Before Surya Kant, J

NO. 13668465 EX-HAVILDAR ROOP SINGH,—*Petitioner*

versus

GENERAL OFFICER COMMANDING
AND OTHERS,—*Respondents*

C.W.P. NO. 2629 OF 1991

2nd April, 2004

Constitution of India, 1950—Art. 226—Army Act, 1950—Ss. 20(3) & 20(7)—Army Rules, 1954—Rls. 17 & 182—Dismissal from service of a Havildar on charge of unlawful possession of 3 service breach blocks recovered from him—No opportunity of hearing given—Rl. 17 requires the competent authority to inform the particulars of cause of action against delinquent person and allow him reasonable time to state in writing any reasons which he may have to urge against his dismissal—Competent authority has power to dispense with such a procedure after assigning some valid reasons to conclude that it was not expedient or reasonably practicable to comply with the provisions of Rl. 17—Sending of such report of non-compliance of prescribed procedure to the Central Government is also necessary—Competent authority neither following the procedure laid down under Rule 17 nor assigning any reasons for dispensing with the requirement of show cause notice to the petitioner—Competent authority also failing to send a report to the Central Govt.—Violation of the mandatory procedure—Action of the respondents illegal—Dismissal order liable to be quashed.

Held that, the petitioner has been dismissed from service in exercise of the powers under Section 20(3) of the Act which could have been invoked subject to sub section (7) of Section 20 of the Act. As a necessary corollary thereof, the competent authority had two options only, namely either to follow the mandatory procedure laid down in Rule 17 or to dispense with the same after assigning some valid reasons to conclude that it was not expedient or reasonably practicable to comply with the provisions of Rule 17. In that eventuality, the competent authority was also required to send a report to this effect to the Central Government. It is an admitted fact that neither the

procedure laid down under Rule 17 was followed nor the competent authority assigned any reasons on the file for dispensing with the requirement of the show cause notice to the petitioner. It has also not been disputed that no report was sent to the Central Government in terms of proviso to Rule 17 of the Rules. Thus, there is a flagrant violation of the mandatory procedure which renders the impunged action patently illegal.

(Para 11)

Further held, that is is true that the gravity or seriousness of a misconduct might justify dispensation of the fair opportunity of show cause notice provided in Rule 17 depending upon the facts and circumstances of each case. However, mere allegations, howsoever, serious they might be, would not clothe the competent authority with sweeping powers to act de-hors the statutory rules. The rules are meant for compliance, not for defiance. If the competent authority *bona fide* felt that even issuance of a show cause notice to the petitioner under Rule 17 was an exercise in futility, and the paramount consideration being national interest, he needed to be thrown out from service forthwith, yet it ought to have recorded these reasons on the file to justify its action, apart from sending its report, namely, the reasons assigned by it for the dispensation of the procedure under Rule 17 to the Central Government as well. No attempt having been made by the competent authority to adhere to the requirements of the Rules.

(Para 12)

R.S. Randhawa, Advocate, *for the petitioner.*

Kamal Sehgal, Additional Standing Counsel for Union of India.

JUDGMENT

SURYA KANT, J.

(1) Ex-Harvinder Roop Singh, who, at the relevant time, was working in 3rd Battalion, Brigade of Guards (1 Raj Rif), has approached this Court under Article 226 of the Constitution of India with a prayer to issue a writ in the nature of certiorari for quashing the order dated 17th October, 1989 (Annexure P-1) whereby he was dismissed from

service with effect from 3rd October, 1989 by invoking the powers under Section 20(3) of the Army Act, 1959 (for short the Act) read with Rule 17 of the Army Rules (for short the Rules) and also to issue a writ in the nature of *mandamus* commanding Respondent No. 1 to reinstate him with all consequential benefits including back wages and seniority as well as to award him damages for the sufferings he has undergone due to illegal action of the Respondents.

