

**IN THE ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

**TA/624/09
WRIT PETITION (CIVIL) NO.2314/2000**

**SERGEANT P.L.DHAKA (RETD)
C-8, NEW WELLINGTON CAMP
AIR FORCE STATION
RACE COURSE, NEW DELHI-110 003.**

THROUGH : SH.V.S.TOMAR, ADVOCATE

...PETITIONER

VERSUS

- 1. UNION OF INDIA
THROUGH ITS SECRETARY
MINISTRY OF DEFENCE
NEW DELHI.**
- 2. THE CHIEF OF THE AIR STAFF
AIR HEAD QUARTERS (VAYU BHAWAN)
RAFI MARG
NEW DELHI-110 011.**
- 3. AIR OFFICER-IN-CHARGE ADMINISTRATION
AIR HEAD QUARTERS (VAYU BHAWAN)
RAFI MARG
NEW DELHI-110 011.**
- 4. THE AIR OFFICER COMMANDING
AIR FORCE STATION
RACE COURSE
NEW DELHI-110 011.**

**THROUGH : MS. JYOTI SINGH, ADVOCATE
WING COMMANDER ASHISH TRIPATHI**

...RESPONDENTS

CORAM :

HON'BLE SH. S.S.KULSHRESTHA, MEMBER

HON'BLE SH. S.S.DHILLON, MEMBER

J U D G M E N T

Dated : 11th MAY, 2010

1. This Writ Petition under Article 226 of the Constitution of India had been brought to Delhi High Court for declaring Air Force Order 15/90 (hereinafter referred to as the "AFO") relating to "search", to be unconstitutional and ultravires. The search so made in the married Quarter C-8, New Wellington Camp, Air Force Station, Race Course, New Delhi-110003 on 19.12.1998 on the basis of the powers drawn by respondent no.4 from the aforesaid AFO 15/90 is said to be illegal, invalid and non-est. Further exemplary damages are also claimed for the violation of his fundamental rights under Article 21 & 19(1)(d) which caused irreparable damages to his social reputation. It is contended by the petitioner that he was posted to the Directorate of Personnel (Airmen) with effect from 14.07.1997 from National Defence Academy Khadakvasala, Pune and continued to work till attaining the age of superannuation on 31.03.2000. The petitioner being a Sergeant was member of the Senior Non Commissioned Officer's Mess and was entitled to draw four bottles of liquor (two each of Rum and Whisky)

from the said Mess every month. He was allotted married quarter C-8, New Wellington Camp, Air Force Station, Race Course, New Delhi-110003. In that quarter, search was affected by Air Officer Commanding without any authority and contrary to provisions of Air Force Act, 1950 (hereinafter referred to as “The Act”) and Air Force Rules, 1969 (“The Rules”). Even the Chief of Air Staff to whom under the Rules any of the powers are delegated, could not sub-delegate these to the respondent no.4 for issuing search warrant of the quarter occupied by the petitioner. By affecting such search of the quarter of the petitioner, on the strength of AFO 15/90, his right of privacy has not only been affected but it is in violation of fundamental rights and is contrary to Article 33 of the Constitution of India, which enjoins that it was for the Parliament to determine to what extent any of the rights conferred by Part-III of the Constitution of India, in their application to the members of the Air Force, be abrogated or curtailed. No such arrangement is made in the Act or the Rules for making the search in the house of the personnel subject to the Act. The search so affected in the quarter of the petitioner is without any legal validity and so any action emanating thereunder is also illegal and non-est. It was not covered by Para-143 of the AFO 15/90.

2. This petition was challenged by respondents contending that in the month of December 1998 information was received from Assistant Provost Marshal (APM) of Race Course with regard to liquor trafficking at Air Force Station New Wellington Camp, Race Course, New Delhi and accordingly surveillance was strengthened. Having received information from the Air Officer Commanding that such liquor trafficking is being made from married accommodation occupied by the petitioner. The AOC authorised Sqn. Leader Sanjay Seth, Sqn Ldr S Pati, WO K Raju and Sgt V B Singh to conduct the search at petitioner's house and issued search warrant under Air Force Order 15/90. Search was virtually effected on 19.12.1998 and in the course of search as many as 145 bottles of liquor in wooden and steel boxes were recovered which he was keeping improperly. As regards the powers conferred under AFO 15/90, it is said that in no way it curtails/abrogates fundamental rights of the person subject to Air Force Act. The provisions of search contained in AFO 15/90 are proper and commensurate to the requirement of discipline amongst the persons subject to the Act. The AFO 15/90 which deals with the search is self contained and entire procedure has also been laid down in paras-143 to 148. Apart from it, para-917 of the Regulations for the Air Force 1969 provided that "*Air Force Orders will be issued by the Chief of the Air Staff on matters of an administrative nature affecting the air force*

formations and units as a whole". The service quarter allotted to the petitioner was an administration process and if some illegal activities are being conducted from that quarter, that would fall within the ambit of administrative process. Moreover such search was also essential for maintaining discipline in the forces. For search, the Air Force Commanding Officer was empowered to issue the search warrant. Other legal issues raised from the side of the petitioner are also opposed by the respondents.

