REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 7133 OF 2008

UNION OF INDIA & ANR. …..APPELLANTS

Versus

PURUSHOTTAM …..RESPONDENT

J U D G M E N T

–

VIKRAMAJIT SEN,J.

1 The Respondent herein, No. 7773409X Havildar (Military Police) Purushottam, was enrolled in the Corps of Military Police, on 7th June 1983. On 27th November 2001, while the Respondent was posted to 916 Provost Unit (General Reserve Engineer Force, or GREF), he was detailed as a member of Mobile Squad and was tasked to carry out checks of various Gref detachments located on the Udhampur-Srinagar highway. On completion of duty, the Squad Commander reported the following activities of the Respondent: a) He had demanded Rs. 15000 from the Commander 367 RM Platoon (Kanbal) against surplus construction stores held with the platoon;

b) he had taken 100 litres of HSD (high speed diesel) with barrel from Superintendent BR-I HL Meena of 367 Platoon, Gund Detachment and thereafter had sold it along with the barrel to a civilian for Rs.1800/-, and this allegation was levelled by the driver of the vehicle in which he was traveling; c) He had extorted Rs.6000/- from Superintendent BR-II Sanjay Kumar, 385 RM Platoon, for not reporting surplus construction material held by the platoon; d) He had taken one coat/parkha along with two steel hammers from QM, at 118 RCC (GREF).

2 Based on these reports, the Chief Engineer, Project Beacon, ordered a Court of Inquiry which investigated these allegations and concluded that the Respondent was blameworthy for two of the four aforesaid acts committed without authority: firstly, demanding and taking 100 litres of HSD from BR-I HL Meena on 30th November, 2001 and selling it to a civilian, and secondly, on 5th December, 2001 demanding and taking a coat/parkha and two stone breaking steel hammers. The Chief Engineer partially agreed with the findings of the Court of Inquiry and directed disciplinary action against the Respondent for the aforementioned two acts. The Respondent was arraigned on two counts for the two respective acts and charged with committing extortion, under Section 53(a) of the Army Act, 1950. Summary of Evidence was recorded under Rule 23, Army Rules and the Respondent

was tried by Summary Court Martial (SCM), headed by Lt. Col CM Kumar, Officer Commanding, (OC) on 11.04.2002. The Respondent pleaded guilty to both charges. At the hearing of the SCM, two prosecution witnesses were examined, both of whom the Respondent declined to cross-examine. The Respondent neither made any statement in his defence, nor did he produce any defence witnesses. He was ultimately awarded the sentence of a reduction in rank to that of "Naik". Thereafter, for reasons recondite, the 'reviewing authority' purportedly acting under Section 162 of the Act, while 'reviewing' the SCM, set aside the same, "due to incorrect framing of charge and lackadaisical recording of evidence at the summary of evidence". This intervention is in the teeth of the Certification in consonance with Rule 115. Inasmuch as it is the Deputy Judge-Advocate General who has made these observations and the records do not bear out and authenticate that his opinion/observation, was subscribed to or approved by the 'reviewing authority' who statutorily has to be the senior ranking officials enumerated in Section 162, there appears to us that a 'review' did not actually take place. This is essentially a usurpation of power by Deputy Judge-Advocate General. Rule 133 no doubt mentions this officer, but his role is restricted to forwarding the proceedings of the Summary Court Martial to the officer authorised to deal with them in pursuance of Section 162. At the most the

Deputy Judge-Advocate General may append his own opinion to the proceedings of the Summary Court Martial while forwarding them to the authorised officer. This is amply clear from the fact that the records made available to the High Court as well as to this Court do not contain any Order of the "prescribed officer" setting aside the proceedings or reducing sentence to any other sentence which the SCM had imposed. It also seems to us to be plain that instead of setting aside or reducing the sting of the sentence the Deputy Judge-Advocate General has opined, without any statutory authority, that the Summary Court Martial itself should be set aside and the Accused/Respondent be relieved of all consequences of trial. Wholly contrary to his own opinion, the Deputy Judge-Advocate General has gone on to return a finding of misappropriation and a sentence that the conduct of the Accused/Respondent renders his retention in the service as undesirable. It determined that although the officer conducting the Court Martial recorded a plea of guilty under Rule 116(4), a perusal of the Respondent's statement in the Summary of Evidence belied this recording; that therein, qua the second charge, the Respondent had contested the charge stating that he had requested for supply of only one hammer which was to be returned at the end of winter. Upon later inspecting the hammer, the Respondent

discovered that there were two hammers packed inside, instead of the one that he had requested.