(2) The Petitoner was enrolled in the Indian Army on 5th October, 1971; he was promoted as Havildar and had 18 years of unblemished service to his credit when three service breach blocks were found in his possession on 19th October, 1986; Court of inquiry was convened to investigate the matter and based upon its report, the matter was placed before the General Officer Commanding, 2 Corps (Respondent No. 1) who, according to the Petitioner, without any justification and in violation of the provisions of the Act and the Rules, directed that the Petitioner be dismissed from service under Section 20(3) of the Act read with Rule 17 of the Rules; the Petitioner learnt about the afore-mentioned illegal direction only through a letter dated 26th May, 1990 which was received by his counsel in response to the previous Writ Petition filed by him in this Court; the Petitioner was not intimated anything about the outcome of the proceedings taken by the Court of Inquiry nor its findings or opinion were ever conveyed to him; the Petitioner, however, was informed that,—*vide* order dated 17th October, 1989 (Annexure P-1), he had been dismissed from service; the directions to dismiss the Petitioner from service issued by Respondent No. 1 were revealed to the Petitioner through a letter dated 26th May, 1990 (Annexure P-2) which was served upon his counsel in his previous Writ Petition No. 6927 of 1990 in which the Respondents placed on record the discharge certificate as well as report of the Court of Inquiry. It was, however, also stated by the respondents that no summary of evidence was recorded and no order of dismissal was passed; a copy of the so-called discharge certificate placed before this Court, has since annexed by the Petitioner as Annexure P-4 which, in fact, is a replica of Annexure P-1. According to the Petitioner, the impugned order has been camouflaged as a discharge order though it is meant to be an order of dismissal from service for all intents and purposes and the same having been passed in utter disregard to the mandatory provisions of Section 20(3) and (7) of the Act read with Rule 17 of the Rules;

is liable to be quashed, as neither Lt. Col. R.L.V. Nath, who passed the impugned order, was the Commanding Officer having powers of Brigade or equivalent Commander nor was the Petitioner given a reasonable opportunity of hearing as envisaged under Section 20(7) of the Act read with Rule 17 of the Rules.

(3) Upon notice, written statement has been filed on behalf of the Respondents. In no uncertain terms, it has beeen stated in para 4 thereof that the Petitioner was dismissed by the competent authority in exercise of its powers under Section 20(3) read with Rule 17 of the Rules. Regarding the plea of the Petitioner that Lt. Col. R.L.V. Nath Officiating Commander of 3 Guards was not competent to pass the order of dismissal, in para 6 of the written statement it has been stated that the above named officer only conveyed the order of the superior authorities i.e. G.O.C. 2 Corps who was very much empowered to pass such an order. The necessary directions issued by G.O.C., 2 Corps, on the staff court of Inquiry in respect of the Petitioner, have been placed on record an Annexure P-1. Countering the Petitioner's claim that he could not have been dismissed from service without being informed of the particulars of the cause of action and allowing him reasonable time to state in writing his defence against the proposed dismissal or removal from service, the Respondents have taken the following stand in their written statement :—

> "In reply to paras 7, 8, 10 and 11 of the writ petition, it is submitted that a few hand grenades with the mark HE-36 were recovered from the fields of his neighbour namely Nafis Ahmed at Pilibhit in the last week of September, 1986, when Nafis Ahmed found these grenades while ploughing his fields. The police had raised that area and recovered arms and ammunition from the possession of some Sikh persons living there. Jasmel Singh brother of Havildar Roop Singh had concealed grenades in the fields of Nafis Ahmed. The petitioner has himself admitted in the Court of Inquiry as well as during interrogation by the Security Agencies that he had taken 3 grenades from the unit. Subsequently, the house was raided and breach blocks, one each of LMG, Carbine 9mm and 7.62 SLR were also found. Thus the petitioner was a grave security risk and the case was investigated by the intelligence

agency at different places. A court of inquiry was held in which the petitioner had fully participated and admitted his guilt. Thus, since the petitioner had been associated all throughout and also because of the fact that he was a grave security risk and seeing overall prevalent situation in the country it was not considered expedient to issue a show cause notice to the petitioner before issuing the dismissal order. In this regard proviso to Rule 17 of the Army Rules 1954 clearly lays down that if it is not expedient or reasonably practicable for the competent officer to comply with the proviso of the rule then an order of dismissal or removal without complying with the procedure set out in Rule 17 can be passed. It is further submitted that as the petitioner had participated in the inquiry held against him then the issuing of a show cause notice before removal or dismissal is not mandatory and especially in a case where the suspect is a grave security risk for the nation. The retention in service of such a man is not in the interest of the country and, therefore, the authorities have been empowered to take immediate action for dismissal or removal. Thus, the dismissal from service was in accordance with law."

