

**IN THE ARMED FORCES TRIBUNAL, PRINCIPAL BENCH
NEW DELHI
(Court No.2)**

O.A NO. 50 of 2010

IN THE MATTER OF:

Ex CPL Amit Kumar Yadav**APPLICANT**
Through : Mr. K.K. Rohtagi, counsel for the applicant

Vs.

UNION OF INDIA AND OTHERS ...**RESPONDENTS**
Through: Mr. Ajai Bhalla counsel for the respondents

CORAM:

**HON'BLE MR. JUSTICE MANAK MOHTA, JUDICIAL MEMBER
HON'BLE LT. GEN. M.L. NAIDU, ADMINISTRATIVE MEMBER**

JUDGMENT

Date: 15.12.2011

1. The OA No.50/2010 was filed in the Armed Forces Tribunal on 19.01.2010.
2. Vide this OA, the applicant has prayed for quashing of the impugned orders dated 02.09.2005 and 12.4.2006 (Annexure A-1) passed by the respondents by which his services were dismissed and his representation was also rejected respectively. The applicant has also prayed that he be reinstated in service with all consequential benefits including his seniority.
3. The facts of the case are that the applicant was enrolled in the Indian Air Force on 12.8.1999 as an Airman. On 26.5.2004, in accordance with the terms and conditions of the service the applicant

was allotted a Service Married Quarter (SMQ). Due to acute shortage of accommodation at Srinagar, the service personnel were permitted to share quarter as the Airmen were not allowed to stay outside the Camp area.

4. It is further contended that in October 2004, one CPL Rajesh Kumar who had recently arrived on posting requested the applicant to allow him to share the quarter. Both the families were of the same cultural background and belonged to the same region and the applicant used to call Mrs. Rajesh Kumar as 'Bhabhi' and likewise CPL Rajesh Kumar also used to address the applicant's wife as 'Bhabhi'. In November 2004, the applicant had to drop his wife at his native place. The applicant had also requested CPL Rajesh Kumar to vacate the house by the time his wife returned. On his return from leave, the applicant felt that there was an element of unease in his relation with CPL Rajesh Kumar and his family and the applicant was constrained to spend a lot of his time among his friends. The applicant had also requested Sepoy Kiran Chaudhary to permit CPL Rajesh Kumar and his family to share the accommodation. The applicant felt that CPL Rajesh Kumar and his wife were reluctant to shift and unhappy with the suggestion of shifting.

5. It is further alleged that on 19.12.2004 at early morning when there was no electricity in the area and when the applicant woke up it was dark. He could not locate the match box in his room to light the

lamp. He came out of his room and requested for a match box from CPL Rajesh Kumar by calling out his name. The room used by CPL Rajesh Kumar was opened from inside and the match box was handed over. It appears that the applicant's hands accidentally brushed with the hands of Mrs. Rajesh Kumar. But what followed was like an enacted drama. Mrs Rajesh Kumar started making shouting noises and the applicant was perplexed as he had just woken up and was not expecting such behaviour. The applicant's first attempt was to make Mrs. Rajesh Kumar to keep quiet. Later on the applicant realised that the CPL Rajesh Kumar was not in the house and on hearing the shouting, Mrs Gochyat, their neighbour came down. The applicant was trying to make Mrs. Rajesh Kumar calm down.

6. It is further submitted that the matter reached the guard room. Investigation was carried out and all people involved in the incident made to sign on prepared statements. Subsequently, Mrs. Rajesh Kumar realised her mistake and retracted her statement and allegations against the applicant in front of elder ladies of the campus, accepting that it was a misunderstanding. However, based on the report by the Air Force personnel, a COI was ordered. It is contended that the applicant being young and inexperienced in legal matters, followed the suggestions of his seniors and cooperated in completing the proceedings at the earliest. The applicant was made to sign prepared statements in his own interest.

