SUPREME COURT OF INDIA

Romesh Kumar Sharma

Vs.

Union of India

C.A.No.7308 of 2003

(Arijit Pasayat and S.H. Kapadia JJ.)

01.08.2006

JUDGMENT

ARIJIT PASAYAT, J.

Delay condoned.

Leave granted in SLP (C) No.5832 of 2006.

Appellants in both the appeals call in question legality of the judgment rendered by a Division Bench of the Jammu and Kashmir High Court dismissing the Letters Patent Appeal filed by the appellants questioning correctness of the order passed by a learned Single Judge whereby the writ petition filed by him was dismissed. The review petition filed was also dismissed which is the subject matter of challenge in Civil Appeal No. 7308 of 2003. The other appeal relates to the order passed in the Letters Patent Appeal.

Background facts in a nutshell are as follows :

The appellant while working as Havildar/Clerk (GD) in Ladakh Scouts, having 17 years service in the Army, was found involved, along with a few other persons, in espionage activities during the period 1984-85. The appellant along with others was interrogated and a Court of Inquiry under Rule 177 of the Army Rules, 1954 (in short the 'Rules') was constituted to collect evidence and to report. Said Court of Inquiry confirmed the involvement of the appellant. Keeping in view the paramount consideration of Army discipline and the security of the State, it was considered expedient by the authorities to proceed against the appellant under Section 20(1) of the Army Act, 1950 (in short the 'Act') read with Rule 17 of the Rules. Accordingly, the appellant was dismissed from service dispensing with enquiry.

Appellant challenged the order of dismissal on the ground that the same was illegal, unconstitutional, improper, malafide and violative of Rule 17 of the Rules and Articles 14 and 21 of the Constitution of India, 1950 (in short 'the Constitution') and that no opportunity of being heard had been afforded to him to explain his conduct. In the counter affidavit filed by the respondent-Union of India and its functionaries, it was pointed out that the approval of the Chief of Army Staff

had been obtained and the procedures required have been duly complied with.

The basic stand of appellant before the High Court was that an enquiry had been conducted to find out whether the appellant and others were involved in the alleged espionage, the same was given up midway and ultimately the order of termination was passed. It was submitted that the procedure required was not followed and in any event action was taken without following the principles of natural justice. The High Court rejected the stand holding that the enquiry which was originally conducted was not qua the appellant but it related to the incident. Further neither any notice was issued nor any charge sheet was submitted. In any event it was held that the authorities were empowered to take action in terms of Section 20 of the Act read with Rule 17 of the Rules in appropriate cases. The Letters Patent Appeal as noted supra did not bring any relief to the appellant.

A review application was filed against the order of learned Single Judge as affirmed by the Division Bench, which as noted above, was also dismissed.

In support of the appeal, Mr. Bhim Singh, learned counsel submitted that the true scope and ambit of Rule 17 of the Rules has not been kept in view. Power of dismissal or removal from service is conferred on the Chief of the Army Staff. An enquiry was conducted by a Court of Inquiry and the role attributed to the appellant is very minor and does not warrant an order of dismissal. Parameters of the power of dismissal or the removal are contained in Rule 17 of the Rules. The proviso is of exceptional nature. No reason was recorded as to why, it was thought to be not expedient or reasonably practicable to comply with the provisions of the main part of Rule 17 of the Rules. That being so the order of dismissal cannot be maintained.

Per contra learned counsel for the respondent-Union of India and its functionaries submitted that modalities to be followed when Chief of the Army Staff thinks it inexpedient to follow procedure as laid down in the main part of Rule 17 of the Rules have been followed. He gave a certificate to the effect that it is not expedient or reasonably practicable to comply with the provisions of the Rules and certificate as required has been given.

It is submitted that on consideration of the materials on record done in an objective manner, the Chief of the Army Staff passed the order. It has not been even alleged or shown that there was any mala fide exercise of powers. That being so the High Court was justified in its conclusion that the grievances are without substance.

In order to appreciate rival submissions, it is necessary to take note of Section 20 of the Act and Rule 17 of the Rules. The applicability of the proviso to Rule 17 is the core issue to be considered.

20. Dismissal, removal or reduction by the Chief of the Army Staff and by other officers.-- (1) The Chief of the Army Staff] may dismiss or remove from the service any person subject to this Act other than an officer.

(2) The Chief of the Army Staffs may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.

(3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer.

(4) Any such officer as is mentioned in sub- section (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non- commissioned officer under his command. (5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy. (6) The commanding officer of an acting non- commissioned officer may order him to revert to his permanent grade as a non-commissioned officer, or if he has no permanent grade above the ranks, to the ranks.

