

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved On: 19<sup>th</sup> August, 2011  
Judgment Delivered On: 30<sup>th</sup> August, 2011

+ W.P.(C) 815/2010

MAJOR VIVEKY RAI ..... Petitioner  
Through: Ms.Jyoti Singh, Sr.Advocate with  
MR.Amandeep Joshi and Ms.Tinu  
Bajwa, Advocates

versus

UOI & ORS. ....Respondents  
Through: Dr.Ashwani Bhardwaj, Advocate

**CORAM:**  
**HON'BLE MR. JUSTICE PRADEEP NANDRAJOG**  
**HON'BLE MR. JUSTICE SUNIL GAUR**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest?

**PRADEEP NANDRAJOG, J.**

1. On 6<sup>th</sup> November 2003, petitioner's wife, Sarita Rai received gun shot wounds at their matrimonial house around 14:45 hours and expired before she could be shifted to the hospital. Pertaining to the incident information was lodged with the local police and investigation revealed that a carbine issued to the petitioner, a Major in the Territorial Army, was the weapon of offence. The petitioner was taken into custody and was tried for the offence of having murdered his wife. The

incident took place in the State of Jammu and Kashmir and thus the petitioner was tried for an offence punishable under Section 302 of the Ranbir Penal Code as also Section 30 of the Arms Act. The trial was conducted before the Court of Sessions.

2. Due to the seriousness of the offence and the charge against the petitioner, he was taken into custody. Bail was denied to him. He was lodged in a prison as an under-trial in Jammu. He was placed under suspension.

3. That the deceased died as a result of gun shot injuries from the carbine and the ammunition issued to the petitioner was not in dispute. The debate at the trial was whether the petitioner was present in the house when the incident took place and whether the injuries could be accidental or self-inflicted or were they homicidal.

4. Vide judgment and order dated 24.11.2008, which has attained finality, the Court of Sessions acquitted the petitioner in view of the forensic evidence which did not rule out the possibility of the injuries being self-inflicted. Acquitting the petitioner the concluding paragraph of the decision of the learned Court of Sessions reads as under:-

“The discussion made above and specially with regard to medical and forensic evidence do make out that the benefit of doubt goes to the accused. The prosecution is not able to prove its case against the accused beyond shadow of doubt. The accused is acquitted of the charges framed against him under Section 302 RPC read with Section 30 Arms Act and is set at liberty. The carbine and magazine seized shall stand

released in favour of the CO of the unit of the accused and the uniform of the accused be returned to him after appeal period. The other articles be destroyed. File to go to records after completion.”

5. Being acquitted, the petitioner was released from prison and since he remained under suspension during trial he prayed to be reinstated in service and suspension revoked. The matter was processed by the Army Authorities at various levels and two issues were considered by the authorities. The first issue was whether petitioner’s acquittal was an honourable acquittal and if not, what was the effect of the acquittal on the service of the petitioner and the second was the consequence of the petitioner remaining in prison for 5 years. The ultimate decision taken was to invoke the Presidential power under Section 18 of the Army Act 1950. Order dated 11.9.2009 was issued, which reads as under:-

**“ORDER**

The President, in exercise of powers conferred by Section 18 of the Army Act 1950 and of all other powers enabling in this behalf, is pleased to order that the services of TA-42343 Lt Viveky Rai of 129 Inf Bn (TA) Eco be terminated with immediate effect.

Sd/-  
(Jai Raj)

Under Secretary to the Government of India”

6. The petitioner has challenged the aforesaid order, which states no reasons on which the Presidential pleasure has been rested upon. Upon the belief that the Presidential pleasure is premised on the belief that petitioner’s acquittal is not honourable and is the result of a benefit of doubt, pleading

that petitioner's acquittal is honourable, prayer made is that the petitioner be reinstated in service and the order terminating his services be quashed.

7. Replying to the writ petition, in the counter affidavit filed, the respondents have highlighted and for which paras 8 & 9, para 24 & 25 of the counter affidavit be noted, that petitioner's acquittal is not an honourable acquittal but is the result of a benefit of doubt and thus he cannot be reinstated in service. We extract herein below the composite paragraph 8 & 9 as also para 24 & 25 of the counter affidavit, which reads as under:-

"8 & 9. That the contents of these paras of the petition need no reply being matter of record. As judgment in the case has already been pronounced by the Hon'ble Court of 1<sup>st</sup> Addl Session Judge Jammu dated 24 Nov 2008. In this connection please refer Court Judgment dated 24 Nove 08, wherein it is mentioned that the accused has been acquitted under "benefit of doubt".