3 Deputy Judge-Advocate General purporting to act as the Reviewing Authority, considering this discrepancy, opined that the "officer holding the trial should have, under AR 116 (4), altered the record and entered a plea of 'not guilty' in respect of both charges, and proceeded with the trial accordingly. Non-compliance of the aforesaid provision, in the instant case, being a serious legal infirmity, makes the SCM proceedings liable to be set aside. Therefore, notwithstanding the pleas of guilty by the accused, the findings, conviction on both charges are not sustainable. In view of the above, I am of the considered opinion that, the Summary Court Martial proceedings are liable to be set aside, and I advise you accordingly. If you agree, following will be a suitable minute for you to record on page "J" of the proceedings:- 'I set aside the proceedings. I direct that the accused be relieved of all consequences of the trial'." The records do not reveal that this advice was acted upon.

4 It was in this impasse that a Show Cause Notice (SCN) was issued shortly afterwards to the Respondent, stating that the Respondent had during his tenure been found to have engaged in illegal activities. The Respondent

was charged with acts of indiscipline for the same set of alleged acts that had erstwhile been the subject of the Court Martial proceedings against him for two offences of extortion. It was made known to the Respondent that his continued presence in the Army would possibly be detrimental to maintaining discipline and hence his retention in service was considered undesirable. The Respondent was required to show cause as to why his service should not be terminated under the provisions of Army Rule 13. The Respondent has submitted that he replied to this notice but it is not on record. The Respondent was allegedly orally told that his services had been terminated and a Discharge Certificate under Rule 13 was issued on 05.02.2003.

5 The Respondent filed a CWP against this Discharge repudiating the legality of its issuance against the same alleged acts that had already been subjected to a Court Martial proceeding. The Respondent relied on Articles 14, 16, 21 and 311 of the Constitution, and declaimed against the "illegal procedure and short cut method" taken by the Army authorities to get rid of him. The Appellants stated in their reply before the High Court, as a preliminary point, that no right of the Respondent, let alone a fundamental right, had been violated. The jurisdiction of the High Courts thus being unwarranted, the Appellants prayed for a preliminary dismissal on that point.

The Appellants denied that the Respondent had been Discharged for offences of extortion; rather, the Respondent's misconduct, amounting to moral turpitude and gross indiscipline, meant that his continued service in the Army was no longer considered desirable. The Appellants canvassed that the Respondent, not being a "civil servant", could not claim the protection of Article 311. Finally, they submitted that the Discharge procedure had been strictly followed in this case. The High Court allowed the Respondent's writ petition, and quashed Show Cause Notice as unsustainable. The Court so concluded on the basis that the Show Cause Notice relied on exactly the same set of charges as had run their course in the Court Martial, resulting in the Respondent's acquittal. The Court did not accept the distinction articulated by the Appellants, between extortion being the subject of the Court Martial, and misconduct and indiscipline being the subject of the Show Cause Notice and Discharge. Nevertheless, the High Court did not preclude the Respondent before it from "taking any departmental action against the petitioner in respect of the allegations, in accordance with law." This is the Judgment which is before us for our scrutation.

6 The factual tapestry having been threaded, we are confronted primarily as to whether the Appellants could have legally issued the notice

and discharged the Respondent for misconduct and indiscipline when the same set of alleged acts had been earlier charged as offences and put through a Court Martial, in which the Respondent was ultimately acquitted. In other words, the legal nodus that we have to cogitate upon is the propriety of the initiation of a Discharge Enquiry of a member of the Army subsequent to Summary Court Martial proceedings against him on the same or similar charges having been set aside. In terms of the impugned Judgment, Discharge Order passed by the Army/Union of India (UOI), Appellants before us, has been quashed. However the commencement of Departmental action in respect of the same allegations has not been interdicted or precluded. The Appellants vehemently contend that the High Court erred in quashing the assailed Discharge Order. Conspicuously, the Respondent has not assailed the grant to the UOI of leave to initiate a Departmental Enquiry. However, it has been vehemently contended before us that the SCN dated 31.10.2002 suffers from the vice of double jeopardy and, therefore, has been correctly quashed by the Division Bench. The rubicon cleaving the commencement or continuance of Departmental proceeding when criminal charges have also been levelled is always difficult to discover. But there is a watershed which can be discerned albeit with a fair share of arduousness.