3. Basically the challenge is to the validity of AFO 15/90. The question arises as to how far this Tribunal can exercise its powers to make the judicial review of those executive instructions and to declare them to be non-est. In that regard, both the learned counsels for the parties have submitted that since the search was conducted on the basis of guidelines contained in the said AFO 15/90, the validity of that AFO can be looked into by this Tribunal. There is no denial of the fact that under the Constitution of India, sovereign power is distributed among legislature and the judiciary with certain checks and balances. The judiciary has been expressly entrusted with the powers of judicial review as sentinel in *qui vive*. Basically judicial review of administrative actions as also of legislation is exercised against the action of the State. Since the State or

public authorities act in exercise of their executive or legislative power, they are amenable to judicial review. Judicial review of administrative action is, therefore, an essential part of the rule of law. The judicial control on administrative action, thus, affords the courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review. Consequently, validity of AFO 15/90 and the search so affected is taken for consideration.

4. It was strenuously argued by the learned counsel for the petitioner that the Act and Rules nowhere provides for the Central Government or Chief of Air Staff to make the search of the house of the individual as a result of which AFO 15/90 is unconstitutional and illegal. In order to appropriate the answer it is to be determined whether in exercise of the powers under section 190, the Central Government has issued any executive instructions or regulation other than what were specified in Section 189? It is a fact that there is no provision in the Air Force Act, 1950 or in the Regulations authorising the search of the house occupied by the individual. It may be mentioned that there is a power under the Act to make regulations, which reads as under :

***Powers to make regulations:** The Central Government may make regulations for all or any of*

the purposes of this Act other than those specified in section 189.

5. The word “regulation” (1) used in the statute cannot have any rigid or inflexible meaning as to exclude ‘prohibition’. The word “regulate” is difficult to define as having any precise meaning. To the contrary, the expression used with the effect that “any of the purpose of this act other than those specified in Section 189” would have a broad import and is very comprehensive in scope. Differentiates of meaning are brought out in *Corpus Juris Secundum*, Vol 76 at P.611.

“Regulate” is variously defined as meaning to adjust; order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.

“Regulate” is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict.

6. By applying the true import to the expression “regulation” for which power vest with the Central Government under Section 190, it may be mentioned that such power also implies to prescribe and enforce such proper and reasonable rules and regulations as may be deemed necessary to conduct the business/administration in proper and ordinary manner. It also imputes the authority to prescribe the regulations or conditions subject to which the administration of the Air Force may be permitted or may be conducted. Even otherwise power of regulations may be conferred on authority with obligations and functions that go with it and are incidental to it. Reliance may be placed in the case of *Deepak Theatre, Dhuri Vs. State of Punjab & Others 1992 Supp (1) SCC Page 684.*

7. The Central Government has issued in exercise of the powers under Article 73 of the Constitution of India general instructions for Air Officers Commanding in Chief which have been incorporated in Chapter-IV of the Regulations of the Air Force. Relevant paragraphs may be quoted here in under:

General Responsibility

(a) An air or other officer commanding-in-chief is responsible for the command, discipline, training and efficiency of the units in his command, subject

to any limitations which may, from time to time, be imposed by Air Headquarters or by the regulations.

(b) He is responsible for all matters relating to the administration of his command.

(c) He is responsible for ensuring that schemes of mobilisation for all units stationed in his command are kept up to date; that all ranks in his command are acquainted with their duties on mobilisation and in connection with any local defence scheme applicable; and that those concerned have such access to the scheme as is necessary for the proper performance of the duties required of them.

Delegation of Responsibilities

He may delegate his responsibilities to such officers under his command and to such an extent as he may consider desirable, subject to any limitations, which are, in any matter, prescribed by regulations, and bearing in mind that the ultimate responsibility devolved on him.

8. Such Regulations or Executive instructions issued by the Central Government would fall under Article 73 of the Constitution. The executive power of union under Article 73 extends to matters with respect to which Parliament has power to make laws and hence the field in which law could have been made, executive inspections may be issued in the absence of Legislation (*See NDMC Vs. Tanvi Trading and Credit*

Ltd.,(2008) 8 SCC 765). The Chief of Air Staff in exercise of the powers under Regulation 917 issued AFO 15/90 which also authorises search as under:

143 : Aim of Search- *Searches are aimed at seizure of subversive materials, stolen articles and in curbing pilferages and the removal of valuable documents etc. It should, now ever be borne in mind that unauthorised and indiscriminate searches of any person and premises without reasonable grounds tantamounts to an assault on the personal liberty of individuals. Therefore, indiscriminate searching of Air Force personnel, without reasonable suspicion, and in the mere hope or on the chance of finding stolen property is not to be undertaken.*

144 : Powers of Commanding Officer- *A Commanding Officer has, by virtue of his position and responsibilities, an inherent power to make a search of any camp, barracks and married or other quarters within his command and may, while doing so, search the Air Force personnel, their kit, boxes, other receptacles, or other vehicles belong to such persons. This power may be delegated by him to any officer or NCO including a member of the IAF Police.*

145 : Types of Searches- *Search can be classified as under:*

- (a) Cursory/Routine Search*
- (b) Periodical Search*

(c) Suspected Search.

