

FORM NO. 21

{SEE RULE 102(1)}

ARMED FORCES TRIBUNAL , REGIONAL BENCH, KOLKATA

APPLICATION NO : T. A. NO. 10 OF 2012

ON THIS 25th DAY OF OCTOBER, 2013

CORAM

HON'BLE JUSTICE RAGHUNATH RAY , MEMBER (JUDICIAL)

HON'BLE LT GEN KPD SAMANTA, MEMBER (ADMINISTRATIVE)

Shibasis Sain,
(Service No. 687995-T, Rank Sergeant).
Son of Late Prosanta Sain,
Residing at Vill & P.O. Kaichar,
P.S. Mangalkote,
District - Burdwan,
PIN No. 713 143.

.....Applicant

-VS-

1. Union of India,
Service through the Secretary,
Ministry of Defence,
Raksha Bhawan,
New Delhi.
 2. The Chief of Air Staff,
Vayu Sena Bhawan,
Air Head Quarter,
New Delhi.
 3. A.O.C. – in- 'C',
Head Quarter, Western Air Command
Subrata Park.,
New Delhi.
 4. The Commanding Officer,
2255 SQUADRON (DETT) Under 8 FBSU,
Air Force, C/O 56 APO.
 5. Air Officer – Commanding,
Advance Head Quarter of E.A.C.,
Air Force, Fort William,
Kolkata – 700 021.
- Respondents.

For the petitioner : Mr. Bharat Chandra Simai, Advocate.
 For the respondents : Mr. Dipak Kumar Mukherjee, Advocate.

ORDER

1. The petitioner is an ex Sergeant of the Indian Air Force (IAF), who, after joining the Indian Air Force on 28 Dec 1987, was dismissed from the Air Force under provisions of Section 20(1) of the Air Force Act, 1950 read with Rule 18 of the Air Force Rules 1969 by the Chief of Air Staff (CAS) on 5th Apr 2003. Being aggrieved with such wrongful dismissal he filed a writ petition in Sep 2003, numbered WP 14195 (W) OF 2003, before the Hon'ble Calcutta High Court. The ibid writ petition was heard by the Ld. Single Judge, at the Calcutta High Court. It was decided in favour of the petitioner with the ibid WP being allowed by the Order dated 1st August 2005, wherein it was observed that the respondents, i.e. UOI and others, were neither represented by any advocate nor was any affidavit in opposition filed on their behalf. The ibid order of the Ld. Single Judge was however set aside based on an appeal (FMA 578/2006) filed by the respondents, by an order of the Division Bench of the Hon'ble Calcutta High Court dated 27 Nov 2011. The original writ petition (WP 14195 (W) of 2003) was again restored before the court of the Ld. Single Judge, which was later transferred to this Tribunal on the point of jurisdiction. After being transferred from the Hon'ble Calcutta High Court the case was renumbered as TA No 10/2012.

2. The case in brief is that the petitioner was enrolled in the IAF on 28.12.1987. After completion of training he was employed in the trade of 'Missile Fitter (Electrical)'. He was promoted to the rank of Corporal on 28.12.1992 and subsequently as Sergeant on 1.6.2001. After his initial posting at Barrackpore, he was posted in various other Air Force (AF) stations/units. He was posted in 2255 Squadron AF at Gwalior with effect from 11 October 2001. During his service at Gwalior, the petitioner developed friendship with one Sergeant Bhattacharjee, who was senior to him and was staying in the family quarters. The petitioner was visiting the house of Sgt. Bhattacharjee frequently to provide tuition to their son at the request of his friend as well as his wife Mrs Mun Mun Bhattacharjee. According to the petitioner, the above mentioned closeness was misunderstood by the authorities as illicit intimacy with Mrs Mun Mun Bhattacharjee. He

was unreasonably suspected to have been passing on secret information to Ms Mun Mun Bhattacharjee who was involved in espionage activities. The petitioner further submits that upon suspicion of being involved in espionage, he was brought to Delhi on 24.9.2002, taken to some unknown room blindfolded, beaten up, tortured and kept in that state for three days. Some confessional statements were written and the petitioner's signatures were alleged to have been obtained forcibly on such documents. Later he was sent back to an Air Force Unit at Avantipur in J&K where he had then been posted. He was examined by the Unit medical officer on 04 Oct 2002 for 'alleged history of assault by Delhi Police', as has been endorsed by the Senior Medical Officer of the 8 FBSU, AF at Avantipur (J&K) (Annexure P2 of the TA). The injuries were, however, considered as superficial injuries and he was treated accordingly.