7 We shall forthwith analyse the concept of double jeopardy, especially in the backdrop of Constitutions of countries spanning our globe. The Fifth Amendment of the U.S. Constitution promises that - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." This protection has been construed as admitting of three facets: i) *Autrefois Acquit* ii) *Autrefois Convict* iii) Protection against multiple punishments. We shall be referring briefly to John **Hudson** vs. United States 522 US 93 (1997) where the U.S. Supreme Court has delineated on what the parameters of double jeopardy. Second, Article 35(3)(m) of the Constitution of the Republic of South Africa (1996) provides that a person is “not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted”. Third, Section 11(h) of the Charter of Rights of the Canadian Constitution provides that any person charged with an offence has the right

"if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again". Fourth, Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR, 1966) states: "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country". Fifth, Article 13 of the Constitution of Pakistan, 1973, reads thus - Protection against double punishment and self incrimination − No person- (a) shall be prosecuted or punished for the same offence more than once; or (b) shall, when accused of an offence, be compelled to be a witness against himself.

8 Venturing a divergent path, the UK Criminal Justice Act, 2003, has modified the operation of *autrefois convict*, in that Part 10 thereof allows for retrial in the cases of serious offences scheduled therein, in the event of 'new and compelling' evidence against the acquitted person in relation to the qualifying offence. This statute has been emulated by legislations in New Zealand and in the Australian States of Queensland, New South Wales, Tasmania, South Australia and Victoria.

9 The Constitution of India charters a contrasting course in the context of incorporation of the doctrine of double jeopardy in that Article 20(2) postulates that – "No person shall be prosecuted and punished for the same offence more than once." This variance from constitutional protections given in other countries has prompted us to sift through the 'Debates of the Constituent Assembly' so as to ascertain whether *autrefois* convict in preference to the more preponderant *autrefois* acquit, was the position intended to be ordained by the drafters of our Constitution. These Debates bear witness to the fact that it was indeed meditated and intended. The original proposal was – "No person shall be punished for the same offence more than once". A proposed amendment whereby the words "otherwise than as proposed by the Code of Criminal Procedure, 1898," was sought to be added, but was roundly rejected. The suggestion made by Shri Naziruddin Ahmad was that "the principle should be that a man cannot be tried again, tried twice, if he is acquitted or convicted by a Court of competent jurisdiction, while the conviction or acquittal stands effective… A man acquitted shall also not be liable to be tried again." (2nd December, 1948). On the next day, the extracted intervention of Shri T.T. Krishnamachari was accepted, sounding the death knell for '*autrefois* acquit'

and leading to Article 20(2) as it stands today. Shri T.T. Krishnamachari (Madras: General):

> "Mr. Vice-President, Sir, the point I have to place before the House happens to be a comparatively narrow one. In this article 14, clause (2) reads thus: `No person shall be punished for the same offence more than once'. It has been pointed out to me by more Members of this House that this might probably affect cases where, as in the case of an official of Government who has been dealt with departmentally and punishment has been inflicted, he cannot again be prosecuted and punished if he had committed a criminal offence; or, per contra, if a Government official had been prosecuted and sentenced to imprisonment or fine by a court, it might preclude the Government from taking disciplinary action against him. Though the point is a narrow one and one which is capable of interpretation whether this provision in this particular clause in the Fundamental Rights will affect the discretion of Government acting under the rules of conduct and discipline in regard to its own officers, I think, when we are putting a ban on a particular type of action, it is better to make the point more clear.
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> I recognise that I am rather late now to move an amendment. What I would like to do is to word the clause thus: `No person shall be prosecuted and punished for the same offence more than once." If my Honourable Friend Dr. Ambedkar will accept the addition of the words `prosecuted and' before the word 'punished' and if you, Sir, and the House will give him permission to do so, it will not merely be a wise thing to do but it will save a lot of trouble for the Governments of the future. That is the suggestion I venture to place before the House. It is for the House to deal with it in whatever manner it deems fit."