7. On 03.5.2005, the applicant was handed over a copy of show cause notice issued on behalf of respondent No.3 calling upon him to show cause as to why his services should not be dismissed under Air Force Act, 1950, Section 20(3) read with Air Force Rule 18 of 1969 from IAF (Annexure A-2). On 27.06.2005, the applicant submitted a reply to the show cause notice (Annexure A-3).

8. Thereafter, the applicant proceeded on leave and when he reported back on 13.9.2005, he heard rumours that orders have already been passed for his dismissal and the applicant approached the Hon'ble Court challenging his dismissal on flimsy grounds. However, by that time the order of dismissal was not handed over to the applicant. The Hon'ble Court permitted the applicant to withdraw the petition being premature and challenge the same at appropriate time. Thereafter, the order of dismissal dated 02.09.2005 (Annexure A-1) was handed over to the applicant. It is submitted that in November 2005, the applicant filed first representation (Annexure A-4) against the order of dismissal but that was not disposed off.

9. The applicant again approached the Hon'ble High Court vide WP(C) No.779/2006 and the Hon'ble Court disposed off the petition with the directions to the respondents to dispose off the representation of the applicant within a period of three months from the date of order i.e. dated 20.1.2006 (Annexure P-7). Consequently, the respondents

disposed off the representation vide letter dated 12.04.2006 reiterating that the order of dismissal passed by respondent No.3 as correct.

10. Learned counsel for the applicant stated that the applicant also made a representation to the MOD and the Chief of Air Staff, respondents 1 and 2 vide Annexure P-4.

11. Learned counsel for the applicant argued that the applicant was falsely implicated in a case of alleged assault on a woman in his own house. It was a conspiracy by the couple for doing him down since he has asked them to vacate his accommodation.

12. He further argued that Mrs. Rajesh Kumar, the complainant had stated before the COI that she had withdrawn the case against the applicant. Even CPL Rajesh Kumar told the applicant that it is human to err and he will try to pacify his wife. This clearly suggests that whatever incident had taken place, was not of grave consequences.

13. Learned counsel for the applicant argued that the COI did not examine the only eye-witness to the alleged incident namely Mrs. Gochayat to obtain the truth of the incident and the circumstances. The applicant had made several pleas to the Presiding Officer of the COI but all those objections and pleas were turned down. So much so that an affidavit filed by one CPL H. Singh who was also a witness regarding the procedure being adopted in the conduct of the inquiry was not given due weightage (Annexure A-6 refers).

14. It is clear from the statement of complainant and her husband that they did not want to pursue the case and as such did not file any police complaint and no FIR was lodged.

15. Learned counsel for the applicant further argued that the persons subject to Air Force Law who has committed a civil offence can be dealt with in accordance with the laid down procedure. In the instant case, the applicant had neither been dealt with in accordance with the criminal law applicable to any person nor under the provisions of Section 71 of the Air Force Act, 1950. The respondents instead of initiating such legal action resorted to administrative action by issuing notice under Air Force Act, Section 20(3) read with Rule 18 of the Air Force Rules which denied the applicant, the opportunity of being investigated the case in an impartial manner. He further argued that the applicant could have been tried under Section 354 of the IPC which is a compoundable offence in terms of Section 320 Cr. P.C.

16. Learned counsel for the applicant further stated that the material witness was not examined by the COI and therefore, their statement was not recorded. Further, the confessional statement taken by the Air Force authority is akin to statement recorded by police which is not admissible in evidence.

17. Learned counsel for the applicant further stated that the applicant has now been left jobless and has no other means of income.

18. Learned counsel for the applicant further stated that no fair opportunity was given to the applicant under Rule 24 of the Air Force Act. The COI should have heard him and he should have been given opportunity to examine the witnesses. He further stated that there were also procedural irregularities in terms of Rule 24 to 26 with no evidence on record before a decision was taken. He further stated that dismissal of ranks by AOC-in-C consequent to COI is only possible under Rule 154 and 166 of the Air Force Rules.

19. He further stated that the applicant was not given a copy of the COI though the show cause notice issued on 03.5.2005 relied heavily on the recommendations and findings of the COI. Therefore, the applicant was unable to reply to the show cause notice in a fair manner.

