

Union of India and others v. Lt. Colonel (Now Major) Surjit Singh  
(G. R. Majithia, J.)

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the application has to be made before him within thirty days from the date of the award, and the right is restricted to persons who had not applied for reference under Section 18 of the Act. If these conditions were satisfied, the petitioners could have availed of the remedy provided under Section 28 A of the Act. In that event, section 25 would enure of their benefit. Any other view would lead to disastrous consequences not intended by the Legislature."

(5) Since the petitioners did not avail the remedy provided under Section 28-A of the Act the executing Court has rightly declined to entertain the same as it was not maintainable as such. Consequently, both the petitions fail and are dismissed with no order as to costs.

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P.C.G.

*Before : V. Ramaswami, C.J. and G. R. Majithia, J.*

UNION OF INDIA AND OTHERS,—Appellants.

*versus*

LT. COLONEL (NOW MAJOR) SURJIT SINGH.—Respondent.

*Letters Patent Appeal No. 550 of 1988*

March 10, 1989.

*Constitution of India, 1950—Arts. 162 and 226—Army Instructions 1/S/75 as amended by 2/76 and further amended by Army Instructions 31/86—Reversion—Attachment of Army Officer on disciplinary grounds—Court martial proceedings pending—Instructions making provision for reversion from acting rank on non performance of duties for 21 days for which acting rank was given—Such army instructions binding—Reversion to substantive post valid.*

*Held.* that there can be no manner of doubt that where rules are silent, the State can exercise its executive powers under Article 162 of the Constitution of India, 1950. These Army Instructions come within the ambit of Article 162 of the Constitution of India, 1950  
(Para 9)

*Held*, further that when the petitioner was attached to HQ 39 Mechanised Brigade with effect from April 15, 1985 the action was taken after a proper court of enquiry and competent authority had directed that disciplinary action should be taken against delinquent. His attachment was made after the enquiry established his involvement in the illegal sale of brass and aluminium scraps. Hence, the action of the Army authorities is fully justified in law.

(Para 9).

*Letters Patent Appeal Under Clause X of the Letters Patent of the High Court against the Judgment of Hon'ble Mr. Justice D. V. Sehgal, dated 2nd June, 1988 in the above C.W.P. No. 5303 of 1987 may kindly be dismissed with costs.*

H. S. Brar, Sr. Standing Counsel for Government of India, P. S. Teji, Advocate with him, *for the Appellant.*

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

#### JUDGMENT

G. R. Majithia, J.

(1) This is an appeal under clause X of the Letters Patent against the order of a learned Single Judge whereby he directed that the writ-petitioner should be restored the acting rank of Lt. Colonel from the date it was taken away from him and he should be paid arrears of salary of the acting rank of Lt. Colonel within two months from the date of the order along with interest at the rate of 12 per cent per annum.

(2) *Facts first* : The respondent, who will hereinafter be referred to as the petitioner, was commissioned to the Armed Forces on June 13, 1963. He was promoted to the rank of Selection Grade Lt. Colonel on June 9, 1983 and was posted to the newly raised 18 Mechanised Infantry. Prior to his assuming the command of the Unit, Major Surinder Kumar officiated as Commanding Officer from March 1, 1983 to June 8, 1983. He made various appointments in the Unit, including that of Capt. J.P.S. Toor as Technical Officer.

(3) On January 6, 1984, two persons of the Unit allegedly took out a vehicle containing petrol barrels. They were detected and as they could not explain their conduct, they were placed under arrest and investigation was started against them. The detailed investigation brought out the involvement of Capt. J.P.S. Toor in

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the sale of fuel. Capt. J.P.S. Toor, in order to save his skin, made a bald statement that Havildar responsible for accounting the fuel items, used to obtain signatures of the petitioner on emergent demands. This statement was made the basis to implicate the petitioner. The petitioner was attached to HQ 39 Mechanised Brigade with effect from April 15, 1985. As a result thereof, he was brought down to a substantive rank of Major. The army authorities took this action under Army Instructions 1/S/74, as amended by Army Instructions 2/76, further amended by Army Instructions 31/86.