10 It would be relevant to mention that modern jurisprudence is presently partial to the perusal of Parliamentary Debates in the context of interpreting statutory provisions, although earlier this exercise was looked upon askance.

Suffice it to mention the analysis of the Constitution Bench in R.S. Nayak vs. A.R. Antulay (1984) 2 SCC 183 and in Haldiram Bhujiawala vs. Anand Kumar Deepak Kumar (2000) 3 SCC 250; and particularly Samatha vs. State of Andhra Pradesh (1997) 8 SCC 191, where Parliamentary Debates were studied by this Court. It appears to be beyond debate that the framers of our Constitution were fully alive to the differing and disparate concepts of *autrefois* acquit and *autrefois* convict and consciously chose to circumscribe the doctrine of double jeopardy only to prosecution culminating in a conviction. This facet of the law has already been carefully considered by the Constitution Bench in Maqbool Hussain vs. State of Bombay 1953 SCR 730, and we cannot do better than extract the relevant portions therefrom:

> **7.** The fundamental right which is guaranteed in Article 20(2) enunciates the principle of "autrefois convict" or "double jeopardy". The roots of that principle are to be found in the well established rule of the common law of England "that where a person has been convicted of an offence by a court of competent jurisdiction the conviction is a bar to all further criminal proceedings for the same offence". (Per Charles, J. in *Reg* v. *Miles*). To the same effect is the ancient maxim "*Nimo Bis Debet Puniri pro Uno Delicto*", that is to say that no one ought to be twice punished for one offence or as it is sometimes written "*Pro Eadem Causa*", that is, for the same cause.
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> **11.** These were the materials which formed the background of the guarantee of fundamental right given in Article 20(2). It incorporated within its scope the plea of "autrefois convict" as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribed it by providing that there should be not only a prosecution but also a punishment in the first instance in order

> to operate as a bar to a second prosecution and punishment for the same offence.
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> **12.** The words "before a court of law or judicial tribunal" are not to be found in Article 20(2). But if regard be had to the whole background indicated above it is clear that in order that the protection of Article 20(2) be invoked by a citizen there must have been a prosecution and punishment in respect of the same offence before a court of law or a tribunal, required by law to decide the matters in controversy judicially on evidence on oath which it must be authorised by law to administer and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute but not required to proceed on legal evidence given on oath. The very wording of Article 20 and the words used therein:— "convicted", "commission of the act charged as an offence", "be subjected to a penalty", "commission of the offence", "prosecuted, and punished, accused of any offence, would indicate that the proceedings therein contemplated are of the nature of criminal proceedings before a court of law or a judicial tribunal and the prosecution in this context would mean an initiation or starting of proceedings of a criminal nature before a court of law or a judicial tribunal in accordance with the procedure prescribed in the statute which creates the offence and regulates the procedure.

11 Keeping in perspective this exposition of double jeopardy as postulated in our Constitution, the *obiter dicta* in State of Bihar vs. Murad Ali Khan (1988) 4 SCC 655, expressed *en passant* by the two Judge Bench does not correctly clarify the law, as this view is contrary to the dictum of the Constitution Bench, which was not brought to the notice of the Bench.

12 The US Supreme Court has extensively excogitated over the conundrum as to what constitutes a successive "punishment" for the

purposes of attracting Constitutional protection against Double Jeopardy, under the 5th Amendment. The Court, in John **Hudson** v United States, 522 U.S. 93 (1997), affirmed the distinction between civil punishment and proceedings and criminal punishment and prosecution, and held that the Fifth Amendment proscribes two (or more) successive punishments or prosecutions of a criminal nature only, and permits civil punishment or proceedings either preceding or succeeding a criminal prosecution or punishment. In the case before the U.S. Supreme Court, John **Hudson** was the Chairman of the First National Bank of Tipton and the First National Bank of Hammon, and used his position to regain bank stock he had used as collateral on defaulted loans through a series of bank loans to other parties. Upon investigation the Office of the Comptroller of Currency (OCC) found that the loans were made in violation of several banking statues and regulations. The OCC fined and debarred **Hudson** for the violations. Later, he faced criminal indictment in the Federal District Court for violations tied to those same events. **Hudson** objected, arguing that the indictment violated the Double Jeopardy clause of the 5th Amendment. Overruling *United States v. Halper*, 490 U.S. 436 (1989), wherein the Court had ruled as unconstitutional successive proceedings taking place in similar circumstances to **Hudson's** case, the Court in **Hudson** reaffirmed the