20. Finally, learned counsel for the applicant stated that the applicant had six years of service and the punishment of dismissal is rather harsh and is liable to be quashed and he is entitled to reinstatement in service with all pecuniary benefits.

21. In support of his contentions, learned counsel for the applicant cited **145 (2007) Delhi Law Times 588(DB) in the matter of Mahesh Chand Vs UOI & Ors.**, wherein the Hon'ble Court opined that while dealing with the question of quantum of punishment, the Court would apply the Wednesbury principle of reasonableness.

22. In **(2001)2 SCC 386 in the matter of Om Kumar and Ors. Vs Union of India**, the Hon'ble Apex Court has held that punishment should be proportionate with the offence committed.

23. In **78(1999) DLT 47 in the matter of Ex Sgt Avimanyu Panda Vs Union of India & Ors.**, the Hon'ble Court has stated that "His investigation revealed that petitioner was involved in two similar incidents- View of AOC-in-C that holding of Court Martial will require complainant to say things in Court will be traumatic for her- wholly irrelevant- Taking final decision of dismissal from service and then issuing show cause notice is arbitrary exercise of power."

24. In **(1987) 4 SCC 611 in the matter of Ranjit Thakur Vs Union of India and Ors.**, the Hon'ble Apex Court has held that "Departmental enquiry and punishment thereto should fall within the statutory provisions for compliance with procedural safeguards before imposing any such punishment."

25. Learned counsel for the respondents refuted the contentions raised by the applicant and stated that this case was dealt with under Air Force Act, Section 20(3) read with Rule 18 and not Air Force Rule 24 as argued by the applicant. Rule 24 deals with disciplinary action. As such, since no disciplinary action was taken, the issue of show cause notice and the procedure adopted thereafter was based on Rule 18.

26. Learned counsel for the respondents argued that the applicant had admitted his misconduct in the COI. Besides, he had neither cross examined any of the witnesses nor the complainant. He drew our attention to the caution given by the COI to the applicant which reads as follows:-

“I explained to 796413 L Cpl Yadav AK GTI of 45 WEU, AF that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him. This confession was voluntarily made.”

27. Learned counsel for the respondents further stated that the applicant made a confessional statement in front of the COI and therefore, there is adequate evidence for the respondents to take the action in terms of administrative action by way of issuing a show cause notice under Air Force Act, Section 20(3) read with Rule 18 of the Air Force Rules. As regards the alleged compromise between the complainant and the applicant is concerned, it did not come out in that manner, the COI in its recommendations have recommended that *“Even though, Mrs. Poonam Rani has pardoned 796413-L Cpl Yadav AK GTI and withdrawn the case on humanitarian grounds as she wants to give him a chance to become a better human being in the years to come, but the fact cannot be denied that the offence has been committed by him against her. The court is of the opinion that suitable disciplinary/administrative action as deemed fit may be initiated against him as corrective action.”*

28. Learned counsel for the respondents submitted that the facts of the case were placed before the Competent Authority including the recommendations of the COI. They also considered the response by the applicant in terms of reply to the show cause notice and therefore, to suggest that all these aspects were not considered by the respondents are incorrect. It was within the purview of the Competent Authority that this decision of dismissing him from service was taken.

29. Having heard both the parties at length and having examined the documents in original. We have also examined the contention of the applicant as regards the so called confession. We are of this opinion that the applicant had given a similar confessional statement earlier also which was recorded during the COI. During the COI, the Court had adequately warned him before he could depose, therefore, no malafide can be construed out of this confessional statement.

