

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

**T.A NO. 404 of 2010  
In W.P.(C) No.9959 of 2009**

**IN THE MATTER OF:**

**Ex Sgt. R.S. Dwivedi** .....**APPLICANT**  
Through : Mr. V.S. Tomar, counsel for the applicant

**Vs.**

**Chief of Army Staff and others** ...**RESPONDENTS**  
Through: Ms. Barkha Babbar, counsel for the respondents

**CORAM:**

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

**JUDGMENT**

**Date: 19.10.2011**

1. This petition was first filed in the Hon'ble High Court as WP(C) No.9959/2009 on 09.07.2009 and was subsequently transferred to the Armed Forces Tribunal on 21 Jan 2010.

2. Vide this petition, the applicant has prayed for quashing and setting aside of the impugned order of AOC-in-C's order dated 27.9.2008 (Annexure P-7) by which his services were dismissed and order of Chief of the Air Staff dated 17 May 2009 (Annexure P-9) rejecting his revision petition. The applicant has also prayed that he be reinstated in service with all consequential benefits. In alternate it has

also been prayed that the order of dismissal be moulded to that of the order of discharge being disproportionate and excessive.

3. The applicant was enrolled in the Air Force on 18 Jan 1988 as an equipment assistant to the rank of Sergeant. He was posted at 334 PRU, Air Force C/o Air Force Station Thane in March 2006. The applicant obtained permission to live out and was accordingly granted the same. He was allotted House No.E-37, Station Married Quarter (SMQ) on 17 Oct 2007. The house allotted to the applicant had two bed rooms, one hall and one kitchen and a bathroom/toilet.

4. The family of warrant officer P.K. Panigrahy approached the applicant for sharing the accommodation which is customary amongst Airmen to share SMQ. The family of Warrant Officer Panigrahy consisted of Mrs. Kumudini Panigrahy, a son named Pradyumana Panigrahy and a daughter Miss Priyanka Panigrahy. One bed room and a hall were given to the Panigrahy family while the other bed room was occupied by the applicant. Bath room and kitchen were remained common. The Panigrahy family moved into SMQ-E-37 on 04 Nov 2007.

5. Due to her father-in-law's 'Barsi' (death anniversary), Mrs. Kumudini Panigrahy left for Orissa on 9 Nov 2007 leaving behind her son and daughter with the applicant. On 19 Nov 2007 Mrs. Panigrahy was expected to return back from her home town. Her son left the

house E-37 at about 0130 Hrs on 19 Nov 2007 to catch a bus to reach railway station to receive her mother. Miss Priyanka Panigrahy (DOB 19<sup>th</sup> April 1990) alleged that the applicant had entered her room and tried to molest her at about 02.00 Hrs. Based on the complaint of Mrs. Panigrahy a Court of Inquiry (COI) under rule 154 of the Air Force Rules of 1969 was ordered by the Station Commander on 23.11.2007.

6. The Court of Inquiry concluded its proceedings on 30 Nov 2007 and the applicant was blamed on the following two grounds:-

(a) Entering inside the bedroom of Miss Priyanka Panigrahy without her permission at night.

(b) For making an attempt to take advantage of the situation that there was no one in the house except him and Miss Priyanka Panigrahy.

7. The COI recommended disciplinary action against the applicant. The Station Commander therefore ordered recording of Summary of Evidence on 16.6.2008 and the same was completed on 30.6.2008. Thereafter, considering the facts, administrative action was proposed to be taken under Air Force Act Section 20(3) of 1950 read with Rule 18 of Air Force Rules of 1969.

8. The applicant was served a show cause notice on 26 Aug 2008 by AOC-in-C, South Western Air Command, IAF (Annexure-P-5). The applicant submitted reply to the show cause notice on 4.9.2008

(Annexure-P-6). Thereafter, the applicant was dismissed from service vide respondent No.2's letter dated 27.9.2008 (Annexure-P-7).

9. The applicant applied for a copy of Court of Inquiry, Summary of Evidence and a copy of complaint dated 22.11.2007 on 14.10.2008 which was supplied to him.

10. The applicant also submitted a petition for review against the order of dismissal dated 27.09.2008 under Section 26 of the Air Force Act on 12.01.2009 which was also rejected vide the impugned order dated 17.5.2009 (Annexure-P-9). Respondents' side submitted their counter denying all the allegations and supported the impugned orders. Rejoinder to reply was also filed reiterating the grounds taken earlier by the applicant.