distinction established between the "civil" and "criminal" nature of the particular successive punishment, in *United States v. Ward*, 448 U.S. 242 (1980). The U.S. Supreme Court thus held in **Hudson's** case that the Double Jeopardy clause did not preclude his subsequent criminal prosecution, because the OCC administrative proceedings were civil, not criminal. *Inter alia*, the civil nature of the punishment was ascertained with reference to the money penalties statutes' express designation of their sanctions as "civil". This reference indubitably eases the resolution of the Double Jeopardy question in the present Appeal. As has been detailed earlier, Article 20(2) does not within it imbibe the principle of *autrefois acquit*. The Fifth Amendment safeguards, inasmuch as it postulates both *autrefois acquit* and *autrefois convict*, could have been interpreted to prohibit civil punishment even in the wake of an acquittal in prosecution, but was not found by the U.S. Supreme Court to do so. *A fortiori* Article 20(2), which contemplates "prosecuted and punished" thus evincing the conscious exclusion of *autrefois acquit*, palpably postulates that the prescribed successive punishment must be of a criminal character. It irresistibly follows that departmental or disciplinary proceedings, even if punitive in amplitude, would not be outlawed by Article 20(2).

13 In R. P. Kapur vs. Union of India AIR 1964 SC 787 the question before the Constitution Bench was that the Petitioner therein had been suspended owing to the pendency of criminal proceedings against him which was challenged on the anvil of Article 314 of the Constitution. Thus, this decision is not of much relevance for the resolution of the legal nodus before us, save for the observations that "if criminal charge results in conviction, disciplinary proceedings are bound to follow against the public servant is convicted, even in case of acquittal proceedings may follow where the acquittal is other than honourable." However, on this aspect of the law we need go no further than the recent decision in Deputy General of Police vs. S. Samuthiram (2013) 1 SCC 598, since it contains a comprehensive discourse on all the prominent precedents. This Court has concluded, and we respectfully think correctly, that acquittal of an employee by a Criminal Court would not automatically and conclusively impact Departmental proceedings. Firstly, this is because of the disparate degrees of proof in the two, *viz*. beyond reasonable doubt in criminal prosecution contrasted by preponderant proof in civil or departmental enquiries. Secondly, criminal prosecution is not within the control of the concerned department and acquittal could be the consequence of shoddy investigation or slovenly assimilation of evidence, or lackadaisical if not collusive conduct of the

Trial etc. Thirdly, an acquittal in a criminal prosecution may preclude a contrary conclusion in a departmental enquiry if the former is a positive decision in contradistinction to a passive verdict which may be predicated on technical infirmities. In other words, the Criminal Court must conclude that the accused is innocent and not merely conclude that he has not been proved to be guilty beyond reasonable doubt.

14 Indeed, it appears to us that the case in hand falls in the passive category since the Respondent has been let-off incorrectly on technicalities, and that too, on a very implausible and debatable if not specious opinion of the JAG Branch. A Summary Court Martial was held on 11th April, 2002 in which Lt. Col P. Bhutani was present as the 'friend of the Accused; along with JC M. Sub KC Manocha as the Interpreter. At the Arraignment the Accused/Respondent pleaded guilty of both charges. It has been certified by the Court that the Respondent had been explained the meaning of the charges and that he understood them as also the effect and consequences of his having pleaded guilty. In the Summary of Evidence four witnesses were questioned, one cross-examined and this opportunity was declined by Respondent for the others. After advising due caution the Accused/ Respondent gave a detailed statement. It was the opinion of the Reviewing Officer that Army Rule 116(4) required the 'Guilty' plea to be altered to

