

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

**T.A NO. 175 of 2010
(WRIT PETITION (CIVIL) NO. 4601 of 2005)**

IN THE MATTER OF:

Ex NK Jyoti Kanta Mahapatra **.....APPLICANT**
Through : Mr. PDP Deo and Ms. Monica Nagi, counsel for the
applicant

Vs.

Union of India and Others **...RESPONDENTS**
Through: Mr. Anil Gautam, counsel for the respondents

CORAM:

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

JUDGMENT

Date: 04.05.2012

1. The case was first filed before the Hon'ble High Court on 14.03.2005 as WP (C) No.4601/2005 and was subsequently transferred to the Armed Forces Tribunal on 04.01.2010.
2. Vide his prayer, the applicant has sought quashing and setting aside of the dismissal order w.e.f. dated 27.01.2005 and for reinstatement in the service with all consequential benefits.
3. Brief facts of the case are that the applicant was enrolled in the Army on 19.10.1988 and after his training he was posted to 11 Battalion of Mahar Regiment.

4. It is contended that on 21.12.2000, the applicant was suddenly arrested by his Commanding Officer and was sent to Army Headquarters Liaison Unit (AHQLU) at Delhi Cantt. under escort and was lodged in the cell of the AHQLU on 23.12.2000. During this period, the applicant was interrogated by Officers and JCOs of AHQLU. He was also interrogated by police from Haridwar and also by some other officials from Delhi Police and Intelligence Bureau. The applicant came to know that he is alleged to be involved in espionage activities.

5. It is further alleged that when nothing was revealed by the applicant as he did not know anything about the espionage case, two officers from Rajputana Rifles Regimental Centre (RRRC) and Capt. H. Vaidyanathan of AHQLU came to him on 22.02.2001 with some written papers and asked the applicant to write in his own hand as per the material brought by them as confessional statement of the applicant. However, the applicant refused to give confessional statement for which the applicant was threatened with dire consequences. Thereafter, the applicant was given numerous threats and was tortured. On 17.03.2001, three senior officers forcibly asked the applicant to write on some pieces of papers brought by them as per their draft. Thereafter, the applicant was sent to RRRC on 22.03.2001 and was kept under close arrest. After that, summary of evidence was recorded.

6. It is submitted by the applicant that when no further action was taken, the applicant enquired about his fate. He was informed that there was a stay on the trial in GCM of applicant alongwith others. The applicant has never moved to the Court. The applicant alongwith Naik Kulmani Gautam one day came in contact with a lawyer who had come to Quarter Guard in connection with some other case. The applicant obtained the permission from the authorities to meet the said lawyer and explain his case. Accordingly, the writ was filed in the Hon'ble High Court, seeking vacation of the stay said to be passed in writ case by Hon'ble Delhi High Court so that he could absolve himself from the case before a GCM. On 25.03.2003, based on CM No.3863 of 2003, the applicant was permitted by the Hon'ble High Court to withdraw the writ petition No.4212 of 2002 and also permitted them to be delinked the applicant from other accused thereby enabling them the opportunity to face GCM as he was ready to face GCM. Regarding releasing from close arrest, the Hon'ble High Court directed the applicant to invoke the provisions of (K) of para 392 of Defense Service Regulations for the Army praying for conversion of close arrest to that of open arrest. This was done but no response was received from the respondents.

7. On 28.04.2003, the applicant filed a writ petition No.CW 2934/2003 for intervention of the Hon'ble High Court for his release from the close arrest. During the hearing it was revealed that the GCM

will be convened before 07.06.2003 and thus the applicant was not released from the close arrest. The GCM was also not convened by that date and thus the applicant filed another CM No.8235/2003 on 25.07.2003.

8. On 25.09.2003, the respondents in their reply to the said CM submitted that the GCM will commence immediately after finishing of trial against another accused in a similar case (Annexure P-2). On 06.11.2003, the GCM of other alleged accused concluded, however, GCM of the applicant did not commence.

9. That after a lapse of about 8 months, an additional affidavit was submitted by the respondents on 06.05.2004 stating that since the Presiding Officer has expressed his inability to continue with the trial, Army Authority had decided to take administrative action against the applicant and three more accused persons against whom also administrative action is proposed. Respondents further submitted that the GCM against the applicant and others will be dropped and their case will be sent to civil authorities for appropriate action (Annexure P-3).

10. It is further contended by the applicant that on 14.10.2004, respondent No.3 ADG, D&V ordered respondent No.4 i.e. GOC-in-C, HQ Western Command to take action to terminate the services of the applicant and others by way of dismissal (Annexure P-5). Thus, the

order of respondent No.3 was illegal as he was not the competent authority to order administrative termination of services of the applicant by way of dismissal under the Army Act Section 20(3) read with Army Rule 17.