(4) The petitioner was informed that he would be tried by a General Court Martial and would be jointly tried with Capt. J.P.S. Toor on the basis of the charge-sheet served upon him. The petitioner objected to the joint trial with Capt. J.P.S. Toor since this was likely to prejudice his defence. He also sought a direction from this Court to the appellants to restore him the acting rank of Lt. Colonel.

(5) The appellants filed a joint written statement and maintained that the petitioner was attached to HQ 39 Mechanised Brigade from April 15, 1985 after a period of 21 days in accordance with the special Army Instructions referred supra. The evidence collected on investigation revealed that the petitioner and Capt. J.P.S. Toor conspired together and indulged in pilferage of the military stores like fuel, brass scrap, aluminium as detailed in the 1st, 2nd, 3rd and 4th charge contained in the charge-sheet Annexure R. 1. 5th charge relating to pilferage of brass scrap weighing 3000 Kgs. valued at Rs. 87,000 related to Capt. J.P.S. Toor alone and the 6th charge regarding making of false statement that brass scrap weighing 3000 Kgs. and 2000 Kgs. issued,—*vide* vouchers dated May 5, 1983, were utilized in the Unit relates to the petitioner alone, but the joint trial of the petitioner and Capt. J.P.S. Toor was ordered since most of the charges were common and same evidence was to be led in proof of these charges.

(6) The learned Single Judge found that the authorities had correctly rejected the prayer of the petitioner for a separate trial and he felt that no exception can be taken to it by him in exercise of extraordinary jurisdiction. On the second aspect of the case relating to the withdrawal of acting rank of Lt. Colonel, the learned Single Judge opined that the Army Instructions under which

the purported action was taken has no legal force. Resultantly, the action was not justified.

(7) During the pendency of the appeal, the learned Senior Standing Counsel for the Union of India brought to our notice the following fact :—

“That the respondent Lt. Col. Surjit Singh was cashiered and was awarded Rigorous Imprisonment for one year on 16th September, 1988 by the General Court Martial. The General Court Martial Proceedings have been sent for confirmation to the Chief of the Army Staff.”

(8) The only question which arises for determination is, whether the acting rank of Lt. Colonel has been rightly withdrawn from the petitioner, consequent upon his attachment to HQ 39 Mechanised Brigade pursuant to Army Instructions 1/S/74, as amended by Army instructions 2/76, further amended by Army instructions 31/86, which are to the following effect :—

“(a) Officers against whom disciplinary action is contemplated may where necessary, be attached to other units, at the discretion of Army Headquarters or General Officer Commanding-in-Chief Command concerned for the purpose of investigation and progress of the disciplinary case. However, such attachment will be ordered only when a prima facie case against him is established and not during investigation stage by a court of Inquiry, even for officers whose character and military reputation is likely to be a material issue at the Court of Inquiry. In exceptional cases whereas officer's continued retention in his appointment say Commanding Officer, is not desirable, he may be attached to another unit or formation even at the commencement of Court of Inquiry.

(b) During the attachment period the officers will continue to be held against the appointment held by them immediately before attachment and no replacement will be made until completion of the disciplinary proceedings.

(c) This supersedes Army Instructions 106/60.”

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In the light of the above, it has been further explained thus:—