(4) The Petitioner filed replication to the afore-mentioned written statement reiterating the plea taken by him in the Writ Petition and also pleading that the Respondents cannot be permitted to rely upon the conclusions drawn in the Court of Inquiry for dismissing him from service as proceedings of the Court of Inquiry are inadmissible against him in view of Rule 182 of the Rules.

(5) Before adverting to the rival contentions of the parties, it is necessary to take on record certain provisions of the Act and the Rules. Section 20(3) and (7) of the Act and Rules 17 and 182 of the Rules have direct bearing upon the controversy involved in the present case and the same are reproduced below :—

Army Act :—

"20. Dismissal, removal or reduction by the Chief of Army Staff and by other Officers—

(1) and (2) xxx xxx xxx xxx

(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) to (6) xxx xxx xxx xxx

(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.

Army Rules :—

"17. Dismissal or removal by Chief of 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."

"182. Proceedings of Court of Inquiry not admissible in evidence—The proceedings of a Court of Inquiry, or any confession, statement, or answer to a question made or given at a Court of Inquiry, shall not be

admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the Court be given against any such person except upon the trial of such person for wilfully giving false evidence before that Court."

(6) I have heard Shri R.S. Randhawa, learned counsel for the petitioner and Shri Kamal Sehgal, learned Additional Standing Counsel for the Union of India, on behalf of the Respondents.

(7) During the course of arguments, Shri Randhawa raised following issues :—

(1) The order of dismissal (Annexures P-1 and or P-4) has been passed by an incompetent authority, namely, Lt. Col. R.L.V. Nath who was only an officiating Commanding Officer of the 3 Guards and had no powers of brigade or equivalent Commander.

(2) Power of dismissal, removal or reduction in rank under Section 20(1) can be invoked by the competent authority subject to other provisions contained in the Act and the Rules and Regulations made thereunder and that requirement of notice informing the particulars of the cause of action against an army personnel so as to allow him reasonable time to state in writing the reasons which he may intend to urge in his defence against the proposed action, it being a mandatory condition precedent under Rule 17 of the Rules and the aforementioined procedure having been given complete go-bye in the present case, the impugned order of dismisssal is unsustainable in law.

(3) Even if the competent authority decides to invoke its power under proviso to Rule 17 so as to dispense with the issuance of a notice to the delinquent army personnel, it can do so only "after certifying to the effect that it is not expedient or reasonably practicable to comply with the provisions of this Rule." Not only this, all cases of dismissal or removal, where the compliance of mandatory procedure laid down in Rule 17 has been dispensed with, are required to be reported to the Central Government. But in the present case neither the Competent Authority has assigned reasons to certify

that it was not expedient or reasonably practicable to comply with Rule 17 nor any report dispensing with such requirements was even sent to the Central Government."

(8) At this stage, it may be mentioned that when this case was taken up for hearing and the learned counsel for the petitioner raised the afore-mentioned issues, Shri Sehgal, learned counsel appearing for the Union of India, was asked to make available the original records of the case. After giving more than three opportunities to produce the original record, this court was constrained to observe that in case the original records were not produced by the Respondents, then an adverse inference would be drawn against them. However, in the interest of Justice, a direction was given either to produce the original record or to file an affidavit of some responsible officer regarding the non-availability of such records. Pursuant to the afore-mentioned order, an affidavit dated 27th February, 2004 of Major Anirudh Panwar, DAAG HQ, 2 Corps has been filed and para 3 thereof reads as under :—

"That the respondents have traced out the record and the available record will be produced in the court at the time of final hearing. However, it is pointed out here that the petitioner was dismisssed from service on 17th October, 1989 without issuing any show cause notice under Army Act Section 20 read with Army Rule 17. However, there is no specific order of GOC 2 Corps for dispensing with Show Cause Notice either on file or in minutes. Furthermore, there is no document on record to show that the matter was reported to the Central Government as provided under proviso to Army Rule 17."