11. It is submitted by the applicant that on 24.11.2004, respondent No.6 served the applicant with a show cause notice citing vague charges wherein the averment did not contain details as to which confidential document he had communicated and to whom and at which place. No particulars of the document that was given in the show cause notice. No name of the person to whom the applicant had allegedly given the alleged document was mentioned. In the second charge also, no averment of any nature of act was given thus keeping the applicant totally in dark regarding his alleged offences (Annexure P-7). Thus, it was not a fair proceeding and liable to be quashed.

12. The respondent No.8 i.e. Brigade Commander, 92 Infantry Brigade was acting at the behest of respondents No.3,4,5 and 6 and thus had not acted independently nor he applied his mind.

13. On 04.12.2004, the applicant replied to the show cause notice in writing stating that the charges suffer from vagueness and as such no specific offence could be made out.

14. On 27.01.2005, the applicant was handed over a discharge certificate endorsing just "Dismissed from Service". No reason for

dismissal and no indication or speaking order was given whether his reply was considered or not. No order of dismissal was given to the applicant.

15. Further, the applicant was kept under close arrest for more than four years before serving the show cause notice which has not been accounted for anywhere. On 28.01.2005, after dismissing the applicant from service, respondent No.8 sent the applicant to military custody under arrest to RRRC. Since that date, the applicant was under arrest without any authority and he was being made to report every day to the respondents. When asked for reasons, the applicant did not receive any reply and hence he was forced to write a letter on 07.02.2005 and on subsequent dates to the Chief of Army Staff and to GOC-in-C, HQ Western Command, GOC Delhi Area and the Adm. Bn Cdr and CO 11 Mahar (Annexure P-10 colly).

16. On 10.02.2005, the RRRC sent the application of applicant to Head Quarter, Delhi Area. On 12.02.2005 in response to the application dated 07.02.2005 sent by the applicant, he was informed by his Unit 11 Mahar stating that he should apply to RRRC since he was in their custody (Annexure P-11). On 14.0.2005, the applicant again wrote another letter to the GOC Delhi Area. He was permitted to go out of RRRC only on specific permission from the Adm Bn Cdr. On 25.02.2005, the applicant was taken to Roorkee where he was produced before the SHO, Gang Nahar Police Station, Roorkee. When

the SHO refused to take the custody of the applicant, the applicant was kept in BEG Center, Roorkee. On 26.02.2005, he was brought back to RRRC. Thus, the applicant was kept in close arrest for 3 years, 8 months and 22 days and in open arrest for 5 months and 15 days. Thus, the applicant is liable to be awarded adequate compensation in this respect.

17. Learned counsel for the applicant argued that forced confession was obtained from the applicant under duress by the officers of RRRC and AHQLU. But while recording the summary of evidence, since the applicant had retracted from his alleged earlier statement and there was no other evidence to prove his guilt, no case could be made out. In the absence of evidence, the authorities malafidely decided to undertake administrative action.

18. Learned counsel for the applicant further argued that on 14.10.2004, ADG (D&V) wrote a letter to the HQ Western Command in which at para 3 he directed that **“You are requested to take necessary action for termination of services of above named individuals and inform the HQ at the earliest”**. Ld. Counsel for the applicant argued that this action was, therefore, bad in law and the Competent Authority was prevented from taking an independent decision or applying its mind to the reply of the applicant in this regard.

19. Learned counsel for the applicant further argued that on 24.11.2004, a show cause notice was issued to him. Para 1(a) of the said show cause notice reads as under:-

“1. A summary of Evidence with regard to your involvement in Roorkee Espionage case was recorded and you were found guilty of the following charges:-

(a) First Charge-Army Act Section 69. Committing a civil offence, this is to say, for a purpose prejudicial to the safety or interests of the state communicating a document in relation to military affairs of Government, to a person, which might be directly or indirectly useful to an enemy, contrary to section 3(i)(c) of the Indian Official Secret Act 1923.”

20. A bare reading of the show cause notice states that the GCM was assembled on 19.12.2001 but due to op commitments of the Members, the Court was adjourned sine die on 31.12.2001. Since they were unable to reassemble the GCM and the case was becoming time barred, this show cause notice was issued. To this show cause notice, the applicant responded on 04.12.2004 (Annexure P-8). In his reply, the applicant clearly stated that he is not guilty of the charges so listed at para 1(a) and (b) of the show cause notice. He reiterated that there was no evidence against him.