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24. That the contents of this para of the writ petition are wrong and denied. As the Petitioner was given "benefit of doubt" and was not "Honorably acquitted", as claimed by the Petitioner, the Petitioner was not entitled for any relief.

25. That the contents of this para of the writ petition are wrong and denied. As per the Petitioner statement, it is a clean acquittal, whereas it is under "benefit of doubt". Hence re-instatement into service with all consequential benefits could not be granted to the Petitioner."

8. From the counter affidavit filed it is apparent that the positive stand taken by the respondents is that since

petitioner has not been honourably acquitted and is the beneficiary of a benefit of doubt being extended to him by the Court of Sessions at the trial for having murdered his wife, it would not be in the interest of the organization to retain petitioner in service or to put it differently, the President of India has lost confidence in the integrity of the petitioner and since he held office at the pleasure of the President, in exercise of the Presidential pleasure, his services could be terminated.

9. Now, it is not in doubt that the petitioner held office, as a Major in the Territorial Army, at the pleasure of the President for the reason Section 18 of the Army Act 1950 states that '*Every person subject to this Act shall hold office during the pleasure of the President*', but the question would be whether in the facts of the instant case the Presidential power has been legitimately and rightly used. But before that question is answered, a preliminary question would need to be answered: Whether exercising judicial review power, this Court can review the decision of the President of India?

10. The second question is no longer res integra and stands settled by a Full Bench decision of this Court reported as 55 (1994) DLT 217 *Ex.Major N.R.Ajwani & Ors. Vs. UOI & Ors.*

11. Reviewing a catena of authorities on the subject of judicial review by Constitutional Courts, it was opined that the power of judicial review in Constitutional Courts is an inherent feature of the Constitution and that a Presidential power

exercised with respect to a service matter, where the incumbent holds an office at the pleasure of the President, would be subject to a judicial review. The decision is also an authority on the point that while exercising judicial review the Constitutional Court can lift the veil and look behind the order. Indeed, the doctrine of pleasure as it existed in a feudal set-up is quite different than the doctrine of pleasure in a democracy governed by the Rule of Law. Where the Rule of Law prevails, there is nothing like unfettered discretion and the withdrawal of pleasure cannot be at the sweet will, whim and fancy of the authority, but can only be for valid reasons.

12. A perusal of the Army Act 1950 would reveal that 4 distinct powers are contemplated with respect to the tenure of Army personnel. The first is Section 18 of the Army Act where service of an Army personnel can be terminated without assigning any reasons. The second would be the power under Section 19 of the Army Act where, with respect to a misconduct, after holding an inquiry as contemplated by Rule 14 of the Army Rules the service can be terminated. The third is the power under Section 83 of the Army Act, where pursuant to summary court martials penalties can be levied. The fourth is the power under Section 109 of the Army Act pertaining to General Court Martials.

13. In a nut shell, power under Section 18 of the Army Act has to be resorted to if it is found inexpedient and not necessary to proceed under the alternative three modes, where-under we find, the Officer proceeded against having a right to contest the proposed action and which three

proceedings integrate the principles of natural justice as an integral part of the proceedings.

14. A veil is normally lifted to see whether there is a camouflage i.e. a guise or a smoke screen to conceal the real and display the face with a mask or to put it differently, to put a veil over the face. As a result of lifting the veil if it is seen that the power is exercised, for a purpose other than for which it was vested or if it is seen that there is arbitrariness in the action, corrective steps can always be taken.