(9) Notwithstanding the admitted position that the petitioner was dismissed from service without issuing any show cause notice under Section 20(7) of the Act read with Rule 17 of the Rules and no specific order was passed by the competent authority for dispensing with the requirement of show cause notice and even report of such dispensation was not sent to the Central Government as provided under proviso to Rule 17 of the Rules, Shri Sehgal, learned counsel for the Respondents strenuously argued that the Petitioner, for the reasons mentioned in reply to paras 7, 8, 10 and 11 of the written statement (already reproduced), had become a grave security risk and

his retention in service was not in the interest of the country, therefore, keeping in view the overall prevalent situation in the country at the relevent time, it was not considered expedient to issue a show cause notice to him before passing the order of dismissal.

(10) Having heard learned counsel for the parties and after perusal of the relevant record, I am of the considered view that the Ist contention of the Petitioner that he was dismissed by an incompetent authority cannot be accepted. The stand taken by the Respondents in para 6 of the written statement read with Annexure R-1 makes it abundantly clear that Lt. Col. R.L.V. Nath had merely conveyed the orders of the superior authority namely, G.O.C., 2-Corps which was very much competent to pass the impugned dismissal order. A copy of the directions issued by G.O.C., 2 Corps to this effect has also been placed on record.

(11) Coming to the second and third submissions, there can be no doubt that an Officer having power not less than a Brigade or equivalent Commander or a prescribed officer is competent to dismiss or remove from service any person serving under his command other than an officer or his junior commissioned officer, subject to provisions contained in the Act and the Rules and Regulations made thereunder. under Rule 17 of the Rules, it is imperative upon the competent authority to inform the particulars of the cause of action against the delinquent person and allow him reasonable time to state in writing any reasons which he may have to urge against his dismissal or removal from service. The only exception to the afore-mentioned requirement can be when the competent authority certifies that it is not expedient or reasonably practicable to comply with the abovestated provision of the Rules. Not only this, as a measure of safeguard either against frequent invoking of the power of dispensation of the procedure laid down under Rule 17 or resorting to the same for wholly insufficient reasons, it has been provided that the competent authority shall report such dispensation to the Central Government. Coming to the facts of the present case, it is not disputed that the Petitioner has been dismissed from service in exercise of the powers under Section 20(3) of the Act which could have been invoked subject to sub-section (7) of Section 20 of the Act. As a necessary corollary thereof, the competent authority had two options only, namely, either to follow the mandatory procedure laid down in Rule 17 or to dispense with the same after assigning some valid reasons to conclude that it was not expedient or reasonably practicable to comply with the

provisions of Rule 17. In that eventuality, the competent authority was also required to send a report to this effect to the Central Government. From the contents of the affidavit dated 27th February, 2004 filed on behalf of the Respondents, the relevant part of which has been extracted above, it is now an admitted fact that neither the procedure laid down under Rule 17 was followed nor the competent authority assigned any reasons on the file for dispensing with the requirement of the show cause notice to the Petitioner. It has also not been disputed that no report was sent to the Central Government in terms of proviso to Rule 17 of the Rules. Thus, there is a flagrant violation of the mandatory procedure which, in my view, renders the impugned action patently illegal.

(12) Coming to the submissions made by Shri Sehgal, it is true that the gravity or seriousness of a misconduct might justify dispensation of the fair opportunity of show cause notice provided in Rule 17 depending upon the facts and circumstances of each case. However, mere allegations, howsoever serious they might be, would not clothe the competent authority with sweeping powers to act dehors the statutory rules. The Rules are meant for compliance, not for defiance. If the competent authority bona fide felt that even issuance of a show cause notice to the Petitioner under Rule 17 was an exercise in futility, and the paramount consideration being national intereest, he needed to be thrown out from service forthwith, yet, it ought to have recorded these reasons on the file to justify, its action, apart from sending its report, namely, the reasons assigned by it for the dispensation of the procedure under Rule 17, to the Central Government as well. No attempt having been made by the competent authority to adhere to the requirements of the Rules, I have no option but to reject the contention raised by Shri Sehgal.

(13) For the reasons stated above, the Writ Petition is allowed. The dismissal order dated 17th October, 1989, a copy of which has been annexed an Annexure P-1, as well as Annexure P-4, is quashed. The Petitioner shall be entitled for all the consequential benefits including arrears of pay. However, it shall be open for the Respondents to proceed against the Petitioner, if so permissible in law, to take appropriate action in accordance with provisions of the Act and the Rules framed threreunder. Needful shall be done within a period of three months from the date of receipt of a certified copy of this order. No order as to costs.

R.N.R.