11. Ld. Counsel for the applicant contended that the COI was held without having adhered to para 790 of the Air Force Regulations. Ld. Counsel further submitted that paras 790 (a),(b) and (c) indicate that the moment professional reputation of an officer or airman is affected by the evidence recorded, or that he is to blame, the affected person is to be so informed by the court. All the evidence recorded upto that stage is to be read over to the affected person, and if so required by him, the affected person can re-summon the witnesses for cross examination. Ld. Counsel for the applicant further argued that once an airman is so informed, the airman has the right to be present during all

the COI proceedings except when the court is deliberating privately. He further argued that the affected officer or airman may, if he so desire, cross-examine any witness after their statements have been recorded and he may also request the court to record the evidence of any witness in his defence. The officer or airman can make any statement in his defence. It was further contended that in his case provisions of Para 790 were not properly applied and he suffered a great prejudice.

12. Ld. Counsel for the applicant further contended that alongwith the show cause notice dated 26.08.2008 (Annexure P-5), the COI and summary evidence including deliberations held by COI was not enclosed to enable the applicant to prepare his effective defence. It was necessary to supply the same under the principles of natural justice, failing which order becomes illegal and liable to be set aside. It was only supplied to him consequent to his dismissal on his application dated 14.10.2008.

13. Ld. Counsel for the applicant also contended that considering the evidence it is obvious that there was some misunderstanding between the girl (victim) and the applicant and therefore, the punishment of dismissal was very harsh and disproportionate to purported misconduct.

14. Ld. Counsel for the applicant in support of his contentions cited the judgment **AIR 1994 Supreme Court 1074 in the case of Managing Director, ECIL & Ors. Vs B. Karunakar and Ors.**, in which it was held that the Courts should ensure that principles of natural justice are ensured. The delinquent employee has a right to receive the copy of Inquiry Officer's report. Here, their Lordships have observed that the incidental questions raised above may be answered as follows:-

(i) *Since the denial of the report of the Inquiry Officer is a denial of reasonable opportunity and a breach of the principles of natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject."*

(ii) XXXXXXXXX

*"(iii) Since it is the right of the employee to have the report to defend himself effectively, and he would not know in advance whether the report is in his favour or against him, it will not be proper to construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the report or not, the report has to be furnished to him."*

15. Ld. Counsel for the respondents stated that paras 790 of the Air Force Regulations were duly applied in its letter and spirit by the COI. He drew the attention of the Court to page 20 of the COI proceedings

which under the heading “**Deliberations by the Court**” on 24.11.2007 decided to enforce the provisions of para 790(a), (b) and (c) for witness No.4 (the applicant) as the statements given by witness No.3 and by witness No.2 can affect the character and professional reputation of the individual. He also drew our attention to page 22 of the COI proceedings which under the heading “**Action under para 790(a),(b) & (c) Regulations for the IAF-1964**”, the observations made by the COI reads as under:-

*“2. The 4<sup>th</sup> witness is sent for at this stage and he is informed. All the evidence recorded upto this stage is read over to him. He is informed that he has a right to be present during all the ensuing proceedings except when the court is deliberating privately. The 4<sup>th</sup> witness present in the court from this stage onwards whenever evidence is recorded. He is informed that he may cross examine any witness whose evidence was recorded prior to this action. He may likewise cross examine subsequent witnesses. He may request the court to record evidence of any witness in his defence. He may also make a statement in his defence. Witness No.4 wishes to make the statement in his defence and wishes to cross examine the witnesses.”*

16. Ld. Counsel for the respondents further drew our attention to page Nos.23 and 28 in which the delinquent had cross examined the witnesses No.2 and 3, though the evidence of witness No.2 and 3 had

been recorded when he was not summoned under para 790 of the Air Force Regulations. Ld. Counsel for the respondents also drew our attention to pages 39, 44, 50, 51, 55, 59, 64, 66, 69, 72 and 74 of the COI in which it is clearly stated that the applicant was present during the recording of evidence and he was also given opportunity to cross examine each witnesses. At page 29, the applicant has given a statement despite the rights explained to him by the COI when invoking para 790 of the Air Force Regulations. Certificate to that effect is at page 30 of the COI proceedings. Further, he also drew our attention to certificate signed by the applicant at page 78 which reads **“Action under para 790(e) Regulations for IAF-1964”**. The certificate states as under:-

