

\$~3.

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

+

Date of Decision: 30.07.2019

% **W.P.(C.) No. 7819/2017**

FAYAZ KHAN

..... Petitioner

Through: Mr. Javed Ahmad, Adv.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Mr. Kirtiman Singh, CGSC with Mr.
Prateek Dhanda and Mr. Waize Ali
Noor, Advs.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to seek monetary compensation of Rs. 5 crores from the respondents. The case of the petitioner that he was appointed as Naib Subedar (RT) with the rank of Junior Commissioned Officer in 25th Battalion Rajput Regiment on 18.09.1997. Sometime in July, 2003 the petitioner's father, who was a retired principal visited the Petitioner's Unit. He states that his father left from Gauhati – where the petitioner was posted, for his home town in Shahjhanpur, UP. On 08.07.2003, during the course of his travel, his father

picked up a quarrel with a army official over a berth. Due to the aforesaid incident, the petitioner claims that a false allegation was made against his father that he was a man of ISI and connected with Osama-bin-Laden. The petitioner claims that the army personnel planted some books on the petitioner's father and claimed that the same belonged to him. On wrong and false allegations, an FIR was registered against the petitioner's father under the Officials Secret Act, 1923. The petitioner states that he was illegally detained under 51 Sub-area headquarters Narangi on the ground that he was involved in espionage. He was not issued any show cause notice and in violation of the Army Act and Rules, no court of enquiry was conducted against him. No charge sheet was issued to him in relation to the allegation made against him.

2. The petitioner states that the respondents prepared a statement which was attributed to the petitioner, which he was forced to sign. The petitioner states that between 23.12.2003 to October, 2004, he performed his duties and during this period no show cause notice was issued to him. He made complaints to the higher authorities, complaining of torture and harassment meted out to him. On 26.10.2004, a show cause notice was issued to the petitioner for the first time, alleging that on 23/24.7.03, the petitioner had admitted his guilt of handing over books relating to the Army to his father for handing over to his younger brother, who was preparing for an examination. It was alleged that the petitioner had committed an offence under Section 5 of the Official Secret Act. The petitioner sent his reply, explaining all the facts and circumstances and assailed the legality and constitutionality of the action taken against him. On 11.08.2005, the

respondents dismissed the petitioner from service without assigning any reason. His appeal was also rejected on 04.05.2006. He preferred a writ petition before this Court to assail his dismissal, which was transferred to the Armed Forces Tribunal and registered as T.A. No. 336/2009. On 11.01.2010, the petitioner's father passed away while suffering from mental pain and agony caused by the Army officials. On 25.01.2010, the Principal Bench of the Armed Forces Tribunal set aside the order of dismissal of the petitioner and held that the respondents could not have dismissed the petitioner without holding a Court Martial. On 27.06.2011, the competent authority accorded sanction for the reinstatement of the petitioner into service with effect from the date of dismissal with all consequential benefits relating to service. The Special Leave Petition preferred before the Supreme Court, eventually came to be rejected on 11.02.2016.

3. The submission of learned counsel for the petitioner is that the entire exercise undertaken by the respondents – both against his father, and against the petitioner, was completely illegal and with a view to subject the petitioner and his father to harassment. Learned counsel submits that the action was completely mala fide and arbitrary. On that premise, the petitioner seeks compensation for the injury caused by the respondents to him and his father in the form of mental torture, harassment, ostracisation in society, and the defamation that he suffered on being labelled as a spy.

4. It appears that when the matter was taken up on 13.02.2019, this Court posted a query to the petitioner to explain as to how the present

petition under Article 226 of the Constitution could be maintained with a simplicitor prayer for compensation.

5. Mr. Kirtiman Singh, who appears on behalf of the respondents submits that merely because the action taken against the petitioner u/s 70 of the Army Act was held to be illegal and not warranted in the facts of the case, and the Armed Forces Tribunal held that the petitioner should have been tried under a Court Martial and by resort to Section 69 of the Army Act, it does not follow that the petitioner is entitled to claim compensation. He submits that if this proposition is accepted, then in every case where the departmental proceedings, or Court Martial, or even Criminal Trial results in the delinquent/ charged officer/ accused not being found guilty, would result in a claim for compensation, merely because the proceedings have been held to be illegal or untenable. In support of his submission, Mr. Kirtiman Singh has placed reliance on the decision of learned Single Judge of this Court in ***Sannam Bharti v. D.T.C. & Ors.***, RFA No. 939/2003, decided on 12.08.2013.