3. The petitioner was issued with a show cause notice (Annexure P3 of TA) by the Air HQ on behalf of the Chief of the Air Staff (CAS) on 8th Jan 2003. As per the ibid Show Cause Notice (SCN) the petitioner had been alleged to have passed sensitive/classified service information to Mrs Mun Mun Bhattacharjee while posted in Gwalior; after having come to know that the said lady was supplying such information to a Pakistani agent, the petitioner failed to inform the Air Force authorities. The petitioner, through the ibid SCN, was required to show cause as to why he should not be dismissed under provisions of Section 20 (I) of AF Act 1950 read with Rule 18 of AF Rules 1969. The petitioner, as per the ibid SCN, was also asked to peruse the adverse material available with CO 2255 Squadron at Gwalior, if he desired. The petitioner, however, did not appear to have perused those material.

4. The petitioner replied the ibid SCN, dated 8th Jan 2003 signed by one Wg Cdr CRR Sastry on behalf of the CAS, on 31 Jan 2003 (Annexure P3 of TA) stating that the SCN was based on ground made out by the authorities to falsely implicate him in an espionage case with unsubstantiated allegations. He denied all such allegations made against him in the said SCN by stating clearly in his reply that while posted at Gwalior he stayed in his Unit (2253 Squadron AF) for a very short time, being mostly attached in other sections of the Wing (Air Force Station Gwalior). Therefore, according to the petitioner, he had no scope to obtain or even have knowledge of any classified or sensitive information; thus there was no question of passing any such information or material to any one as alleged in the said SCN. The petitioner in his reply has narrated the circumstances in which he got to gain acquaintance with Sgt. Bhattacharjee and his wife Mun Mun posted in the same

Air Force Station (Gwalior), which was purely on a humanitarian basis to give tuition to their child. There was no other motive and he also submits that he was never aware of any Pakistani agent Sushil Kumar Sharma who has been alleged to be known to the Bhattacharjee couple. The petitioner in his reply to the *ibid* SCN has further submitted that he was tortured and coerced to sign on some papers, which are now said to be his confession statement, by force and he vehemently denied to any such so called confession.

5. Despite the petitioner's reply as above and plea of innocence, he was dismissed from the Air Force service under provisions of Section 20(I) of the Air Force Act 1950 read with Rule 18 of the Air Force Rules 1969, on 5th April 2003 by the impugned order signed by the CAS dated 5th Apr 2003 (Annexure P4 of the TA). Being aggrieved with such dismissal, the petitioner appealed before the Hon'ble Defence Minister through a petition dated 8th Jul 2003 (Annexure P5 of the TA) seeking justice but got no response. Thereafter the petitioner wrote an application to the CAS on 4th August 2003 seeking response on procedure to appeal against the said dismissal order, but unfortunately got no response.

6. The Petitioner finally approached the Hon'ble Calcutta High Court in Sep 2003 by filing a writ petition (WP 14195 (W)/ 2003) which has been transferred to this Tribunal and renumbered as TA 10 of 2012. The petitioner, in the *ibid* TA, has prayed for setting aside/ quashing the impugned order of dismissal and his reinstatement with consequential benefits. Alternatively, as prayed for in Para 25 (d) of the TA, the petitioner has sought for grant of pension and related benefits since he had put in more than 15 years of service in the Air Force (Dec 1987 to Apr 2003). The minimum qualifying service for grant of pension being 15 years, the petitioner shall be eligible.

7. The respondents have relied on facts submitted in their affidavit in opposition and agree on all factual aspects as submitted by the petitioner in the WP (TA-10/2011). The respondents however have submitted that the petitioner, while posted at 2253 Squadron at AF station Gwalior from 21 Dec 1998 to 10 Dec 2001, came into contact with one Mrs Mun Mun Bhattacharjee, wife of Sgt U Bhattacharjee posted in the same AF Station (11 BRD) and started tutoring their son. In the process the petitioner, as submitted in Para 4 (d) of the A/O, frequented their house and developed an intimate relationship with Mrs Bhattacharjee, even leading to sexual relationship. In the process of such intimacy, the