- (a) The permanent authorised establishment of the Army including rank structure is sanctioned by the Government of India. The total number of vacancies in each rank based on this authorisation constitutes the substantive ranks. In addition to the authorised establishment the Government from time to time authorises certain increases or increments on a temporary basis for specified periods which may be extended from time to time depending upon the prevailing situation. In order to give facility of rank and pay to officers holding higher appointments than their substantive rank in the increased complement of the Army, the system of acting ranks was introduced. The acting rank, therefore, is admissible for the duration that the officer is actually holding such appointment and performing the duties. To cater the administrative requirements a certain cushion period of 21 days has been laid down between the actual relinquishment of the appointment and relinquishment of acting rank. As such when an officer becomes ineffective in a particular appointment for twenty one days either due to his attachment or disciplinary grounds or due to sickness by way of hospitalisation, he relinquishes the acting rank as he is no longer performing the duties for which he was granted the acting rank.
- (b) When an officer's involvement in a case likely to result in disciplinary action is established, he is attached to another Headquarters or Unit to facilitate investigation and disciplinary proceedings. This is done primarily in the interest of discipline and to prevent undue pressure being brought upon the witness as also tampering with evidence. This is particularly relevant when the officer concerned is the Commanding Officer who holds overall charge of the unit.
- (c) In the case of the petitioner he was attached to Headquarters 39 Mechanised Brigade pending investigation and disciplinary action as such he ceased to function as Commanding Officer 18th Battalion the Mechanised Infantry Regiment with effect from 15th April 85. Accordingly after a period of 21 days he relinquished the acting rank of Lieutenant Colonel with effect from 06 May 85."

The learned Single Judge allowed the claim of the petitioner with the following observations :—

“It is further not in dispute that there is no provision in the Act, Rules and Regulations to the effect that where disciplinary proceedings/General Court Martial proceedings are commenced against an officer and he is holding an acting rank he should be reverted to his substantive rank. Reversion from the acting rank to the substantive rank because of pendency of Court Martial proceedings results in penal consequences. Administrative instructions which have no statutory force cannot be allowed to bring about such a result as it takes away a right vested in an officer.”

These observations cannot be supported at law. It was authoritatively laid down by the apex Court in *Sant Ram Sharma v. State of Rajasthan and others* (1), as under :—

“It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.”

It was further held in this case :—

“.....the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of Sch. 7, List II Entry 41, State Public Services, and there is nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law.”

(9) There can be no manner of doubt that where rules are silent, the State can exercise its executive powers under Article 162 of the Constitution of India. These Army Instructions come within the ambit of Article 162 of the Constitution of India. Thus, the learned Single Judge has fallen in error in making the observations referred

(1) A.I.R. 1967 S.C. 1910.

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supra. The authority relied upon by the learned Single Judge *Romesh Chander v. G. O. C. Northern Command and others* (2), has absolutely no bearing on the facts of the present case. In that case, the army instructions, which were under challenge, were not identical to the one in dispute. The learned Judge set aside the order of cancellation of promotion on the ground that it was conceded before him that no disciplinary enquiry was pending against the writ-petitioner at the time when the order of promotion was cancelled. The following observations clearly bring out the distinction and inapplicability to the facts of the present case :—

“This order gives no jurisdiction to the Army Authorities to cancel the order of promotion once made. It is also conceded before me that there was no disciplinary enquiry pending against the petitioner at the time when the order of promotion was cancelled and on that ground also Army Order 236/73 would not be applicable to the case of the petitioner. Assuming, though not conceding, that Army Order 236/73 has some force of law. I am of the opinion that the same is inapplicable to the facts of the present case. Even if this order was held applicable, it could only be used against the petitioner against his posting out of the Unit and could not be used to supersede an order of promotion made in his favour.”

In the present case, when the petitioner was attached to HQ 39 Mechanised Brigade with effect from April 15, 1985, the action was taken after a proper court of enquiry and competent authority had directed that disciplinary action should be taken against the petitioner and others. His attachment to HQ 39 Mechanised Brigade was made after the enquiry established his involvement in the illegal sale of brass and aluminium scraps. The action of the appellants is fully justified under law.

(10) Strong reliance was also placed on *Major K. D. Gupta v. Union of India and another* (3). In that case, the dispute arose in the following circumstances : The writ petitioner was promoted to the rank of acting Lt. Colonel with effect from February 27, 1975. On March 22, 1976, he was directed by the Brigade Commander to report to the Officer Commanding Military Hospital, Kirkee for

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(2) 1977 (2) C.L.R. 865.