21. Learned counsel for the applicant also argued that after having received the dismissal order on 27.01.2005, he was not released from military custody and was transferred to RRRC where he was again kept in custody. To support his contentions, learned counsel for the applicant also drew our attention to the Out Passes that were signed by the Admn Bn Cdr (Annexure P-3) which were issued to him regularly when he was going out. This implies that the applicant was kept in custody and there were no rules to state that after dismissal respondents can kept in custody.

22. Ld. Counsel for the applicant cited **78 (1999) DLT 47 in the matter of Ex. Sgt. Avimanyu Panda Vs Union of India and Ors.**, in which their Lordships have observed that taking final decision of dismissal from service and then issuing show cause notice is arbitrary exercise of power and violates Article 14 of the Constitution. It has been submitted by the learned counsel for the applicant that in this case the ADG (D&V) had already directed that the case be taken up for dismissal on administrative action which was a colourful exercise of power by the Army HQ without giving a show cause notice, a decision was taken to dismiss the applicant from the service and the competent authority i.e. Commander HQ 92 Infantry Brigade had no other option except to abide by the orders.

23. Ld. Counsel for the respondents stated that the case was relating to espionage. It was known as "Roorkee Espionage Case" in

which there were 41 accused persons out of which 5 persons were brought before the GCM. Against all other delinquents, administrative action was taken. It was more so because it was decided to hold the GCM of the 5 accused persons earlier and the case against other delinquents was time barred. Thus, administrative action was taken. He further cited the orders of Hon'ble High Court of Delhi dated 13.09.2004 in WPC No.2924/03 which reads as under:-

“So long the decision is not taken by the respondents regarding handing over the case to the civil authorities or any other decision, the petitioner shall remain attached to Rajputana Rifles, Delhi Cantonment. However, the petitioner shall not leave the unit without prior permission of the Commanding Officer. He shall report to the Commanding Officer every morning and shall also attend the roll call, which is carried out in the evening every day. This order shall be operative till a decision is taken by the respondents for handing over the case to the civil authorities when action could be taken in accordance with law or any other decision is taken in the matter.

It is also made clear that this order shall not be treated to be an order of releasing the petitioner on bail with regard to the subject matter of the allegations. Decision with regard to the handing over of the case or otherwise shall be taken within four weeks.”

24. This order was followed up. In the same case, the Hon'ble Lordships observed on 07.05.2003 that *"In view of the statement, no further relief can be granted to the petitioner in this petition and the same stands disposed off accordingly. However, in case the General Court Martial does not assemble by the aforementioned date, it will be open to the petitioner to approach this Court for revival of this writ petition and for appropriate orders."*

25. Learned counsel for the respondents also stated that the letter of ADG (D&V) dated 14.10.2004 (Annexure P-5) was a recommendatory letter. The language of the letter is absolutely clear in that respect. This letter was addressed to Head Quarter, Western Command and it was written with a view that instead of GCM, administrative action could be initiated. Administrative action had to be initiated by competent authority which was Commander HQ 92 Infantry Brigade since the applicant was attached thereto. The show cause notice was issued accordingly. Similarly, the reply submitted by the applicant to the show cause notice was duly considered by the competent authority before he took a decision to dismiss the applicant from service.

26. Learned counsel for the respondents also drew our attention to the Hon'ble High Court of Delhi order dated 13.09.2004 whereon on two occasions, the Hon'ble High Court had specifically mentioned that ***"or any other decision"*** which shows that they were privy to the fact

that instead of the GCM, as the GCM had become time barred, administrative action could be initiated against the applicant before the individual was handed over to the civil authorities at Roorkee. Learned counsel for the respondents particularly highlighted the sentence “*This order shall be operative till a decision is taken by the respondents for handing over the case to the civil authorities when action could be taken in accordance with law or any other decision is taken in the matter.*”

27. Learned counsel for the respondents also argued that on 26.02.2005 the SHO, Gang Nagar Police Station, Roorkee, Haridwar responded to the RRRC letter dated 24.02.2005 (Annexure R-7/4) in which he stated that case had been registered against accused Pratap Singh and Rikhi Ram, in which Rikhi Ram has already been awarded punishment by the Civil Court. Against Pratap Singh and four other accused persons of the Army, proceedings were conducted by the Military Court, in which one accused has been awarded punishment by the Military Court. In all other cases, stay orders have been obtained by the accused persons from the Hon'ble High Court of Delhi. He, therefore, confirmed that since the Military Court is conducting proceedings against the accused persons, there is no need for registration of the FIR at the police station.

28. Learned counsel for the respondents further argued that on termination of his services on 27.01.2005, the applicant sought specific

permission to stay in the RRRC so that he can pursue his case which was lodged in the civil court as also his case in the Hon'ble High Court. As such, he has given a certificate to the RRRC (Annexure R-8/2) in which he stated that he was willingly attached to the Adm Bn RRRC on his own accord after dismissal from service on 27.01.2005.