petitioner passed much sensitive and classified information to Mrs Mun Mun Bhattacharjee, who in turn was supplying such information to one Shri Sushil Sharma, a Pakistani intelligence operative. The said sensitive information included role and deployment of 2253 Sqn, AF; operational location of this unit during Karigil Ops; location of OSAKA air defence missile system; details, role and deployment of other sensitive Air Force units in Gwalior and also dates of security checks in Gwalior AF Station etc. According to the respondents, the petitioner was all through aware of the fact that such information was being passed on to the Pakistani agent Sri Sushil Sharma by his close friend Mrs Mun Mun Bhattacharjee; yet he did not report the matter to the Air Force authorities. He continued to get entrapped in the said espionage ring and kept providing information about the Air Force to Mrs Mun Mun Bhattacharjee. He was interrogated by the intelligence authorities at Delhi and the petitioner is said to have confessed to all the above activities of espionage and his involvement. The respondents deny that the petitioner was ever tortured or any statement was signed by him under duress or by force.

8. The respondents further submit that the petitioner was issued with a SCN and he was given an opportunity to explain his said conduct and involvement, which he did in the form of reply to the said SCN on 31 Jan 2003 (Annexure P3 and P4). On being dissatisfied with the reply offered by the petitioner and having regard to the grave misconduct and high security risk and after all due considerations, the petitioner was dismissed from Air Force Service by order of the CAS on 5th Apr 2003 (Annexure P4), which was in terms of Section 20 (I) of the Air Force Act 1950 read in conjunction with Rule 18 of Air Force Rule 1969. The respondents contested in their A/O the plea taken by the petitioner that he was dismissed on mere suspicion. They further submitted that there was enough corroboratory evidence, besides the confession made by the petitioner, to substantiate the petitioner was passing classified information to Mrs Mun Mun Bhattacharjee knowing fully well that she was in contact with a Pakistani agent to whom such information was being passed on by her. Being in knowledge of her espionage activities and contacts, he never reported the matter to the Air Force authorities. To this effect the Wg Cdr Roy, OIC legal cell of the Air Force submitted certain classified material in a sealed envelope for the perusal of the court. They were perused by us.

9. The Ld. Counsel for the petitioner Mr BC Simai during his oral submission reiterated on the points made in his TA. He submitted that the petitioner had been victimised wrongfully by the Air Force authorities to escape from the responsibilities of detecting

the actual culprit of espionage activities and to wash their hands, the petitioner was implicated falsely. Moreover, he was not given reasonable opportunity of hearing before being dismissed from service. Mr Simai also prayed that no documents were ever produced by the Air Force authorities to prove that the petitioner was ever involved in any such espionage activities. He prayed that the impugned order of dismissal is therefore illegal and should be quashed and the petitioner be reinstated in service with all consequential benefits. Mr Simai also submitted that the petitioner had more than 15 years of unblemished service before he was dismissed on 5th Apr 2003. His excellent service record and long span of service was not considered before deciding to dismiss him. He further brought to our notice that the petitioner was eligible for pension having completed more than 15 years of service, but even that has been denied to him. He therefore has brought in the prayer for grant of pension in his petition as an alternate prayer .

10. Mr Dipak Kumar Mukherjee, the Ld. Counsel for the respondents rebutted the points made by Mr Simai and also drew our attention to the Para 9 of the SCN dated 8th Jan 2003 (Annexure P3), wherein it has been clearly mentioned that all adverse material against the petitioner were available with the CO of 2255 Squadron, AF at Gwalior and he was at liberty to peruse those before replying the said SCN. The petitioner however did not make any effort to peruse them then. Be that as it may, the same documents have now been submitted before the Hon`ble Tribunal for the perusal of the court. Mr Mukherjee further submitted that the petitioner was dismissed from service under provisions of law {Sec 20 (I) of AF Act and Rule 18 of AF Rules} and the TA has no merit. It should be dismissed. As regards the prayer for pension made by the petitioner, Mr Mukherjee submitted that the petitioner had never approached the competent authorities for grant of pension after being dismissed from service. Therefore it would not be appropriate for the Hon`ble Tribunal to consider this prayer before the same is examined by the competent authorities within the rules and regulations as set out in the Pension Regulations for the Air Force. Mr Mukherjee, however, submitted that as per provisions of Reg 102 (a) of Chapter III of Pension Regulations for the Air Force, the petitioner would not be eligible for any pension since he was dismissed under the provisions of the Air Force Act. Regulation 102 (a) of the Pension Regulations for the Air Force is quoted below:-

“102 (a). An individual, who is dismissed under the provisions the Air Force Act, is ineligible for pensions or gratuity in respect of all previous service.”