(7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder.

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.

The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. As was stated in Mullins v. Treasurer of Survey [1880 (5) QBD 170, (referred to in Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha (AIR 1961 SC 1596) and Calcutta Tramways Co. Ltd. v. Corporation of Calcutta (AIR 1965 SC 1728); when one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule. "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it you cannot derive these provisions by implication from a proviso." Said Lord Watson in West Derby Union v. Metropolitan Life Assurance Co. (1897 AC 647)(HL). Normally, a proviso does not travel beyond the provision to which it is a proviso. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. (See A.N. Sehgal and Ors. v. Raje Ram Sheoram and Ors. (AIR 1991 SC 1406), Tribhovandas Haribhai Tamboli v. Gujarat Revenue Tribunal and Ors. (AIR 1991 SC 1538) and Kerala State Housing Board and Ors. v. Ramapriya Hotels (P)Ltd. and Ors. (1994 (5) SCC 672).

"This word (proviso) hath divers operations. Sometime it worketh a qualification or limitation; sometime a condition; and sometime a covenant" (Coke upon Littleton 18th Edition, 146)

"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole" (per Lord Wrenbury in Forbes v. Git [1922] 1 A.C. 256).

A statutory proviso "is something engrafted on a preceding enactment" (R. v. Taunton, St James, 9 B. & C. 836).

"The ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances" (per Lord Esher in Re Barker, 25 Q.B.D. 285).

A proviso to a section cannot be used to import into the enacting part something which is not there, but where the enacting part is susceptible to several possible meanings it may be controlled by the proviso (See Jennings v. Kelly [1940] A.C. 206)."

Under the proviso to Rule 17 the Chief of the Army Staff and other officers are competent to order dismissal or removal without complying with the procedure set out in the main part of the Rule after certifying that it is not expedient or reasonably practicable to comply with the provisions so set out. There is a further requirement that such cases of dismissal or removal shall be reported to the Central Government.

Original records were produced before us. A perusal thereof shows that the Chief of the Army Staff had followed the requisite procedure and the certificate as contemplated in the proviso to Rule 17 of the Rules has been given. The note sheets, the records which were also perused by the High Court clearly show that various aspects were taken note of and it was specifically recorded that it will be inexpedient to follow the procedure provided in the main part of Rule 17 of the Rules. There is, therefore, no substance in the plea taken by learned counsel for the appellant.

Additionally, it is alleged that the main plank of the argument of the appellant before the High Court was that the enquiry which was initiated should not have been abandoned midway and should have been continued. As rightly noted by the High Court, the enquiry was not qua the appellant but it related to the incident. That being so there was nothing wrong in the order of dismissal. It cannot be faulted. In any event enquiry was not abandoned midway as claimed. The basic facts were revealed during enquiry. In any event, as has been held by this Court in Union of India and Others v. Harjeet Singh Sandhu [2001(5) SCC 593] even after a Court Martial is held departmental action is not prohibited. In para 41 it was noted as follows:

"Having thus explained the law and clarified the same by providing resolutions to the several illustrative problems posed by the learned ASG for the consideration of this Court (which are illustrative and not exhaustive), we are of the opinion that the expiry of period of limitation under Section 122 of the Act does not ipso facto take away the exercise of power under Section 19 read with Rule 14. The power is available to be exercised though in the facts and circumstances of an individual case, it may be inexpedient to exercise such power or the exercise of such power may stand vitiated if it is shown to have been exercised in a manner which may be called 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 court martial, and also by reference to which

the power under Section 19 was not promptly exercised may cease to be relevant by long lapse of time. A subsequent misconduct though less serious may aggravate the gravity of an earlier misconduct and provide need for exercise of power under Section 19. That would all depend on the facts and circumstances of an individual case. No hard and fast rule can be laid down in that behalf. A broad proposition that power under Section 19 read with Rule 14 cannot be exercised solely on the ground of court martial proceedings having not commenced within the period of limitation prescribed by Section 122 of the Act, cannot be accepted. In the scheme of the Act and the purpose sought to be achieved by Section 19 read Rule 14, there is no reason to place a narrow construction on the term `impracticable' and therefore on availability or happening of such events as render trial by court-martial impermissible or legally impossible or not practicable, the situation would be covered by the expression-the trial by court-martial having become `impracticable'."

It was also pleaded that approval of Central Government was necessary in case action was taken under the proviso to Rule17. We find no such necessity prescribed. All that is required that where proviso to rule 17 is resorted to report has to be made to the Central Government. Record reveals that same has been done.

Above being the position we find no merits in these appeals, which are accordingly dismissed. No cost.