29. We have heard both the parties at length and perused the records. Since the case is based on administrative action, therefore, we will confine ourselves to consider the averments qua the administrative action initiated by the respondents to terminate the services of the applicant.

30. Having considered the contentions placed by the parties and having examined the documents produced by the parties, we are of the opinion that the Hon'ble High Court of Delhi was apprised of the action likely to be taken by the respondents before the applicant was transferred to face the judicial proceedings in the Court of Civil Judge (Judicial) Roorkee. The word "*or any other actions*" at two places very clearly indicate that their Lordships were either taken into confidence or were told by the respondents that they intend to take action and their Lordships had passed an affirmation with directions in which they said "*This order shall be operative till a decision is taken by the respondents for handing over the case to the civil authorities when action could be taken in accordance with law or any other decision is taken in the matter.*"

31. We have also noted that the Adjutant General while issuing his directions vide letter dated 14.10.2004 was clear to state that having examined the case in its entirety, he had given his approval for taking administrative action under the Army Act, Section 20(3) read with Army Rule 17. The letter was a request for the Competent Authority to take action accordingly. Therefore, this did not constitute a direct order to the Competent Authority who was responsible for its own actions. In this respect, it is also settled position of the law that the respondent authority is competent to take a decision considering the factual aspect to initiate administrative action. This view also finds support from the judgment cited by the learned counsel for the respondents in the case of **Union of India and Others Vs Ex Sgt Avimanyu Panda in LPA 170/1999 dated 13.11.2002** and other leading cases of **UOI Vs Harjeet Singh Sandhu, JT 2001(4) SC 597, Chief of Army Staff and Ors. Vs Major Dharam Pal Kukrety, (1985) 2 SCC 412, Union of India and Ors., Vs J.S. Sivia, MLJ 1996 SC 3**. Further, in **2008(9) AD (Delhi) 773 in the matter of S.S. Shekhavat Vs Union of India**, the Hon'ble High Court of Delhi has held as under:-

"20. However, the rule position, the policy issued by the Chief of Army Staff with respect to the award of censure and the law laid down in the cases of Major Dharam Pal Kukrety, Harjeet Singh Sandhu and J.S. Sivia (Supra) permits the respondents to pass the impugned order despite findings returned by the court

marital holding the incumbent not guilty of the charges even for the 2nd time provided such a punishment is justified for the reasons available on record as an administrative action which is also described as “custom of service.”

The contentions raised in this respect by the learned counsel for the applicant, therefore, cannot sustain.

32. We have also noted that the show cause notice did not contain any reference to this direction of Adjutant General which clearly shows that the Competent Authority has applied its mind independently. The main consideration for having taken this decision by the Competent Authority has been national security and national interest. The show cause notice was having full details of the involvement of the applicant in the alleged Roorkee Espionage case. It was also mentioned in the show cause notice that *“A Summary of Evidence with regard to your involvement in Roorkee Espionage case was recorded and you were found guilty of the following charges:-*

(a) **First Charge-Army Act Section 69.** *Committing a civil offence, this is to say, for a purpose prejudicial to the safety or interests of the state communicating a document in relation to military affairs of Government, to a person, which might be directly or indirectly useful to an enemy, contrary to section 3(i)(c) of the Indian Official Secret Act 1923.”*

(b) **Second Charge- Army Section 63.** *An Act prejudicial to good order and military discipline.”*

33. We have also examined the records pertaining to involvement of the applicant in aforesaid activities and also the dismissal order passed by the Commander 92 Infantry Brigade. He has clearly stated that he has examined the summary of evidence and the reply dated 04.12.2004 submitted by the applicant. He has also considered an additional reply dated 15.01.2005 whereby he has considered the gravamen of the show cause notice and the reply thereto. He has come to the conclusion that the applicant has committed an offence which is prejudicial to the safety and interest of the State. Further, he has observed that the individual has not produced any evidence or effective reasoning to counter the charges and finally he feels that the retention of the applicant in the Army Service does not merit consideration and would be detrimental to discipline and against the interests of the organisation. Dismissal order was passed. Judgment given in the case of Sgt. Avimanu Pandu (Supra) cited by the applicant does not help his contentions as the same has been overruled by the Division Bench of the same High Court, copy of which has been placed on record by the learned counsel for the respondents.

34. In view of the foregoing, we find that the action taken by the respondents does not infringe the natural justice and fair play. The case is dismissed. No orders as to costs.

(M.L. NAIDU)
(Administrative Member)

(MANAK MOHTA)
(Judicial Member)

Announced in the open Court
on this 04th day of May, 2012.