11. We have heard both sides and have also gone through all affidavits and submissions made by both sides. We have also gone through the confidential communications and reports as submitted by the AF authorities in a sealed cover in detail. The confidential report dated 30 Sep 2002(submitted by the respondents for our perusal), prepared by the AF authorities and analysed by staff at Air HQ at the level of the Vice Chief of the Air Staff regarding the activities of the petitioner while he was posted in Gwalior, appears authentic and reliable. It has been prepared, supported by detailed investigation and interrogation by intelligence experts.

12. As per the above report, there was an espionage ring operating in Gwalior AF Station which was busted and necessary disciplinary and administrative actions were taken against all those Air Force personnel that includes the petitioner, for their acts of omissions and commissions. The civilians involved were handed over to the IB for necessary action. Mrs Mun Mun Bhattacharya and her husband Sgt. U Bhattacharya were involved with one Sri Sushil Sharma who was a Pakistani agent. The petitioner got involved due to his intimacy with Mrs Bhattacharya who seemed to have trapped him with sexual favours and also money, as per the said report. The petitioner kept feeding much sensitive and classified information about the Air Force deployment and technical details of missiles etc in Gwalior to Mrs Bhattacharya, who in turn was passing these to Sushil Sharma, a Pakistani agent. The petitioner appeared to have been aware of Mrs Bhattacharya's exploits and contacts as regards to the said espionage activities, but did not bring to the notice of the AF authorities. The said report at the Air HQ has concluded that the petitioner, having known the links of Mrs Mun Mun Bhattacharya with unauthorised persons and passing of information to them, had failed to report to his superior Air Force authorities; and has also indulged in anti national activities of espionage by leaking sensitive/ classified information of the IAF to Pakistani Intelligence agent. The petitioner, as per the above report, has thereby committed a grave misconduct of traitorous nature and shown him to be a disloyal airman. His continuance in the Air Force was considered a security risk and detrimental to service interest. These aspects, being sensitive to be brought in public, were analysed at the Air HQ and the petitioner was accordingly issued with a SCN which was replied by the petitioner.

13. We find no reasons to doubt the findings of the said confidential reports. Further detailed discussion would not be in the interest of the security of the Air Force. We are thus of the view that the CAS has taken appropriate steps, within the provisions of the Air

Force Act 1950 {Section 20 (I), and AF Rule 18} as per power vested upon him in the said AF Act, to dismiss the petitioner for the omissions and commissions as specified in the impugned order of dismissal dated 5th April 2003. There is no need to interfere with such administrative actions taken by the CAS on such sensitive and important issues to safeguard the security of the country.

14. We have also considered the prayer for pension made by the petitioner on the ground that he had put in more than 15 years of unblemished service in the Air Force before he was dismissed. We have also taken note of the fact that the petitioner was dismissed under the provisions of the Section 20 (I) of the AF Act, which was an administrative action exercised by the CAS under powers vested upon him. Notwithstanding the provisions of Reg. 102 (a) of the Pension Regulations for the Air Force as quoted above, it is quite clear that the 'dismissal' in this case was not awarded by any court martial under the Air Force Act. Dismissal by administrative action and dismissal by trial by a properly constituted court martial under the AF Act are two different procedures, of which, an award by trial by a court martial should be considered more serious when deciding on consequential implication on pension. Similar provisions of dismissal through administrative action are also provided for in Section 20 of the Army Act 1950. In fact the object and contents of Section 20 of the AF Act and Section 20 of the Army Act are the same. A difference, however, exists when consequential implication upon pension is considered for those dismissed under such administrative provisions. The consequential implications on pension are given in Reg. 102 of the Pension Regulations for the Air Force and in Reg. 113 of the Pension Regulations for the Army. It is thus relevant to quote and compare both these regulations. Section 20 of the AF Act and Section 20 of the Army Act; as well as the ibid regulations of the Pension Reg. for the AF and the Army are as under:-

Section 20 of the Air Force Act 1950

“Dismissal, removal or reduction by the Chief of the Air Staff and by other officers.

(1) The Chief of the Air Staff may dismiss or remove from the service any person subject to this Act, other than an officer.