*“1. The court having examined the evidences recorded so far including the statement made by 726590-H Sgt RS Dwivedi Eq Asst of 334 TRU, AF presently attached to 26 Wing, AG (witness No.4) is of the opinion that the character and professional reputation of Sgt RS Dwivedi is affected and he is to be blamed for the actions/omissions as given below in contravention to various orders, instructions and directives.*

*(a) Entering inside the bedroom of a female (Ms Priyanka Panigrahy witness No.3) without her permission with an intention to outrage her modesty. (Para 2 of statement of Witness No.3 and para 3 of statement of witness No.4 refers).*



*(b) Made an attempt to outrage modesty of a female (Ms. Priyanaka Panigrahy Witness No.3) otherwise than on a grave provocation. (Para 2 of statement of witness No.3 refers).*

*(c) Committed insubordination by staying 'living-out' without family without permission. (Answer to Question No.2,3 & 4 refers).*

*2. The entire proceedings are shown to Witness No.4. He is asked whether he wishes to make further statement. The witness No.4 wishes to make an additional statement."*

17. Ld. Counsel for the respondents further stated that therefore, there is no question of the COI having been vitiated because of non-adherence to para 790 of Air Force Regulations. He further explained that as soon as it was observed by the COI that character and professional reputation of the applicant is likely to come under question, the COI immediately invoked the Regulation 790 in its letter and spirit.

18. Ld. Counsel for the respondents further submitted that the SCN dated 22.8.2008 issued to the applicant clearly gave out the gravamen of the charges against him. The gravamen of the charges is as per the findings of the COI. At para (11), the SCN states **"For the purpose of preparation of your reply to this SCN, you, may, if you wish, peruse the proceedings of the Court of Inquiry and the Summary of Evidence held with Adjutant 26 Wing, AF, during Station Working Hours"** that clearly shows that besides a detailed SCN

which reflected the gravamen of charges against the applicant, the COI and the summary of evidence proceedings were made available to the applicant for perusal in order to make his reply to the said SCN.

19. He also drew our attention to the Air Force Rule 156(7) of Rules 1969 under which the applicant was entitled to the proceedings of the COI on payment of an amount and on specific application, which he never applied and demanded.

20. It was further stated by the learned counsel for the respondents that after considering the reply and looking to the allegations against the applicant, the order of dismissal from service was passed. His representation was also duly considered and rejected.

21. In order to appreciate the respective case of the parties, it is necessary to have a brief resume of the facts. It is stated that in between the night of 18-19 November 2007 when Miss Priyanka Panigrahy was alone in her bed room, the applicant without her permission entered and went close to her in spite of her objections. It is also alleged that the applicant used criminal force by touching her shoulders and shutting her mouth with his hand with the intention to outrage her modesty.

22. Having heard both the parties at length and having examined the documents in original alongwith judgment cited by the applicant. We are of the view that since the applicant is not pressing on the facts

of the case, the issue of law as regards the invoking of para 790 of Air Force Regulations 1964 and providing copy of the COI and Summary of Evidence alongwith the SCN need to be examined under the legal norms.

23. Keeping in view the contentions raised by the learned counsel of the applicant and having gone through the COI proceedings we found that the COI very diligently invoked para 790 on 25.11.2007 after having examined witness No.1,2 and 3, the COI felt that the statements of witness No.2 and 3 corroborated in a manner that the personal character and professional reputation of the applicant would be affected. Thereafter, they have invoked the para (a), (b) and (c) of 790 of the Air Force Regulations and the applicant was given full opportunity to cross examine the witnesses whose evidence were taken before invoking of para 790. Thereafter, the applicant was again directed to present all through the recording of the evidence by the COI and was given full opportunity to cross examine the witnesses. When giving his own statement, he was cautioned by the COI regarding his rights under para 790 (e) of the Air Force Regulations. We are also satisfied having examined page 78 of the COI proceedings that the applicant was present throughout the recording of the COI from 25.11.2007 onwards.

24. In view of the foregoing, we are of the opinion that the COI has been conducted properly and the provisions of para 790 of the Air

Force Regulations, 1964 have been adhered to in its letter and spirit. Therefore, there is no impropriety in the conduct of the COI, its findings and recommendations. Thus, the contentions placed in this respect are not sustainable.

