

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : September 01, 2016

Pronounced on: April 03, 2017

+ W.P.(C) 3629/2015

VIVEKY RAI

..... Petitioner

Through:

Ms.Jyoti Singh, Sr. Adv. with
Mr.Sameer Sharma and Mr.Indraser
Singh, Advs.

Versus

UNION OF INDIA & ORS

..... Respondents

Through:

Mr.Arun Bhardwaj, CGSC with
Mr.Mimansak Bhardwaj,
Adv. with Mr.Satya Ranjan Swain,
G.P. for UOI.
Mr.Sunil Fernandes, Standing
Counsel with Mr.Deepak Pathak,
Advocate for R-6.

CORAM:

HON'BLE MS. JUSTICE INDIRA BANERJEE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

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JUDGMENT

INDIRA BANERJEE, J

1. In this writ petition the petitioner has challenged an Order dated 16(3)/2012/D(GS-III) issued by the Government of India, Ministry of Defence, informing the petitioner that the President

had, in exercise of powers conferred *inter alia* by Section 18 of the Army Act, 1950, been pleased to be deemed to have withdraw pleasure and order the services of the petitioner to be deemed to have been terminated with effect from 11.09.2009.

2. On or about 05.05.1997, the petitioner was granted commission in the Territorial Army by the President of India, in the rank of Second Lieutenant. It was directed that the petitioner would be embodied on permanent staff under the Territorial Army Act.
3. On 16.08.2001, the petitioner joined 129 Infantry Battalion (TA), which was deployed in Jammu & Kashmir. After the petitioner was deployed in the 129 Infantry Battalion, the petitioner continued to remain subject to the provisions of the Army Act 1950 and the Rules and Regulations framed thereunder in the same manner and to the same extent as if he held the rank of Major in the regular Army, by virtue of Section 9 of the Territorial Army Act, 1948.
4. It appears that on 06.11.2003, while the petitioner was on active service in the State of Jammu & Kashmir in the 129 Infantry

Battalion, there was an incident of firing in the family quarters of the petitioner in which the wife of the petitioner sustained gunshot wound and died.

5. On or about 19.11.2003, a case was filed against the petitioner under Section 302 of the Indian Penal Code read with Section 30 of the Arms Act and he was arrested by the Civil Police, Samba.
6. According to the petitioner, the petitioner had to undergo trial by criminal court and languish in jail for more than 5 years, during which he had to undergo prolonged agony, harassment, mental torture, loss of social status and his only son aged 2 years at the time of incident, had to go through loss of parental care and affection. On 24.11.2008, the petitioner was acquitted by the 1st Additional Session Judge, Jammu. According to the petitioner, the petitioner was honourably acquitted. Pursuant to his acquittal, the petitioner was released from jail.
7. On or about 03.01.2009, the petitioner made an application to the respondent for reinstatement with consequential benefits in

view of his acquittal by the Trial Court. However, on 11.09.2009, the impugned order was issued terminating the services of the petitioner under Section 18 of the Army Act under the doctrine of the President's pleasure.

8. In January, 2010, the petitioner filed a writ petition in this Court challenging the order of termination and for his reinstatement.
9. In the course of final hearing, this Court called for the relevant records and on perusal thereof, came to the conclusion that the real reason for the termination order was that the petitioner had remained in jail for almost five years, where he had been in contact with hardcore criminals and anti-social national elements. His continuation in the Territorial Army, would, therefore, be prejudicial to the discipline and organizational interest.
10. By an order dated 30.08.2011, this Court, inter alia, quashed the termination order under the Army Act on the ground that the same was arbitrary as there was no material on record to justify the reasons on which the order was passed. On or about

08.09.2011, the respondent wrote a letter addressed to the Central Jail, Jammu, inter alia seeking information whether the petitioner had during his incarceration in the said jail come in contact with terrorists and antisocial elements, hardcore criminals.

11. On 10.09.2011, the Superintendent, District Jail, Jammu, furnished the information sought by the respondent thereby practically ruling out the possibility of the petitioner having come in contact with terrorists and antisocial elements/hardcore criminals.
12. On 27.04.2012, the respondent no.1 issued the impugned termination order under Section 18 of the Army Act, 1950. On 14.05.2012, an order of termination was communicated to the petitioner through the Headquarter, TA Group, Central Command, by an order dated 14.05.2012 and it was received by the petitioner on his permanent home address at Lucknow on 15.05.2012.