- (2) The Chief of the Air Staff may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.s
- (3) An officer having power not less than an air officer in charge of a command or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a warrant officer.
- (4) On active service, an officer commanding the air force in the field may reduce to a lower rank or to the ranks any warrant officer or non-commissioned officer under his command.
- (5) The Chief of the Air Staff or an officer specified in sub-section (3) may reduce to a lower class in the ranks any airman other than a warrant officer or non-commissioned officer.
- (6) The commanding officer of an acting non-commissioned officer may order him to revert to his substantive rank as a non-commissioned officer, or he has no such substantive rank, to the ranks.
- (7) The exercise of any powers under this section shall be subject to the other provisions contained in this Act and the rules and regulations made thereunder. "

Section 20 of the Army Act 1950

"Dismissal, removal or reduction by the Chief of the Army Staff and by other officers.

- (1) The Chief of the Army Staff may dismiss or remove from the service any person subject to this Act, other than an officer.
- (2) The Chief of the Army Staff may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.
- (3) An officer having power not less than a brigade or equivalent commander or any prescribed officer may dismiss or remove from the service any person serving under his command other than an officer or a junior commissioned officer.

- (4) Any such officer as is mentioned in sub-section (3) may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer under his command.
- (5) A warrant officer reduced to the ranks under this section shall not, however, be required to serve in the ranks as a sepoy.
- (6) The commanding officer of an acting non-commissioned officer may order him to revert to his permanent grade as a non-commissioned officer, or he has no permanent grade above the ranks, to the ranks.
- (7) The exercise of any power under this section shall be subject to the said provisions contained in this Act and the rules and regulations made thereunder. “

Pension Regulations for the Air Force

“102. (a) An individual who is dismissed under the provisions of the Air Force Act, is ineligible for pensions or gratuity in respect of all previous service.

(b) An individual who is discharged under the provision of Air Force Act and the rules made thereunder remains eligible for pension or gratuity under these Regulations .”

Pension Regulations for the Army

“113. (a) An individual who is dismissed under the provisions of the Army Act, is ineligible for pension or gratuity in respect of all previous service. In exceptional cases, however, he may, at the discretion of the President be granted service pension or gratuity at a rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date.

(b) An individual who is removed from service under Army Act, Section 20, may be considered for the grant of pension/gratuity at the rate not exceeding that for which he would have otherwise qualified had he been discharged on the same date. The competent authority may, however, make, if considered necessary, any reduction in the amount of pension/gratuity on the merits of each case.

(c) An individual who is discharged under the provisions of Army Act and the rules made thereunder remains eligible for pension or gratuity under these Regulations.

15. The spirit of Reg. 113 (b) of the Army Pension Reg. is clearly to differentiate between an administrative action and a disciplinary action. In the instant case (Gwalior espionage case) also we find, from the confidential report prepared by the Air HQ submitted for our perusal, few personnel were recommended to be tried by disciplinary proceedings whereas few others were dealt administratively. The petitioner was dealt with administrative action under Section 20 of the AF Act and no disciplinary proceedings like court martial or summary trial were initiated against him. Therefore both categories cannot be treated in the same manner while denying them pension as a consequential administrative action. Discretion, however, lies on the competent Air Force authorities, even if the petitioner's case was to be considered for pension. We are conscious of the seriousness of the omission/ commission by the petitioner that attracted such severe administrative action upon him. Therefore we are inclined not to take any judicial view as of now with regard to grant of pension to the petitioner in this case except to bring it to the notice of the respondent authorities, as competent, that provisions exist for them to sanction pension to the petitioner, if considered appropriate, after he applies for the same before such competent authority. Moreover, we also observe that the Air Force authorities have issued no show cause notice to the petitioner before taking an administrative decision to withhold grant of pension to him for whatever reasons, thus denying an opportunity to the aggrieved petitioner to explain his side of facts and circumstances as they relate to denial of pension. We also observe that the respondent authorities must not treat pension as a bounty or a favour to a person. It is his right to receive pension in recognition of his long span of eligible unblemished service till he was dismissed. He has a right to be heard and represent if pension was denied. Unfortunately no such steps appear to have been taken before ordering denial of his pension. It is equally surprising that the petitioner, till date has not even represented before the appropriate competent authority questioning denial of pension. We are inclined not to interfere in this administrative matter without an opportunity for the petitioner to represent for award of pension and the competent authority to consider such representation on merit in the light of the observations made above.

16. The TA thus stands dismissed on contest with above observations made in Para 14 and 15 of this Order with regard to eligibility for pension.

17. No costs.

18. The confidential reports and other papers submitted by the respondents shall be returned on proper receipt.

Let a plain copy of the order duly countersigned by the Tribunal Officer be furnished to both sides on observance of due formalities.

(Lt. Gen K P D Samanta)
Member (Administrative)

(Justice Raghunath Ray)
Member (Judicial)