15. We had summoned the original file in which the impugned decision was taken and are pained to note that the counter affidavit filed discloses a patently wrong reason on which the Presidential pleasure has been exercised. As per the counter affidavit filed, and as noted hereinabove, the ground taken is that petitioner's acquittal not being honourable and being the result of a benefit of doubt extended, the respondents were justified in terminating the services of the petitioner. Though not expressly pleaded, it was sought to be argued that such an officer has lost the confidence of the President of India and thus the pleasure could be withdrawn by the President of India. But the file shows an entirely different reason to terminate the services of the petitioner. The reason is contained in a note dated 17.8.2008 which was put up to the Hon'ble Defence Minister, to whom, under the Business Allocation Rules of the Government of India, the executive power stands allocated to with respect to the Presidential power under the Army Act 1950. The note highlights that as per the Territorial Army,

petitioner having remained in jail for almost 5 years *where he has been in contact with heart core criminals and anti-national elements, his continuation in the Territorial Army as an officer would be prejudicial to the discipline and organizational interest.* The note pens that petitioner's *Access to the Army Establishment for Training and other associated aspects needs to be denied at the earliest.*

16. It is this note, which reflects the opinion of the Territorial Army, being the note dated 17.8.2009, which has been put up to the Hon'ble Minister of Defence, who has accorded approval thereto; the order impugned is the manifestation thereof.

17. Now having seen the real reason behind the order, it assumes importance to highlight that nobody has bothered to put the question: What was the material to infer that when lodged in the Central Jail Jammu, petitioner was in contact with heart core criminals and anti-national elements?

18. Learned counsel for the respondents could show none and indeed, having read the file page to page, we find none. It is apparent that somebody formed the belief that since a few alleged terrorists were lodged in Central Jail Jammu, the petitioner was in contact with them during his incarceration, as an under-trial prisoner, when he too was in Central Jail Jammu.

19. This is the ipse dixit of the authorities concerned, who have not even cared to seek any clarification from the authorities in-charge of the Central Jail Jammu, with respect to

the procedures at the jail pertaining to lodging under-trial prisoners of different categories as also convicts of different categories. Are under-trials mixed with terrorists, in that, they are lodged in the same cells? Are under-trial Army Officers kept in the same cells where terrorists or anti-national elements are kept? No information was sought.

20. We would highlight that when the reason in the file surfaced, Ms.Jyoti Singh learned senior counsel for the petitioner vehemently argued that during 5 year period spent by the petitioner as an under-trial in Central Jail Jammu, he was lodged in a cell with an under-trial IPS Officer and not for a day did the petitioner interact with any other person.

21. Whether said statement is correct need not be adjudicated upon by us for the reason we find that the competent authority has premised its reasons on a belief that when the petitioner was in Central Jail Jammu he had come into contact with terrorists and anti-social elements; and since decisions have to be taken not on a belief, but with respect to objective facts, we find a serious taint in the decision making process. We highlight that as long as there is some objective material on which a subjective satisfaction is based upon, a writ Court cannot venture into the subjectiveness of the satisfaction, but where the Court finds that there is no objective material, it would be obvious that the subjectiveness of the satisfaction is rested on a fancy or a belief and this would render the satisfaction, arbitrary and unreasonable.

22. It is settled law that where a decision is the result of irrationality or procedural impropriety, such a decision has to be struck down. A decision would be irrational if there is no rational for the same. If the rational is found to be a belief sans an objective fact, the same would be irrational.

23. Since law is settled, that a Presidential pleasure is subject to a judicial review, noting the facts as hereinabove, we find a taint in the decision and thus dispose of the writ petition quashing the impugned order dated 11<sup>th</sup> September 2009. We leave it open to the authorities to re-decide the matter after obtaining relevant information from the Prison Authorities at Central Jail Jammu with respect to the period spent by the petitioner in the said jail as an under-trial. Where was the petitioner lodged in the jail? Did the jail have sub-jails where prisoners and under-trials of different categories were housed? Were terrorists and anti-national elements segregated from the other prisoners? Whether Army Officers and Government servants were lodged separately? Whether different categories of prisoners were so segregated that none could interact with each other? Information relatable to these questions would have to be gathered and posing each question, with respect to the information gathered, the decision would have to be re-taken. We grant the authorities 8 weeks' time to re-decide the matter and would observe that if the decision taken is to reinstate the petitioner, consequential decision pertaining to wages payable and the manner in which the period interregnum petitioner being dismissed from service till reinstatement has to be reckoned would be taken

and if the decision is against the petitioner he would be entitled to such remedies as are available to him as per law.

24. No costs.

(PRADEEP NANDRAJOG)  
JUDGE

(SUNIL GAUR)  
JUDGE

AUGUST 30, 2011  
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