'Not Guilty' predicated on the unsubstantiated and unsustainable conclusion that the Respondent did not understand the effect of the former. Premised on this conclusion, his recommendation was for setting aside the proceeding and sentence of 'reduction to rank of Naik' and also directing that the accused be relieved of all consequences of the Trial. Curiously enough, the Reviewing Authority also opined: "Notwithstanding the ibid, setting aside due to incorrect framing of charge and lackadaisical recording of evidence at the Summary of Evidence, the evidence shows that the accused misused his position as a member of CMP and misappropriated various items. Therefore, in my opinion, his conduct renders his retention in service undesirable. You may accordingly initiate action to progress his case for administrative discharge under the provisions of Army Rule, 13". It is in this backdrop that we think it to be illogical to hold the opinion that the Respondent had earned an honourable acquittal. Consequently, whether on reliance of the Double Jeopardy principle or on the setting aside of his punishment, Departmental or Disciplinary proceedings ought not to be viewed as precluded. Ironically and paradoxically, we may comment, the Respondent has been made vulnerable to a far more stringent action by setting aside the findings in the Court Martial in that from a comparatively lenient punishment of being lowered in rank he has been discharged from service.

15 Section 121 of the Army Act requires special scrutiny inasmuch as it specifies that:

> **121. Prohibition of second trial**. -- When any person subject to this Act has been acquitted or convicted of an offence by a court-martial or by a criminal court, or has been dealt with under any of the sections 80, 83, 84 and 85, he shall not be liable to be tried again for the same offence by a court- martial or dealt with under the said sections.

16 The language immediately distinguishes it from Article 20(2) since it palpably postulates both *autrefois acquit* and *autrefois convict* to a court-martial or a trial by criminal courts, but then restricts the insulation only to a second court-martial or a dealing under Sections 80, 83, 84 and 85 of the Army Act. A conjoint perusal of Sections 121, 125 and 126 will clarify that a simultaneous court-martial and trial by a Criminal Court is not contemplated. Furthermore, the Army Act is rightly reticent on the jurisdiction and powers of criminal courts. Although the question does not arise before us, we cannot refrain from ruminating on the *vires* of Section 126(2) inasmuch as it postulates primacy to the Central Government of a determination as to whether the Court Martial or criminal court shall have custody of the offender regardless of the decision of the criminal court. Although Section 127 of the Army Act stands repealed by the Army (Amendment) Act, 1992 it did not suffer from the same vice in that the

Central Government possessed the power to grant or desist from granting sanction for a second/successive trial by a Criminal Court. The erstwhile provision read so:-

> 127. (1) A person convicted or acquitted by a court martial may, with the previous sanction of the Central Government, be tried again by a criminal court for the same offence, or on the same facts.
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> (2) If a person sentenced by a court-martial under this Act or punished under any of the sections 80, 83, 84 or 85 is afterwards tried and convicted by a criminal court for the same offence, or on the same facts, that court shall, in awarding punishment, have regard to the punishment he may already have undergone for the said offence".

17 Although this question also does not arise before us, Section 300 of Criminal Procedure, 1973 may arguably not be in harmony with the Constitution since it contemplates both *autrefois acquit* and *autrefois convict* even though a conscious decision had been taken by the Drafters of our Constitution that protection only as regards the latter shall be available. Of course, the Cr.P.C. grants much wider protection to the individual and for this reason has understandably not been assailed on the touchstone of Article 20(2) of the Constitution. We must again advert to the speech of Mr. Naziruddin Ahmad, who had reminded the Constituent Assembly of this very position, namely, of the wider parameters of Double Jeopardy

enshrined even in the then extant Cr.P.C., and his pitch for the Constitution to do likewise.