25. As regards the furnishing of the COI alongwith the SCN (Annexure P-5) is concerned, we are of the view that the SCN contained a detailed gravamen of the charges referred against the applicant. However, this is not substitute to the proceedings of the COI and the Summary of Evidence to be given to the applicant. Though the applicant has submitted a detailed reply and in reply he has nowhere stated that due to non-supply of COI, he has not been able to make his defence. The SCN dated 22.08.2008 (Annexure P-5) giving the details is reproduced as under:-

- “1. WHEREAS, you were enrolled in the Indian Air Force on 18 Jan 88 and at present are held on the posted strength of 334 TRU, AF attached to 26 Wg. AF.*
- 2. AND WHEREAS, while being posted to 334 TRU, AF you were permitted to live out and allotted Service Married Quarter No.(in short SMQ) E-37 AT AF Station Thane on 17 Oct 07;*
- 3. AND WHEREAS, with effect from 04 Nov 07 the family of 623116 WO PK Panigrahy comprising of wife Smt Kumudini Panigrahy, daughter Miss Priyanka Panigrahy and son Mr. Pradyumna Panigrahy shifted to the said SMQ No.E-37 at AF Station, Thane and started living with you on sharing basis;*

4. *AND WHEREAS, in the said SMQ E-37 family of WO PK Panigrahy occupied one bedroom, Hall and Kitchen and you occupied the other bedroom;*
5. *AND WHEREAS, Court of Inquiry was held at AF Station, Thane on 23 Nov 07 and subsequent days to inquire into complaint made against you by Mrs Kumudini Panigrahy, wife of WO PK Panigrahy, in which you were blamed;*
6. *AND WHEREAS, subsequently the above said acts of misconduct were investigated by the Station Commander, 26 Wg. AF in terms of Rule 24 of the AF Rules, 1969 who ordered that the evidence be reduced to writing.*
7. *AND WHEREAS, the proceedings of the Court of Inquiry and the Summary of Evidence recorded in the case reveal that on the night of 18-19 Nov 07 after Mr. Pradyumna Panigrahy left SMQ No.E-37 for Thane Railway Station, to receive his mother, who was returning from her home-town in Orissa, leaving his sister alone with you in the said SMQ No.E-37, you committed the following acts of misconduct:-*
  - (a) *Improperly forced open the door of the bedroom in which Miss Priyanka Panigrahy, daughter of 623116 Warrant Officer PK Panigrahy was sleeping;*
  - (b) *Entered the bedroom of the said Miss Priyanka Panigrahy, switched off the lights, went very close to her inspite of said Miss Priyanka Panigrahy begging you to leave her alone and said to her "LET ME COME CLOSER TO YOU" or words to that effect;*
  - (c) *used criminal force to Miss Priyanka Panigrahy daughter of 623116 Warrant Officer PK Panigrahy, by touching her*

*shoulders and shutting her mouth with his hand, with the intent to outrage her modesty;*

- (d) *When said Miss Priyanka Panigrahy was trying to open the main door of the said Service Married Quarter to escape from your sexual advances, you held the said Miss Priyanka Panigrahy by her abdomen and arm and pulled her, in order to prevent her from moving out of the said SMQ;*
8. *AND WHEREAS, your misconducts as aforesaid are serious and grave in nature and besides being unbecoming of an airman of the Indian Air Force and also prejudicial to the community living in the Air Force;*
9. *AND WHEREAS, the entire facts and circumstances of the case were placed before the Air Officer Commanding-in-chief, South Western Air Command, IAF who is of the opinion that in view of the aforesaid circumstances, your retention in the Air Force is undesirable and has ordered issuance of this Show Cause Notice to you; and*
10. *NOW THEREFORE, you are to show cause as to why you should not be dismissed from the service under Section 20(3) of the air Force Act, 1950 read with Rule 18 of the Air Force Rules, 1969 for your abovementioned acts of misconduct. Your reply, if any, should be submitted to Station Commander, 26 Wing, AF within ten (10) days from the date of receipt of this Show Cause Notice. If no reply is received within the stipulated time, it shall be presumed that you have nothing to urge in your defence and further action shall be taken against you.*
11. *For the purpose of preparation of your reply to this SCN, you, may, if you wish, peruse the proceedings of the Court of Inquiry*

*and the Summary of Evidence held with Adjutant 26 Wing, AF, during Station Working Hours.”*

26. However, in this case at para 11 of the SCN it was clearly stated that the COI proceedings as also the Summary of Evidence proceedings were available for the applicant to pursue in order to make his defence. That means the proceedings of the COI and Summary of Evidence was available for inspection to the applicant. Besides, the applicant has made no averment or there has been no whisper of the proceedings having been not given to him at the time of issuing him with the SCN, in his reply to SCN on 04.9.2008 as also in his review petition dated 12.01.2009 against the order of dismissal.