30. We have also examined the aspect of compromise reached between the complainant and the applicant. The complainant has very clearly stated that she is willing to forgive the applicant so that he could improve himself as a human being. But that does not mean that the alleged incident had not taken place or that it was a misunderstanding of the actions taken by the applicant and as observed by her. We have gone through the statements of witnesses deposed during the COI. In her statement, Mrs. Poonam Rani stated as under:-

“XXXXXXX

(b) *While taking the match box he pushed open my door grabbed my arm and tried to pull me towards him. I started screaming and tried to run out.....(page 6 of COI refers)*

c) *He then clasped my mouth to stop me from screaming. I bit his fingers on an attempt to free myself. I got a cut on my lip from his finger nail also..... (page No.6 of COI refers)*

d) *.....He started apologizing but kept preventing me to go outside the room and in that attempt pulled my legs and I fell on the ground.....(Page 6 of COI refers)*

e) *.....Mrs. Gochayat started abusing him and managed to free me from him (page 6 of COI refers).”*

31. The applicant himself has confirmed this incident. In his statement before the COI, the applicant made a confessional statement as under:-

“.....On 19 Dec 04 appx at 0645 hrs I got up, by then Cpl Rajesh had left for duty. I knocked their room and asked for match box. Mrs. Poonam opened the door and handed me the matchbox. While taking the matchbox I her hand, pushed open the door and tried to pull her towards me. She started screaming. I then scared of the consequences, closed her mouth with my hands to stop her from shouting...”

32. Therefore, to suggest that the complaint was withdrawn is incorrect. The authorities are still within their powers to examine the incident from an angle which leads to greater discipline and cohesiveness in the unit. Any such allegation or action can be

detrimental to the overall cohesiveness of the unit. Keeping this principle of high standard discipline required in forces in mind, the COI has very clearly recommended that disciplinary/administrative action be taken against the individual.

33. We are also conscious of the fact that after the COI it was within the realm of the competent authority to either take administrative action and/or to initiate disciplinary proceedings. It is apparent that the competent authority felt for good reasons perhaps that administrative action will be prudent and will serve the ends of justice. We are of the opinion that the decision taken by the competent authority in these circumstances need not be questioned. The contentions raised in this respect are not tenable.

34. As regards the quantum of punishment, we are of the opinion that the competent authority has considered both the aspects i.e. the allegations against the applicant which were investigated and finalised by the COI and which lead to the issuance of show cause notice dated 03.5.2005 (Annexure A-2). The show cause notice contained in detail the gravamen of the charges against the applicant. Besides, it also states that the copy of the COI is available in the Office of the Adjutant, 1 Wing AF. Therefore, the applicant was given all possible details to put up his defence in the reply (Annexure-A-3) which was submitted by him on 27.06.2005. We are satisfied that the applicant has not suffered

any prejudice in this respect and he had also filed a detailed reply in which nowhere he has made grievance of non-supply of material.

35. Going through the reply we observe that at para 6 he has narrated the same incident and the facts which have figured in his confessional statement during the COI as also the statement given by him to the Air Force authority. Thus, the incident cannot be denied. Considering the incident, the competent authority has considered all angles of the case before passing the order of dismissal. The applicant has put in six years of service. His record has been unblemished till this incident of 19.12.2004 and looking at the judgments cited by the Learned counsel for the applicant that the punishment should be commensurate with the offence has also been given weightage to the other circumstances of the case i.e., age of the applicant and his number of years of service. The issue could have been considered by the authorities when the applicant submitted the representation. His representation was submitted in November 2005. The same was rejected by the Chief of Air Staff on 04.04.2006 consequent to the order of Hon'ble High Court of Delhi in WP(C) No.779/2006.

36. We considered the facts of case and the extent of allegations found proved against the applicant and the submissions made by the Learned counsel for the applicant and also the citations which basically deal with the punishments being commensurate with the offences committed.

37. However, it would have been most appropriate had the competent authority considered the representation of the applicant for mitigation of sentence in the context that he had only six years of service and he is still 26 years of age and that he was to go and re-establish his life in civil street.

38. Be that as it may, we are of this opinion that considering the circumstances as stated above, we hold that reduction of sentence from dismissal to that of discharge will be more appropriate and will meet the ends of justice.

39. In view of the foregoing, we partly allow the OA. The applicant be treated as discharged instead of dismissed from service. Necessary formalities be completed by the respondents within a period of 90 days from the date of this order. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

**Announced in the open Court
on this 15th day of December, 2011.**