6. He points out that in this decision, the learned Single Judge has taken note of several earlier decisions of the Courts, and eventually summarised the legal position that it is not the law that if disciplinary action is unsuccessful, it would give rise to liability or compensation even when the action is bona fide and not found to be mala fide. Particular reference has been made to paragraph 11 of this decision, which reads as follows:

11. *The matter is placed beyond any pale of controversy in the recent judgment of the Supreme Court in Municipal*

*Corporation of Delhi Vs. Uphaar Tragedy Victims Association (2011) 14 SCC 481 where after noticing a plethora of earlier decisions of the Supreme Court and of the English and Canadian Courts, it was held in para 54 that it is **not proper to award damages against public authorities merely because there has been some inaction in the performance of their statutory duties or because the action taken by them is ultimately found to be without authority of law. It was further held that with regard to performance of statutory functions and duties, the Courts will not award damages unless there is malice or conscious abuse.** (emphasis supplied)*

7. A perusal of the order passed by the Armed Forces Tribunal in T.A. No. 336/2009 shows that the Tribunal found that the action taken by respondent u/s 70 of the Army Act was not warranted, and that the respondents should have tried the petitioner by holding a Court Martial u/s 69 of the Army Act. The relevant extract from the said decision reads as follows:

“28. In the present case, under Section 69 for offence under the Official Secrets Act could have been tried by Court Martial only. Therefore, resorting to power under Section 70 was not at all warranted. We are not expressing any opinion on the factual aspect but by going by purely technical question that whether Chief of the army staff could have resorted to power under Section 70 when such offence should have been tried under Court Martial under Section 69.

29. Resorting to the power under Section 70 by short cutting the procedure laid down under Section 69 of the Act cannot be sustained. The proper course for the authorities was to send the petitioner for Court Martial, where the department could have produced all the evidence and petitioner would have got an opportunity to defend himself. All the questions whether the so called recovery of those 9 precis come under the definition of

Official Secrets Act or not could have been adjudicated. Fairness is the hallmark of judicial system in our country.

30. Therefore, the order passed by the Chief of the Army staff by resorting to Section 70 was not proper and cannot be sustained. Consequently, we allow the petition and set aside the order dated August, 2005 passed by the Chief of Army staff and dismissal order dated 17th August, 2005 passed by respondent No.2. Likewise the order passed by the Ministry of Defence (respondent No.1) in appeal is also set aside. It is open for the respondent to proceed in accordance with law, if they so desire. Petition is allowed. No order as to costs”.

8. From the above, it would be seen that the Armed Forces Tribunal did not return any finding of mala fides against the respondent authorities. Though, the petitioner alleges that action taken against him was mala fide, there is no specific averment made against any particular officer of the Army, who is claimed to have acted mala fide against the petitioner or his father.

9. Pertinently, the Armed Forces Tribunal did express any opinion on the factual aspects, and its decision was premised on purely technical question whether the Chief of the Army Staff could have resorted to exercise of power under Section 70 when the alleged offence against the petitioner should have been tried under Court Martial under Section 69 of the Army Act. Tribunal also did not return a finding giving a clean chit to the petitioner, and did not hold that the charge against him was false or without basis. It was left open to the respondents to proceed in accordance with law, if they so desired. Evidently, since the petitioner was nearing his

superannuation, the respondents decided not to take any action against him by resort to Court Martial.

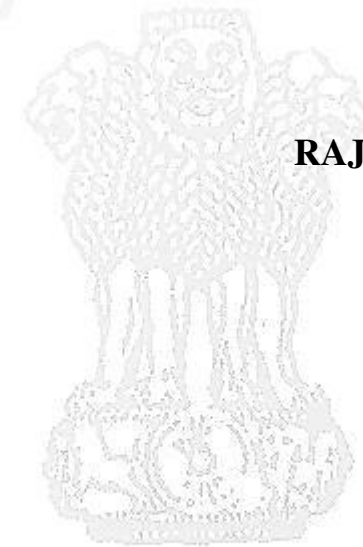
10. In these circumstances, in our view, it is not open to the petitioner to claim compensation in the present petition. We, therefore, find no merit in this petition. Dismissed.

VIPIN SANGHI, J.

RAJNISH BHATNAGAR, J.

JULY 30, 2019

N.Khanna



न्यायमेव जयते