18 This would be the opportune time to consider the Three-Judge Bench decision in Chief of Army Staff vs. Major Dharam Pal **Kukrety**, 1985 (2) SCC 412, for the reason that in the facts obtaining in that case the finding of the Court Martial was not confirmed which brought into play Section 153 of the Army Act, 1950 which ordains that no finding or sentence of a general, district or summary general, court-martial shall be valid except so far as it may be confirmed. This Court was of the view that there was "no express provision in the Army Act which empowers the holding of a fresh court-martial when the finding of a court-martial on a revision is not confirmed". It, thereafter, construed Rule 14 of the Army Rules as unrestrainedly enabling the Chief of Army Staff to: (a) dismiss or (b) remove or (c) compulsory retire from service any officer. Even though the aspect of honourable acquittal was not pressed into service in **Kukrety**, this element would also have been relevant in holding it legally permissible to take action under the Army Rules. Furthermore, Article 20(2) is not a restraint on even the initiation of a fresh Court Martial, as the case may be. **Kukrety** was a commissioned officer unlike the case with which we are presently dealing. Rule 14 permits the afore-mentioned actions being taken with the

concurrence of the Central Government whilst the pandect comprising Rules 11, 12 and 13 deals with discharge etc. of every person enrolled under the Army Act. We must immediately hark back to Section 20 of the Army Act which empowers the dismissal or removal from service of any person subject to this Act, other than a commissioned officer.

19 The Show Cause Notice impugned before the High Court was predicated on Rule 13 by obviously circuitously taking recourse to the residuary clause 13(3)(III)(V) of the relevant Table, We have consciously used the word 'circuitously' for the reason that the Appellants could have resorted to Section 20 of the Army Act. We may add a word of caution here – the power to do a particular act must be located in the statute, and if the rules framed under the statute ordain an action not contemplated by the statute, it would suffer from the vice of excessive delegation and would on this platform be held *ultra vires*. Rules are framed for dealing in detail with myriad situations that may manifest themselves, for the guidance of the concerned Authority. Rules must, therefore, be interpreted in a manner which would repose them in harmony with the parent statute. Based on our experience, it seems to us that the Army Authorities are often consumed by the Army Rules without fully comprehending the scope of the Army Act itself.

20 Another Three-Judge Bench in Union of India vs. Harjeet Singh **Sandhu**, 2001 (5) SCC 593, considered **Kukrety** and then concluded that if the decision of the Court Martial is not confirmed, the disciplinary action, whether a dismissal (or, for that matter, a discharge) may be resorted to. Rule 14(2) was construed by this Court to enable the Central Government or the Chief of Army Staff to arrive at a satisfaction that since it is inexpedient or impracticable to have the officer tried by a court martial, to either dismiss, remove or compulsory retire the officer or the concerned officer.

21 The impugned Judgment holds that "though in the summary Court Martial proceedings initiated against the petitioner on the basis of same charges have been set aside and the petitioner has succeeded, the subsequent show cause notice for discharge relies on the same very charges to discharge the petitioner, which in our view cannot be sustained. The result of the aforesaid is that the impugned order of discharge cannot be sustained and is hereby quashed with all consequential benefits to the petitioner. This will however, not preclude the respondent from taking any departmental action against the petitioner in respect of the allegations in accordance with law". These conclusions we are unable to sustain. In the first place there is no complete ban on a second Court Martial, provided it is within the prescribed period of limitation, etc. Secondly, as has been held in **Kukrety** and

indirectly affirmed in **Sandhu**, where the decision of the court martial fails to find confirmation, the effect is that it cannot be considered that a court martial has, in fact, been concluded and further, in our opinion, so as to debar a fresh one. The Double Jeopardy principle contained in Section 121 has only premised the prohibition of a second trial in case the first one leads to punishment/conviction.

22 The Discharge Certificate issued against the Respondent under Rule 13 interestingly describes his character at the time of Discharge as being "exemplary". This recording is eminently irreconcilable with the findings in the order of setting aside, illegal as it was, by Deputy Judge-Advocate General, which concluded that the Respondent was liable to be discharged for misconduct, being unfit for further service in the Army, having misappropriated various items. This dissonance further discredits and makes unsustainable the discharge proceedings under Rule 13, which we have already described as circuitously having been exercised on the basis of a residual entry, and in supersession of the Army Act's dismissal powers, which are appositely exercisable as a sequel to failed Court Martial proceedings. The Discharge Certificate, issued under Section 23 read with Rule 12, being the conclusive step of the discharge proceedings, cannot therefore stand.

