgment of High Court is the judgment of Supreme Court which was held to be not correct by a larger Bench of Supreme Court – Matter remitted to High Court to decide the matter in view of law laid down in the judgment passed by larger Bench – Army Act, 1954 – Precedent. C D

Services of the respondent were terminated by orders of the Chief of Army Staff. Respondent challenged the order in a writ petition. High Court primarily relying on **Major Radha Krishnan's* **case allowed the writ petition.** E

In appeal to this Court appellant contended that reliance on Major *Radha Krishnan's* **case was misconceived as the judgment therein was held to be not correctly decided, by a three Judge Bench in** **Harjeet Singh Sandhu's* **case.** F

Partly allowing the appeal and remitting the matter to High Court, the Court

HELD: Since the foundation of the impugned judgment of the High Court is *Major Radha Krishnan's* **case, therefore, the impugned order is set aside and the matter is remitted to High Court for a fresh consideration keeping in view the position in law as delineated in Harjeet Singh Sandhu's case. [Para 8] [936-F-G]** G

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A ****Union of India and Ors. v. Harjeet Singh Sandhu* 2001 (5) SCC 593 – relied on.**

***Major Radha Krishan v. Union of India and Ors.* AIR 1996 SC 309; *Chief of Army Staff v. Major Dharam Pal Kukrety* 1985 (2) SCC 412 – referred to.**

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CIVIL APPELLATE JURISDICTION : Civil Appeal No 2764 of 2007.

From the final Judgment and order dated 19/12/2005 of C the High Court of Uttaranchal at Nainital in Review/Recall Application No. 120/2005 in W.P. (C) No. 1436/2001 (S/S)

S. Wasim A. Qadri, Jubair Ahmad Khan, B.K. Prasad and Anil Katiyar for the Appellants.

D Tehmina Punvani, Ankur Saigal, Gaurav Singh and Bina Gupta for the Respondent.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Challenge in this appeal is to E the judgment of a Division Bench of the Uttranchal High Court allowing the writ petition filed by the respondent. The respondent had filed the writ petition under Article 226 of the Constitution of India, 1950 (in short the 'Constitution') questioning the order dated 13.11.1990 whereby his services were terminated by F orders of the Chief of Army Staff.

2. The High Court primarily relied on a decision of this Court in *Major Radha Krishan v. Union of India & Ors.* (AIR 1996 SC 3091) and allowed the writ petition.

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3. The stand of the appellants is that the High Court failed to notice that the relied-upon decision was held to be not correctly decided by a three judge Bench in *Union of India & Ors. v. Harjeet Singh Sandhu* [2001(5) SCC 593].

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4. Learned counsel for the respondent submitted that the decision of the High Court was not based only on *Major Radha Krishan's case* (supra) but on other grounds.

5. The High Court allowed the writ petition with the following conclusions:

> "In *Major Radha Krishan v. Union of India & Ors.* (AIR 1996 SC 3091, the Hon'ble Apex Court has held that where the trial by Court-Martial against the offences committed by an army personnel was barred by limitation under Section 122 of the Act, the summary procedure for termination under R.14(2) of the Rules, cannot be followed on the ground that the trial by Court-Martial was inexpedient or impracticable. Such a satisfaction that the trial was inexpedient or impracticable can be arrived only at a time when trial by a Court Martial is permissive or possible. In view of the said principle of law and for the reasons as discussed above by us, the impugned order by which the services of the petitioner were dismissed is liable to be quashed. Accordingly the writ petition is allowed. The impugned order is quashed. The petitioner shall be entitled to the consequential benefits, admissible (as of right) to him under the rules treating him Captain, the post he held on the date when the impugned order was passed. No order as to costs."

6. In *Harjeet Singh Sandhu's case* (supra) the scope and ambit of the Army Act, 1950 (in short the 'Act') and Rule 40 of the Army Rules, 1954 (in short the 'Rules') inter alia fell per consideration. This court also referred to earlier decision in *Chief of Army Staff v. Major Dharam Pal Kukrety* [1985(2) SCC 412].

7. In *Harjeet Singh Sandhu's case* (supra) it was inter alia observed as follows:

> **37.** On the meaning which we are placing on the term "impracticable" as occurring in Rule 14(2) we proceed to

A provide resolutions to the several problems posed by the illustrations given by the learned Additional Solicitor-General. According to us:

In Illustration (*i*) the expiry of the period of limitation prescribed by Section 122 renders the trial by Court Martial B "impracticable" on the wider meaning of the term. There is yet another reason to take this view. Section 122 prescribes a period of limitation for the commencement of court-martial proceedings but Parliament has chosen not to provide any bar of limitation on exercise of power C conferred by Section 19. We cannot, by an interpretative process, read the bar of limitation provided by Section 122 into Section 19 of the Act in spite of a clear and deliberate legislative abstention. However, we have to caution that in such a case, though power under Section D 19 read with Rule 14 may be exercised but the question may still be — who has been responsible for the delay? The period prescribed by Section 122 may itself be taken laying down a guideline for determining the culpability of delay. In spite of power under Section 19 read with Rule E 14 having become available to be exercised on account of a trial by a Court Martial having been rendered impracticable on account of bar of limitation created by Section 122, other considerations would assume relevance, such as — whether the facts or set of facts F constituting misconduct being three years old or more have ceased to be relevant for exercising the power under Section 19 read with Rule 14. If there was inaction on the part of the authorities resulting in delay and attracting bar of limitation under Section 122 can it be said that the G authorities are taking advantage of their own inaction or default? If the answer be yes, such belated decision to invoke Section 19 may stand vitiated, not for any lack of jurisdiction but for colourable or mala fide exercise of power.

H **38.** In Illustration (*ii*), the Court Martial has stood dissolved

for fortuitous circumstance for which no one is to be blamed — neither the Chief of the Army Staff nor the delinquent officer. The delinquent officer, howsoever grave his misconduct amounting to offence may have been, would go scot-free. It would be fastidious to hold that bar of limitation under Section 122 would also exclude the exercise of power under Section 19 read with Rule 14.

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

A of the Act and the purpose sought to be achieved by Section 19 read with Rule 14, there is no reason to place a narrow construction on the term "impracticable" and therefore on availability or happening of such events as render trial by Court Martial impermissible or legally impossible or not B practicable, the situation would be covered by the expression — the trial by Court Martial having become "impracticable".

43. We are also of the opinion that *Major Radha Krishan case (supra)* lays down propositions too broad to be C 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 D 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 the submission of the learned Additional Solicitor-General that the case of *Dharam Pal* E *Kukrety's case (supra)* being a three-Judge Bench decision of this Court, should have been placed before the two-Judge Bench which heard and decided *Major Radha Krishan case (supra).*

F 8. Since the foundation of the impugned judgment of the High Court is *Major Radha Krishnan's* case (supra), we therefore, set aside the impugned order of the High Court and remit the matter to it for a fresh consideration keeping in view the position in law as delineated in *Harjeet Singh Sandhu's case* (supra). Since the matter is pending long we request the G High Court to dispose of the Writ Petition as early as practicable preferably by the end of September, 2008.

9. The appeal is allowed to the aforesaid extent. No costs.

K.K.T. Appeal partly allowed

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