27. We have also considered the judgment of **Managing Director, ECIL Vs B. Karunakar (Supra)** in detail. Their Lordships have clearly stated that reasonable opportunity needs to be given to the delinquent and refusal to furnish copy of the Inquiry Officer's report to the delinquent amounts to denial of reasonable opportunity which is against the principles of natural justice at the same time Hon'ble Court held that it should also be seen that he has been prejudiced and principles of natural justice have been violated by non-supplying of reports.

28. We perused that in that case their Lordships have also observed at page 1092 that ***“If after hearing the parties, the Court/Tribunal comes to the conclusion that the non-supply of the report would***

*have made no difference to the ultimate findings and the punishment given, the Court/Tribunal should not interfere with the order of punishment. The Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short-cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Courts/Tribunals find that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment.”*

29. Further, we have carefully examined the provisions of Air Force Act, 1950, Rule 18(1) which reads as under:-

**“18. Dismissal or removal of a person subject to the Act other than an officer.-(1)** *Save in a case where a person subject to the Act other than an officer is dismissed or removed from the service on the ground of conduct which had led to his conviction by a criminal court or a court-martial, no such person shall be dismissed or removed under sub-section (1) or sub-*



*section (3) of section 20 unless he has been informed of the particulars of the cause of action against him and allowed reasonable time to state in writing any reasons he may have to urge against his dismissal or removal from the service.”*

30. The gravamen of the charges have been explained in detail in the show cause notice issued to the applicant on 22.08.2008. Besides, the applicant was also given an opportunity to peruse the proceedings of COI and the summary of evidence (para 11 of the SCN refers). Therefore, it is evident that the provisions of Air Force Act, Rule 18 have been more than fully complied with, and thus no prejudice has been caused to the applicant in preparation of his defence.

31. It is, therefore, opined that in this particular case considering his detailed reply there has been no prejudice caused nor any breach of principles of natural justice nor the applicant has been denied of reasonable opportunity to defend his case or to make his defence. We also find that not furnishing the COI proceedings alongwith SCN would not have made any difference to the reply to the SCN dated 04.9.2008 (Annexure P-6) nor applicant has able to establish that how he has been prejudiced due to that. Thus, the judgment of Managing Director ECIL Vs Karunakar (Supra) does not help the applicant. The submissions made in this respect are not sustained. Our conclusion also find supports from the judgment of Hon'ble Supreme Court in **(1997) 9 SCC 1 titled Major General Inder Jit Kumar Vs UOI & Ors.,**

in which their Lordships have stated that the supply of copy of the report to the charged employee is not necessary because proceedings of the Court of Inquiry are in the nature of preliminary enquiry as long as the rules of natural justice have been adhered to.

32. We have also considered the alternate submissions made with regard to award of dismissal. In that we have been guided by **(1983) 2 SCC 442 Bhagat Ram Vs. State of Himachal Pradesh and Others** where their Lordships have laid down that the punishment should be proportionate to the gravity of misconduct and further it should be tempered by the past conduct of the delinquent. In case of **(1991) 3 SCC 213 Nk Sardar Singh Vs. Union of India and Others**, their Lordships opined that in “awarding punishment the court martial has to keep the spirit behind Sec 72 and give due regard to nature and degree of offence.” Keeping in view the conduct of the delinquent in this case, his unblemished record and also looking at the actions as stated by the victims and other witnesses, the punishment appears a little severe.

33. Considering the length of service put in by the applicant, he having been enrolled on 18.01.1988 and having served without any blemish in his record, it may be a case for consideration that the punishment given to the applicant be moderated by viewing the circumstances and the facts of the case in addition to the clean record of the applicant so as he remained entitled to get the pensionary

benefits. Therefore, we remand the case back to the Competent Authority for reconsideration of the punishment of dismissal given to the applicant, keeping in view our above observations and in case of any change, this order of dismissal and rejection of his representation will not come in his way and he will get all consequential benefits accordingly. This exercise be completed preferably within a period of 120 days.

33. The TA is partly allowed as per aforesaid observations. No order as to costs.

**(M.L. NAIDU)**  
**(Administrative Member)**

**(MANAK MOHTA)**  
**(Judicial Member)**

**Announced in the open Court  
on this 19<sup>th</sup> day of October, 2011.**