23 The ostensible order of setting aside under Section 162 that has been placed on record is Deputy Judge-Advocate General's order, but this is not the authority conceived of by Section 162. There is no order by a competent officer or authority under Section 162 indicating the setting aside of proceedings on merits, in the exercise of the reviewing function under Section 162. The Appellants have endeavoured availing of Rule 133 of the Army Act in conjunction with Section 162 thereof to legitimise the order. Rule 133 states:

> **133. Review of proceedings**.— The proceedings of a summary court-martial shall, immediately on promulgation, be forwarded (through the Deputy Judge-Advocate General of the command in which the trial is held) to the officer authorized to deal with them in pursuance of section 162, After review by him, they will be returned to the accused person's corps for preservation in accordance with sub-rule (2) of rule 146.

Rule 133 does not empower Deputy Judge-Advocate General as the reviewing authority, but merely confers on it a forwarding function, the Rule stating that the proceedings of the SCM on promulgation require to be forwarded to the competent officer under Section 162, but only parenthetically provides that this will occur "through" Deputy Judge-

Advocate General. This cannot be interpreted substitutively, as enshrining in Deputy Judge-Advocate General the statutory remit of the reviewing authority under Section 162. This apart, it has already been opined by us heretofore that the setting aside took place "technically" and therefore impermissibly in terms of Section 162.

24 We also find it apposite to add that though there was incongruity between the Deputy Judge-Advocate General (acting as the Reviewing Authority) and the Summary Court Martial, resulting in a nugatory Court Martial process, a perusal of the Act, as well as the facts on record, will reveal that this need not have been. A Summary Court Martial does not require for its efficacy, finality and validity, the confirmation of the Confirming Authority, as has been mandated for the other three classes (supra) of Court Martial, enumerated in Section 153. Section 161(1) expressly states that the finding and sentence of a Summary Court Martial shall not require to be confirmed, but may be carried out forthwith. However, Section 162 requires transmission of proceedings without delay to be forwarded to the competent officer, commanding the division or brigade in which the trial was held, or to the prescribed officer; and such officer, or the Chief of Army Staff, or any other empowered in this behalf by the Chief of Army Staff, may for reasons based on the merits of the case, but not

merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court (martial) might have passed. This being a transmission of proceedings under Section 162, the Reviewing Authority's basis for insistence that a plea of "not guilty" ought to have been recorded after the summary of evidence, based upon the statement of evidence given by the Respondent therein, and subsequent setting aside of the consequences of the Court Martial presided by the Officer Commanding, cannot stand. On a demurrer, at the Summary of Evidence, the Respondent had only contested the Charge of his having extorted the coal hammer, stating in reply thereto that he had requested for one hammer which was to be returned at the end of winter, and that upon opening the bag, found two therein. There are no averments in his defence to be found in the Summary of Evidence, as to the charge of extorting high speed diesel. Furthermore, the Respondent did not make any Statement of Defence at the Summary Court Martial hearing itself, and neither produced any defence witnesses on his behalf nor cross examined either of the two prosecution witnesses therein. Faced with these inescapable facts, the Reviewing Authority could not have set aside the proceedings on such a technical ground - which Section 162 expressly prohibits - that a plea of "not guilty" should have been recorded under Army Rule 116(4) in respect of both charges of extortion, as the effect of the

Respondent's plea of "guilty" was not fully understood by him. The Court Martial finding and sentence ought to have been left undisturbed by the Reviewing Authority, self-sufficiently valid as it was under Section 161 (1).

25 The Army Act and the Rules framed thereunder specifically contemplate that any person other than an officer subject to the Act may be dismissed or removed from service under Section 20 of the Act; and any such person may be dismissed, removed or reduced in rank under Section 20 read with Rule 17. The High Court has not failed to appreciate this dichotomy inasmuch as it has not precluded the taking of departmental action. The difference is that the departmental action is exactly what was taken and additionally what has now been permitted by the Impugned Judgment to be initiated.

26 It is with the above clarifications that we dispose of the Appeal by restoring the order of the Summary Court Martial, yet not prohibiting the Appellants to proceed in accordance with law.

.....J.
[VIKRAMAJIT SEN]

.....J.
[SHIVA KIRTI SINGH]

New Delhi;
January 05, 2015.