148 : Suspected Search-The suspected search may be carried out anywhere (inside or outside the camp). Suspected search may be carried out in respect of personnel, vehicle, premises etc. The following principles are to be adhered to:

(a) If a member of IAF Police wishes to search a person who is not in custody, he has to obtain prior permission of his Commanding Officer in writing.

(b) IAF Policemen should not under any circumstances be alone when searching a person or premises. They should be in two, fully armed and should proceed on the clues of suspects or informers.

(c) The IAF Police personnel supervising the search should offer themselves to be searched by the suspects(s) before the commencement of search at any premises.

(d) If a person to be searched is an officer, the search must be carried out by an officer and must be duly witnessed by another officer.

(e) The search of an airman or his kit is to be carried out in his presence duly witness by an independent officer.

(f) The search of a civilian is to be conducted in his presence duly witnessed by an independent witness, preferably another civilian.

(g) The search of a female is to be carried out by another independent female with due regard to privacy and her modesty.

(h) Searches of the service quarters (both single and married) of the Air Force personnel are to be carried out on the authority of a written Warrant (specimen given at Appx 'AA') issued under the hand of the Commanding Officer. Before searching a married quarters, the female members are to be requested to withdrawn.

(i) The searches of the premises of Air Force personnel in the civil area are to be carried out with the help of civil police of the area, duly witnessed by PANCHAS (independent local civilians).

9. It is argued by the learned counsel for the petitioner that even if validity is attached to the impugned AFO 15/90, the powers to make search are confined where the searches are aimed at seizure of subversive materials, stolen articles and pilferages of the government property and the removal of valuable documents etc. Here in these provisions search of the house is not restricted, if occupant is suspected to be involved in illegal activities.

10. But the material aspect cannot be ignored. Here the police power of search under Para-143 is independent to any of the directions.

This power under Para-144 of AFO 15/90 has the power of the Commanding Officer which is also in consonance with Para 51-Instructions for Commanding Officer as given in the Regulations for the Air Force. It is the responsibility of the Air Officer Commanding in Chief or other officer commanding to ensure discipline, training, efficiency and proper administration of the station and Unit under their Command. Pursuant to that responsibility, he may also get the search of the house of Air Force personnel. He can also affect the search of barracks and any other quarters within his command. It in no way infringes upon the fundamental rights of any individual subject to Act. Certain safeguards of the search have also been incorporated under Para-148 of AFO 15/90. We do not see how anyone who is carrying out illegal activities can consider himself immune from search and seizure, even if it appears that prima-facie there is information of a particular offence which warrant search of the quarter: moreso when such quarter is official Government owned accommodation.

11. As regards to violation of fundamental right to privacy is concerned, it may be mentioned that power to make search and seizure by itself may not offend the right of privacy. Analogy may be drawn from the principle of law canvassed by the Supreme Court in the case of

Directorate of Revenue Vs. Mohd. Nisar Holia, (2008) SCC 370 as under:

Although a statutory power to make a search and seizure by itself may not offend the right of privacy but in a case of this nature, the least that a court can do is to see that such a right is not unnecessarily infringed. Right to privacy deals with persons and not places.

A person, if he does not break a law would be entitled to enjoy his life and liberty which would include the right to not to be disturbed. Right to be let alone is recognised to be a right which would fall under Article 21 of the Constitution of India. This Court in Sharda Vs. Dharmपाल dealt with right to privacy to a certain extent. The question came up for consideration in Distt. Registrar and Collector Vs. Canara Bank wherein the provisions of Section 73 of the Stamp Act, as amended by the State of Andhra Pradesh, was struck down holding: (SCC p.523, para 53)

“Once we have accepted in Gobind and in later cases that the right to privacy deals with ‘persons and not places’, the documents or copies of documents of the customer which are in a bank, must continue to remain confidential vis-a-vis the person, even if they are no longer at the customer’s house and have been voluntarily sent to a bank. If that be the correct view of the law, we cannot accept

the line of Miller in which the Court proceeded on the basis that the right to privacy is referable to the right of 'property' theory. Once that is so, then unless there is some probable or reasonable cause or reasonable basis or material before the Collector for reaching an opinion that the documents in the possession of the bank tend to secure any duty or to prove or to lead to the discovery of any fraud or omission in relation to any duty, the search or taking notes or extracts therefore, cannot be valid. The above safeguards must necessarily be read into the provision relating to search and inspection and seizures so as to save it from any unconstitutionality."

12. Here in this case, there was information with regard to illegal trafficking of liquor from the quarter of the appellant. When the accused himself was breaking the law, he was not entitled to enjoy his life at liberty. **Accordingly petition is dismissed.**

S.S.DHILLON
(Member)

S.S.KULSHRESTHA
(Member)

PRONOUNCED IN OPEN COURT
TODAY ON DATED 11th MAY, 2010