(3) A.I.R. 1983 S.C. 1122,

psychiatric examination and report. On March 23, 1976, he was examined by Lt. Col. A. Mukherjee, specialised in Psychiatry and on March 26, 1976, he was examined by Surgeon Commodore T.B.D'netto, Consultant (Psychiatry) to the India Navy. As a result of the examination by the specialists, his medical classification was downgraded on August 13, 1976 from SHAPE-SI (fit for all duties) to SHAPE S. 3-T.24 (fit for routine duties under supervision in areas where hospital with psychiatric facilities exist nearby, not fit for duties at high altitudes). By an 'Attachment Order' dated May 14, 1976, he was transferred from 4/3 Gorkha Rifles to Headquarters 54, Infantry Division against the post of Commander NCC Group HQ Bellary in the rank of an acting Lieutenant Colonel. He returned from leave on August 14, 1976 and was attached to HQ 54 Infantry Division till November 16, 1976. By order dated November 16, 1976, the petitioner who was described in the order as an acting Lieutenant Colonel was posted as "GLO (Maj/Capt) 142, GL Sec Type C vice Cept. I.K. Bedi". Apparently the post to which the petitioner was transferred by the order dated November 16, 1976, was a post which could be held by an officer of the rank of a Major or a Captain and it was in fact at that time held by an officer who was of the rank of a Captain. Though there is no order specifically reducing the rank of the petitioner from that of an Acting Lieutenant Colonel to that of a Major, the posting order dated November 16, 1976 was treated as such by the Brigadier in-charge and all other Army authorities and the petitioner was instructed by the Brigadier not to wear the badges of the rank of Lieutenant Colonel. This order was challenged in the writ petition and the apex Court allowed the writ petition with the following observations :—

"Shri Khader was unable to draw our attention to any rule, order or circular which prescribed that reduction in rank should inevitably follow on placement of an Officer in a lower medical category. In fact it was conceded by Shri Khader that an officer whose medical classification is downgraded, will not be reduced in rank on that account, but will continue to hold the same rank as before. We are, therefore, unable to understand why the petitioner had to be reduced in rank because subsequent to his promotion his medical classification was downgraded.

The above observations clearly draw the distinction and its non-applicability to the facts of the present case. In the present case,



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as stated supra there are positive instructions to the effect "As such when an officer becomes ineffective in a particular appointment for twenty-one days either due to his attachment on disciplinary grounds or due to sickness by way of hospitalisation, he relinquishes the acting rank as he is no longer performing the duties for which he was granted the acting rank." The action of the authorities has been taken strictly in accordance with these instructions and no fault can, therefore, be found with it.

(11) For the foregoing reasons, the judgment of the learned Single Judge is set aside, the appeal is allowed and the writ petition is dismissed. There will, however, be no order as to costs.

R.N.R.

Before : G. C. Mital and S. S. Sodhi, JJ.

KESHO RAM KHUSHI RAM,—Applicant.

versus

COMMISSIONER OF INCOME-TAX, HARYANA,—Respondent.

Income Tax Reference No. 23 of 1982

April 6, 1989.

*Income Tax Act (XLIII of 1961) S. 271(1)(c)—Assessee's returned income more than 80 per cent of the assessed income—Burden of proof on department for levying penalty—Department putting burden on assessee—No satisfactory explanation furnished by assessee—Imposition of penalty by the department on assessee—Such imposition—Whether legal.*

Held, that we are of the view that the Tribunal was not right in sustaining the penalty by placing wrong burden of proof on the assessee. Accordingly, the matter is sent back to the Tribunal to hear the appeal of the assessee afresh and take fresh decision after placing burden on the department in accordance with law.

(Para 3).

*Reference under Section 271(1)(c) of the Income-tax Act, 1961 by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh, to the Hon'ble High Court of Punjab and Haryana for opinion of the following questions of law arising out of the Tribunal's order dated 13th May, 1981 in I.T.A. No. 895 of 1979, Assessment Year 1974-75 :*

*"Whether, on the facts and in the circumstances of the case, the Tribunal erred in law in sustaining the penalty of Rs. 9400 levied by the Income Tax Officer under Section 271(1)(c) of the Income Tax Act, 1961?"*