13. On 29.11.2012, the petitioner filed a writ petition in the Lucknow Bench of the Allahabad High Court challenging the termination order dated 27.04.2012. The writ petition was dismissed by the Lucknow Bench of the Allahabad High Court on the sole ground of lack of territorial jurisdiction holding that no part of the cause of action had arisen within the territorial jurisdiction of the said High Court. Thereafter the petitioner filed this writ petition.
14. Learned counsel appearing on behalf of the petitioner argued that the impugned order was totally arbitrary, unreasonable, without application of mind and liable to be set aside. Learned counsel argued that a perusal of the order reveals that what weighed with the respondents in passing the order impugned was the fact that the petitioner had been lodged in jail in Jammu with other accused persons along with terrorists and antisocial elements who might have indoctrinated the petitioner, an Army man.

15. A perusal of the order, however, reveals that there were two grounds for invocation of the doctrine of pleasure. The first ground was the heinous charge of murder, of which the petitioner was acquitted by being given the benefit of doubt. The acquittal was not an honourable acquittal. The second ground was that the petitioner had been lodged in Jammu jail along with other accused persons which could include hardcore terrorists and antisocial elements who may have influenced the ideas and views of the petitioner rendering his retention in the Army a threat to the security of the country.
16. May be, the second ground is not sustainable in view of the specific answer of the Jail Superintendent to the queries which indicate that there was segregation of terrorists.
17. However, the ground of implication of the petitioner in a grave and heinous offence of murder of his wife of which he was acquitted by being given the benefit of doubt was ground enough for invoking the doctrine of pleasure.

18. In *Union of India & Others v. Major S.P. Sharma and Others*, reported in (2014) 6 SCC 315, the Supreme Court held that when the President in exercise of his constitutional power terminates service of an Army officer whose tenure of service is at the pleasure of the President and such termination is based on materials on record, then the Court in exercise of its power of judicial review should be slow in interfering with the exercise of President's constitutional power.
19. It is true that the judgment in *Major S.P.Sharma (Supra)* was rendered in the context of serious espionage charges. However, the proposition of law which has emerged is, that the pleasure doctrine is a constitutional necessity for the reason that there is difficulty in dismissing a Government servant whose continuance in office is detrimental to the state, by proving offence to the satisfaction of the Court.
20. There can be no dispute that an order of termination passed against army personnel in exercise of pleasure doctrine is subject to judicial review, but while exercising its power of

judicial review the Court cannot substitute its own conclusion on the basis of materials on record. The Court in exercise of power of judicial review has certain limitations particularly in cases where the safety and security of the nation is involved. The safety and security of nation is above everything.

21. In A.K. Kaul and another v. Union of India and another, reported in (1995) 4 SCC 73, cited on behalf of the respondents, the Supreme Court held that a distinction has to be made between judicial review and justiciability of a particular action. In a written Constitution the powers of the various organs of the state are limited by the provisions of the Constitution. The extent of those limitations on the powers has to be determined on an interpretation of the relevant provisions of the Constitution. Since the task of interpreting the provisions of the Constitution is entrusted to the Judiciary it is vested with the power to test the validity of the action of every authority functioning under the Constitution on the touchstone of the Constitution in order to ensure that the authority exercising the

power conferred by the Constitution does not transgress the limitations placed by the Constitution on exercise of that power. The power of judicial review is, therefore, implicit in a written Constitution and unless expressly excluded by a provision of the Constitution, the power of review is available in respect of exercise of powers under any of the provisions of the Constitution. Justiciability relates to a particular field falling within the purview of the power of judicial review. However, in what cases the Court would interfere with an Act is a different issue.

22. In our view, the exercise of the doctrine of pleasure of terminating the service of an Army officer charged with the heinous offence of murder of his wife who has only been acquitted by being given the benefit of doubt does not call for interference in exercise of power of this Court of judicial review under Article 226 of the Constitution of India.

23. The writ petition is, therefore, dismissed.

INDIRA BANERJEE, J

V. KAMESWAR RAO, J

April 03, 2017
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